109TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPT. 109–544 Part 1

FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT

JUNE 29, 2006.—Ordered to be printed

Mr. TOM DAVIS of Virginia, from the Committee on Government Reform, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 1317]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Reform, to whom was referred the bill (H.R. 1317) to amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections; and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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49–006

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employee Protection of Disclosures Act".

SEC. 2. CLARIFICATION OF DISCLOSURES COVERED.

Section 2302(b)(8) of title 5, United States Code, is amended—

(1) in subparagraph (A)—

(A) by striking "which the employee or applicant reasonably believes evidences" and inserting ", without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, that the employee or applicant reasonably believes is evidence of"; and

(B) in clause (i), by striking "a violation" and inserting "any violation"; and

(2) in subparagraph (B)—

(A) by striking "which the employee or applicant reasonably believes evidences" and inserting ", without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, of information that the employee or applicant reasonably believes is evidence of"; and

(B) in clause (i), by striking "a violation" and inserting "any violation (other than a violation of this section)".

SEC. 3. COVERED DISCLOSURES.

Section 2302(a)(2) of title 5, United States Code, is amended—

(1) in subparagraph (B)(ii), by striking "and" at the end;

(2) in subparagraph (C)(iii), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(D) 'disclosure' means a formal or informal communication, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee providing the disclosure reasonably believes that the disclosure evidences—

"(i) any violation of any law, rule, or regulation; or

"(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.".

SEC. 4. REBUTTABLE PRESUMPTION.

Section 2302(b) of title 5, United States Code, is amended by adding at the end the following: "For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the employee or applicant would reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.".

SEC. 5. NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS.

(a) PERSONNEL ACTION.—Section 2302(a)(2)(A) of title 5, United States Code, is amended—

(1) in clause (x), by striking "and" at the end;

(2) by redesignating clause (xi) as clause (xii); and

(3) by inserting after clause (x) the following:

"(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and".

(b) PROHIBITED PERSONNEL PRACTICE.—Section 2302(b) of title 5, United States Code, is amended—

(1) in paragraph (11), by striking "or" at the end;

(2) by redesignating paragraph (12) as paragraph (14); and

(3) by inserting after paragraph (11) the following:

"(12) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: 'These

provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosures to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 and following) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.';

"(13) conduct, or cause to be conducted, an investigation, other than any ministerial or nondiscretionary factfinding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section; or".

SEC. 6. EXCLUSION OF AGENCIES BY THE PRESIDENT.

Section 2302(a)(2)(C) of title 5, United States Code, is amended by striking clause (ii) and inserting the following:

"(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the National Security Agency; or

"(II) as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, if the determination (as that determination relates to a personnel action) is made before that personnel action; or".

SEC. 7. DISCIPLINARY ACTION.

Section 1215(a)(3) of title 5, United States Code, is amended to read as follows:

"(3)(A) A final order of the Board may impose—

"(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

"(ii) an assessment of a civil penalty not to exceed $1,000; or

"(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

"(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under such paragraph (8) or (9) (as the case may be) was the primary motivating factor, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.".

SEC. 8. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON REVOCATION OF SECURITY CLEARANCES.

(a) REQUIREMENT.—The Comptroller General shall conduct a study of security clearance revocations, taking effect after 1996, with respect to personnel that filed claims under chapter 12 of title 5, United States Code, in connection therewith. The study shall consist of an examination of the number of such clearances revoked, the number restored, and the relationship, if any, between the resolution of claims filed under such chapter and the restoration of such clearances.

(b) REPORT.—Not later than June 30, 2006, the Comptroller General shall submit to the Committee on Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a report on the results of the study required by subsection (a).

SEC. 9. ALTERNATIVE RECOURSE.

Section 1221 of title 5, United States Code, is amended by adding at the end the following:

"(k)(1) If an employee, former employee, or applicant for employment—

"(A) seeks corrective action with respect to a prohibited personnel practice described in section 2302(b)(8) by making an allegation (as described in section 1214(a)(1)(A)) to the Special Counsel, and

"(B) within 180 days after so seeking such corrective action, has neither—

"(i) been notified by the Special Counsel that the Special Counsel intends to seek corrective action in connection therewith, nor

"(ii) initiated any proceeding under subsection (a) to seek corrective action from the Merit Systems Protection Board in connection with the same matter, such employee, former employee, or applicant may bring an action against the United States at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. In any such action, the court may award such damages and other relief as provided in subsection (g).

