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HOUSE OF REPRESENTATIVES

REPORT
114–835

FEDERAL BUREAU OF INVESTIGATION WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2016

NOVEMBER 29, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 5790]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 5790) to provide adequate protections for whistleblowers at the Federal Bureau of Investigation, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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69–006

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 5790, the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, strengthens protections for whistleblowers at the Federal Bureau of Investigation (FBI) by expanding the list of persons authorized to receive protected disclosures of waste, fraud, and abuse, expanding the categories of prohibited personnel practices, and replacing the lengthy and inefficient process of adjudicating reprisal complaints with an improved process of adjudication by Administrative Law Judges and judicial review in a federal court of appeals.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 5790, the Federal Bureau of Investigation Whistleblower Protection Act of 2016 ("the Act"), aims to correct long-standing inadequacies in the laws protecting whistleblowers in the FBI. Such employees who make disclosures of waste, fraud, and abuse are not sufficiently protected against improper retaliation from their supervisors, often in the form of demotion, reassignment, or termination. Despite these risks, the current process for investigating and adjudicating claims for FBI whistleblowers is lengthy and ineffective.

The Civil Service Reform Act of 1978 (CSRA) established statutory protections for federal employees who disclosed waste, fraud, and abuse, and also prohibited retaliation against those employees for making such disclosures.[1] In addition to codifying the creation of the Merit Systems Protection Board, it created the position of Special Counsel to investigate retaliation and recommend corrective action.[2] The Office of Special Counsel (OSC) was established as an independent arm of the Board to carry out these functions.

FBI employees, however, were exempted from the protections afforded to other executive branch employees—including other federal law enforcement agencies—and instead were provided for in a separate section of the statute, 5 U.S.C. § 2303.[3] According to the U.S. Government Accountability Office (GAO):

> Minimal legislative history exists explaining the separate statutory provision for the FBI. Comments made by Members of Congress at the time suggest a compromise was adopted given the sensitive nature of the agency but also in recognition of past improprieties and the need to ensure public confidence that there are channels within the FBI to raise whistleblower matters, among other things.[4]

Instead, 5 U.S.C. § 2303 directed:

> (a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with

[1] Pub. L. No. 95–454, §§ 101, 202, 92 Stat. 1111, 1113–8, 1121–31 (codified as amended at 5 U.S.C. §§ 2301–2306, 1201–122, respectively).
[2] *Id.*
[3] 5 U.S.C. §§ 2302–2303.
[4] U.S. Gov't Accountability Office, GAO–15–22, *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints*, 15 fn. 35 (Jan. 2015) [hereinafter "GAO Report"].

> respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—(1) a violation of law, rule, or regulation, or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[5]

The CSRA required that the Attorney General develop regulations to protect FBI whistleblowers from retaliation, and that the President provide for the enforcement of those regulations.[6]

In January 1980, the Department of Justice (DOJ) published a final rule implementing section 2303.[