"(2) A petition to review a final decision under paragraph (1) shall be filed in the United States Court of Appeals for the Federal Circuit.".

SEC. 10. ENHANCEMENT OF CONTRACTOR EMPLOYEE WHISTLEBLOWER PROTECTIONS.

(a) CIVILIAN AGENCY CONTRACTS.—Section 315(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 265(c)) is amended—

(1) in paragraph (1), by striking "If the head" and all that follows through "actions:" and inserting the following: "Not later than 180 days after submission of a complaint under subsection (b), the head of the executive agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:"; and

(2) by redesignating paragraph (3) as paragraph (4) and adding after paragraph (2) the following new paragraph (3):

"(3) If the head of an executive agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.".

(b) ARMED SERVICES CONTRACTS.—Section 2409(c) of title 10, United States Code, is amended—

(1) in paragraph (1), by striking "If the head" and all that follows through "actions:" and inserting the following: "Not later than 180 days after submission of a complaint under subsection (b), the head of the agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:"; and

(2) by redesignating paragraph (3) as paragraph (4) and adding after paragraph (2) the following new paragraph (3):

"(3) If the head of an agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.".

SEC. 11. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

(a) IN GENERAL.—Chapter 23 of title 5, United States Code, is amended—

(1) by redesignating sections 2304 and 2305 as sections 2305 and 2306, respectively; and

(2) by inserting after section 2303 the following:

"§ 2304. Prohibited personnel practices affecting the Transportation Security Administration

"(a) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

"(1) the provisions of section 2302(b)(1), (8), and (9);

"(2) any provision of law implementing section 2302(b)(1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and

"(3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).

"(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.

"(c) EFFECTIVE DATE.—This section shall take effect as of the date of the enactment of this section.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 23 of title 5, United States Code, is amended by striking the items relating to sections 2304 and 2305, respectively, and by inserting the following:

"2304. Prohibited personnel practices affecting the Transportation Security Administration.
"2305. Responsibility of the Government Accountability Office.
"2306. Coordination with certain other provisions of law.".

SEC. 12. EFFECTIVE DATE.

This Act shall take effect 30 days after the date of enactment of this Act, except as provided in the amendment made by section 11(a)(2).

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 1317, the Federal Employee Protection of Disclosures Act, was introduced March 15, 2005, by Rep. Todd Platts, along with 17 original cosponsors. The legislation would modernize, clarify, and expand the federal employee whistleblower protection laws.

One of the most significant reforms included in this legislation is that, if the Office of Special Counsel (OSC) does not take action within 180 days in response to a whistleblower complaint filed with them, a federal employee could chose to have his or her claim decided in federal district court. This would include a right to a jury trial. Under current law, the only recourse for most federal whistleblowers is the Merit Systems Protection Board (MSPB). In addition to this structural change, the legislation includes provisions aimed at clarifying congressional intent in response to federal court rulings regarding whistleblower claims that have been issued over the past decade.

BACKGROUND AND NEED FOR LEGISLATION

As a result of findings that the civil service protections of the time were inadequate, Congress and the first Bush Administration enacted into law the Whistleblower Protection Act (WPA) of 1989, which expressly stated that a federal employee who makes "any" protected disclosure of waste, fraud, or abuse is protected from adverse personnel actions. However, as interpreted by the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), loopholes began to develop in the WPA. Accordingly, Congress attempted to strengthen the law in 1994. Since the 1994 amendments, however, a number of decisions have created exceptions to the law. The purpose of this legislation is to make Congress's intent perfectly clear that "any" whistleblower disclosure includes disclosures "without restriction to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties."

Also, the Federal Circuit at one point stated that, for a federal employee to "reasonably believe" there is evidence of waste, fraud, and abuse, as required by the law, he or she must overcome with "irrefragable proof" the presumption that the agency was acting in good faith. While it appears that the Federal Circuit has abandoned this standard in a December 2004 opinion, the Committee felt strongly that Congress should clearly state the proper standard to assist the Court in this regard. As a result, this legislation makes it clear that the presumption that an agency official was

acting in good faith may be rebutted by "substantial evidence," not "irrefragable proof."

In addition, amendments were adopted in Committee that would provide whistleblower protections to employees at the Transportation Security Administration as well as enhance the whistleblower protections available to contractor personnel.

LEGISLATIVE HISTORY

H.R. 1317, legislation to modernize the federal employee whistleblower protection laws, was introduced on March 15, 2005, and referred to the Committee on Government Reform. The Committee held a markup to consider H.R. 1317 on September 29, 2005, and ordered the bill to be reported, as amended, by a roll call vote of 34–1. During the markup, a substitute amendment was offered by Mr. Platts (R-PA), which was adopted by voice vote. In addition, an amendment offered by Ranking Member Waxman (D-CA) was agreed to that would enhance whistleblower protections for contractor employees, and an amendment offered by Rep. Norton (D-DC) was agreed to that would clarify that employees of the Transportation Security Administration, including those carrying out screener functions, had federal whistleblower protections.

SECTION-BY-SECTION

Section 1. Short title

This section would provide the short title of H.R. 1317 as the "Federal Employees Protection of Disclosure Act."

Section 2. Clarification of disclosures covered

This section would amend section 2302(b)(8) of title 5, United States Code, to clarify what constitutes a disclosure for purposes of whistleblower protection. These changes are intended as a response to Federal Circuit decisions that have limited the scope of disclosures permitted by law.

Section 3. Covered disclosures

This section would amend section 2302(a)(2) of title 5, United States Code, to define, in statute, the term "disclosure," for whistleblower protection purposes. The section explicitly states that Congress defines a disclosure to include both formal and informal communications where the employee reasonably believes the disclosure evidences any violation of law rule or regulation or gross mismanagement, waste, abuse of authority or specific danger to public health or safety. However, any communication concerning policy decisions resulting from the exercise of lawful discretion would not be a disclosure.

Section 4. Rebuttable presumption

This section would amend section 2302(b) of title 5, United States Code, to state that any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence.

Section 5. Nondisclosure policies, forms, and agreements

This section would amend section 2302(a)(2)(A) of title 5, United States Code, state that a prohibited personnel practice includes the implementation or enforcement of any nondisclosure policy, form, or agreement. This section would also amend section 2302(b) to prohibit any employee from implementing or enforcing any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the statement included in the legislation. Finally, this section would amend section 2302(b) to prohibit any employee from conducting, or causing to be conducted, an investigation, other than any ministerial or nondiscretionary fact-finding activities necessary for the agency to perform its mission, of any employee or applicant for employment because of any activity protected under section 2302.

Section 6. Exclusion of agencies by the President

This section would amend section 2302(a)(2)(C) of title 5, United States Code, by clarifying the definition of "covered agency" for purposes of whistleblower protection laws.

Section 7. Disciplinary action

This section would amend section 1215(a)(3) of title 5, United States Code, to clarify the authority of the Merit Systems Protection Board in disciplining employees found to have violated the provisions of 2302(b)(8) and (9) of title 5, United States Code.

Section 8. GAO Study on revocation of security clearances

This section would require GAO to conduct a study of security clearance revocations, taking effect after 1996, with respect to personnel that filed claims under chapter 12 of title 5, United States Code, in connection therewith.

Section 9. Alternative recourse

This section would amend section 1221 of title 5, United States Code, to provide that an employee, former employee, or applicant that seeks corrective action with respect to a prohibited personnel practice described in section 2302(b)(8) may bring an action, under certain circumstances, against the United States in federal district court within 180 days after seeking such corrective action. A petition to review a final decision by a district court shall be filed in the United States District Court of Appeals for the Federal Circuit.

Section 10. Enhancement of contractor employee whistleblower protections

This provision would amend section 315(c) of the Federal Property and Administrative Services Act (41 U.S.C. 265(c)) to require that the head of an executive agency make a determination, within 180 days after the submission of a complaint by a contractor employee about reprisal by his employer for the employee's disclosure of wrongdoing by the employer. The agency head shall determine whether there was a reprisal and whether the agency will take action with regard to the employee's complaint. If the head of the executive agency fails to make such determination within 180 days, and there is no showing that such delay is due to the bad faith of

the complainant, the complainant can then seek corrective action in federal district court.

Section 11. Prohibited personnel practices affecting employees of the transportation Security Administration

This section would add a new section 2304 to title 5, United States Code, clarifying that employees at the Transportation Security Administration, including those carrying out screener functions, have the same whistleblower protections as other federal employees.

Section 12. Effective date

This section would provide that the provisions of H.R. 1317 would take effect 30 days after date of enactment of the Act.

EXPLANATION OF AMENDMENTS

The amendments adopted in Committee are reflected in the descriptive portions of this report.

COMMITTEE CONSIDERATION

On Thursday, September 29, 2005, the Committee ordered the bill reported to the House by a recorded vote.

ROLLCALL VOTES

Amendment Offered by Mrs. Maloney and Ms. Watson to the Amendment in the Nature of a Substitute to H.R. 1317 Offered by Mr. Platts
Page 1, after line 3, technical and conforming changes

COMMITTEE ON GOVERNMENT REFORM
109TH CONGRESS – **1st SESSION**
ROLL CALL SHEET

Representatives	Aye	No	Present	Dem.	Aye	No	Present
MR. DAVIS (VA) (CHAIRMAN)		X		MR. WAXMAN	X		
MR. SHAYS		X		MR. LANTOS			
MR. BURTON				MR. OWENS			
MS. ROS-LEHTINEN				MR. TOWNS			
MR. MCHUGH				MR. KANJORSKI	X		
MR. MICA		X		MR. SANDERS			
MR. GUTKNECHT		X		MRS. MALONEY	X		
MR. SOUDER				MR. CUMMINGS	X		
MR. LATOURETTE		X		MR. KUCINICH			
MR. PLATTS		X		MR. DAVIS (IL)	X		
MR. CANNON				MR. CLAY	X		
MR. DUNCAN		X		MS. WATSON	X		
MRS. MILLER (MI)		X		MR. LYNCH	X		
MR. TURNER (OH)		X		MR. VAN HOLLEN	X		
MR. ISSA		X		MS. SANCHEZ	X		
MRS. BROWN-WAITE		X		MR. RUPPERSBERGER	X		
MR. PORTER		X		MR. HIGGINS	X		
MR. MARCHANT		X		MS. NORTON			
MR. WESTMORELAND							
MR. MCHENRY		X					
MR. DENT		X					
MRS. FOXX		X					
MRS. SCHMIDT		X					

Final Passage
H.R. 1317 passed as amended
9-29-05
COMMITTEE ON GOVERNMENT REFORM
109TH CONGRESS – **1st SESSION**
ROLL CALL SHEET

Representatives	Aye	No	Present	Dem.	Aye	No	Present
MR. DAVIS (VA) (CHAIRMAN)	X			MR. WAXMAN	X		
MR. SHAYS	X			MR. LANTOS			
MR. BURTON	X			MR. OWENS			
MS. ROS-LEHTINEN				MR. TOWNS			
MR. MCHUGH	X			MR. KANJORSKI	X		
MR. MICA	X			MR. SANDERS	X		
MR. GUTKNECHT	X			MRS. MALONEY	X		
MR. SOUDER	X			MR. CUMMINGS	X		
MR. LATOURETTE	X			MR. KUCINICH	X		
MR. PLATTS	X			MR. DAVIS (IL)	X		
MR. CANNON				MR. CLAY	X		
MR. DUNCAN	X			MS. WATSON		X	
MRS. MILLER (MI)	X			MR. LYNCH	X		
MR. TURNER (OH)	X			MR. VAN HOLLEN	X		
MR. ISSA	X			MS. SANCHEZ	X		
MRS. BROWN-WAITE	X			MR. RUPPERSBERGER	X		
MR. PORTER	X			MR. HIGGINS	X		
MR. MARCHANT	X			MS. NORTON	X		
MR. WESTMORELAND							
MR. MCHENRY	X						
MR. DENT	X						
MRS. FOXX	X						
MRS. SCHMIDT	X						

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill provides enhanced transparency to the operations of the executive branch. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 1317. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1317. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1317 from the Director of Congressional Budget Office:

OCTOBER 18, 2004.

Hon. TOM DAVIS,
Chairman, Committee on Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1317, the Federal Employee Protection of Disclosures Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure.

H.R. 1317—Federal Employee Protection of Disclosures Act

H.R. 1317 would amend the Whistleblower Protection Act (WPA). The bill would clarify current law and extend new and expanded protections to federal employees who report abuse, fraud, and waste involving government activities. The legislation also would make changes to the laws governing the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC), which implement provisions of the WPA. In addition, the legislation would require a study by the Government Accountability Office (GAO) regarding the revocation of security clearances in retaliation for whistleblowing.

CBO estimates that implementing H.R. 1317 would not have a significant budgetary impact. H.R. 1317 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

According to the MSPB and OSC, there generally are between 400 and 500 whistleblower cases per year. In 2005, the MSPB received an appropriation of $35 million, and the OSC received $15 million. Although H.R. 1317 could increase the number of whistleblower cases, CBO expects that any such increase and any additional administrative and staffing costs would not be significant. In addition, the legislation would require the GAO to prepare a study by June 2006 on security clearance revocations since 1996. Based on similar reports, CBO estimates that preparing and distributing the report would cost less than $500,000 in fiscal year 2006, assuming the availability of appropriated funds. Enacting the legislation would not affect direct spending or revenues.

On April 20, 2005, CBO transmitted a cost estimate for S. 494, the Federal Employee Protection of Disclosures Act, as ordered reported by the Senate Committee on Homeland Security and Gov-

ernmental Affairs on April 13, 2005. The Senate bill contains additional amendments to the laws that govern the MSBP and OSC. The differences in the estimated costs reflect the differences between the two bills.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

* * * * * * *

SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

* * * * * * *

§ 1215. Disciplinary action

(a)(1) * * *

* * * * * * *

[(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.]

(3)(A) A final order of the Board may impose—

(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

(ii) an assessment of a civil penalty not to exceed $1,000; or

(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under such paragraph (8) or (9) (as the case may be) was the primary motivating factor, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.

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SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

§ 1221. Individual right of action in certain reprisal cases

(a) * * *

* * * * * * *

(k)(1) If an employee, former employee, or applicant for employment—

(A) seeks corrective action with respect to a prohibited personnel practice described in section 2302(b)(8) by making an allegation (as described in section 1214(a)(1)(A)) to the Special Counsel, and

(B) within 180 days after so seeking such corrective action, has neither—

(i) been notified by the Special Counsel that the Special Counsel intends to seek corrective action in connection therewith, nor

(ii) initiated any proceeding under subsection (a) to seek corrective action from the Merit Systems Protection Board in connection with the same matter, such employee, former employee, or applicant may bring an action against the United States at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. In any such action, the court may award such damages and other relief as provided in subsection (g).

(2) A petition to review a final decision under paragraph (1) shall be filed in the United States Court of Appeals for the Federal Circuit.

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CHAPTER 23—MERIT SYSTEM PRINCIPLES

Sec.
2301. Merit system principles.

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[2304. Responsibility of the Government Accountability Office.
[2305. Coordination with certain other provisions of law.]
2304. Prohibited personnel practices affecting the Transportation Security Administration.
2305. Responsibility of the Government Accountability Office.
2306. Coordination with certain other provisions of law.

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§ 2302. Prohibited personnel practices

(a)(1) * * *

(2) For the purpose of this section—

(A) "personnel action" means—

(i) * * *

* * * * * * *

(x) a decision to order psychiatric testing or examination; [and]

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

[(xi)] *(xii)* any other significant change in duties, responsibilities, or working conditions;

* * * * * * *

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) * * *

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; [and]

(C) "agency" means an Executive agency and the Government Printing Office, but does not include—

(i) * * *

[(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or]

(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the National Security Agency; or

(II) as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, if the determination (as that determination relates to a personnel action) is made before that personnel action; or

(iii) the Government Accountability Office[.]*; and*

(D) "disclosure" means a formal or informal communication, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee providing the disclosure reasonably believes that the disclosure evidences—

(i) any violation of any law, rule, or regulation; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) * * *

* * * * * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant [which the employee or applicant reasonably believes evidences]*, without restriction as to time, place, form, motive, context, or prior disclosure made to any per-*

son by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, that the employee or applicant reasonably believes is evidence of—

(i) [a violation] *any violation* of any law, rule, or regulation, or

* * * * * * *

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information [which the employee or applicant reasonably believes evidences]*, without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, of information that the employee or applicant reasonably believes is evidence of—*

(i) [a violation] *any violation (other than a violation of this section)* of any law, rule, or regulation, or

* * * * * * *

(11)(A) * * *

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; [or]

(12) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosures to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 and following) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.";

(13) conduct, or cause to be conducted, an investigation, other than any ministerial or nondiscretionary factfinding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section; or

[(12)] *(14)* take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress. *For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the employee or applicant would reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.*

* * * * * * *

§ 2304. Prohibited personnel practices affecting the Transportation Security Administration

(a) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

(1) the provisions of section 2302(b)(1), (8), and (9);

(2) any provision of law implementing section 2302(b)(1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and

(3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).

(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.

(c) EFFECTIVE DATE.—This section shall take effect as of the date of the enactment of this section.

§ [2304] *2305*. Responsibility of the Government Accountability Office

If requested by either House of the Congress (or any committee thereof), or if considered necessary by the Comptroller General, the Government Accountability Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the executive branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management.

§ [2305] *2306*. Coordination with certain other provisions of law

No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403), the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), the Act entitled "An

Act to provide certain administrative authorities for the National Security Agency, and for other purposes", approved May 29, 1959 (73 Stat. 63; 50 U.S.C. 402 note), and the Act entitled "An Act to amend the Internal Security Act of 1950", approved March 26, 1964 (78 Stat. 168; 50 U.S.C. 831–835).

* * * * * * *

SECTION 315 OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

SEC. 315. CONTRACTOR EMPLOYEES: PROTECTION FROM REPRISAL FOR DISCLOSURE OF CERTAIN INFORMATION.

(a) * * *

* * * * * * *

(c) REMEDY AND ENFORCEMENT AUTHORITY.—(1) **[**If the head of an executive agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a), the head of the executive agency may take one or more of the following actions:**]** *Not later than 180 days after submission of a complaint under subsection (b), the head of the executive agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:*

(A) * * *

* * * * * * *

(3) If the head of an executive agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

[(3)**]** *(4)* Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5, United States Code.

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SECTION 2409 OF TITLE 10, UNITED STATES CODE

§ 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) * * *

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(c) REMEDY AND ENFORCEMENT AUTHORITY.—(1) [If the head of the agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a), the head of the agency may take one or more of the following actions:] *Not later than 180 days after submission of a complaint under subsection (b), the head of the agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:*

(A) * * *

* * * * * * *

(3) If the head of an agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

[(3)] *(4)* Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5.

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ADDITIONAL VIEWS OF REPRESENTATIVE HENRY WAXMAN

H.R. 1317, the "Federal Employee Protection of Disclosures Act," makes a number of improvements to current law to protect whistleblowers in federal government agencies; improvements made necessary in large part by court decisions which have weakened whistleblower law. I am a proud cosponsor of this legislation.

A key component of accountability is whistleblower protection. Federal employees are on the inside. They see when taxpayer dollars are wasted. They are often the first to see the signals of corrupt or incompetent management. Yet without adequate protections, they cannot step forward to blow the whistle.

During the Committee's consideration of H.R. 1317, a number of amendments were offered by Democratic members. Two amendments were agreed to in principle, one offered by myself to give federal contractor employees some whistleblower protections, and another offered by Rep. Norton to ensure that employees of the Transportation Security Agency, including those carrying out screening functions, are covered by the whistleblower provisions of federal law. I would like to thank the majority for working with us in good faith to reach agreement on the specific language of these amendments.

Unfortunately, two other amendments did not get included in the bill as reported by the Committee. The first was offered by Reps. Carolyn Maloney and Diane Watson to extend whistleblower protections to employees of certain national security and intelligence agencies and give those employees recourse when their security clearances are inappropriately stripped.

There are many federal government workers who deserve whistleblower protection, but perhaps none more than national security whistleblowers. These are federal government employees who have undergone extensive background investigations, obtained security clearances, and handled classified information on a routine basis. Our own government has concluded that they can be trusted to work on the most sensitive law enforcement and intelligence projects. Ironically when these officials come forward to identify waste, fraud, or abuse they have little, if any, protection under our whistleblower laws.

This bill, H.R. 1317, was considered in Committee in September 2005 and is being reported in June 2006. During that intervening time, the majority worked with the minority on the issue of national security whistleblower protections.

In April 2006, the Government Reform Committee passed H.R. 5112, the Executive Branch Reform Act of 2006 by a unanimous vote of 32–0. That bill included provisions similar to those of the Maloney/Watson amendment. As H.R. 1317 moves forward in the legislative process, every effort should be made to include the bipartisan national security whistleblower provisions of H.R. 5112.

The second amendment which did not pass was offered by Rep. Van Hollen, suspending the exclusive jurisdiction of the Federal Circuit for five years and allowing appeals of decisions of the Merit Systems Protection Board to be made to any court of appeals of competent jurisdiction for that five-year period.

The monopoly that the Federal Circuit Court of Appeals currently enjoys on whistleblower appeals undermines an important principle of appellate review—that of a peer review process that helps to hold circuit court judges accountable. This principle is especially important because without multiple circuit review, no splits in the circuit can ever occur, and this is the most likely avenue for review by the Supreme Court.

Moreover, other statutes governing federal and private whistleblowers, like the Hatch Act, the False Claims Act, and appeals of decisions of the Federal Labor Relations Authority, all provide for multi-circuit reviews. The Van Hollen amendment would have provided similar treatment for cases under the Whistleblower Protection Act.

HENRY A. WAXMAN.

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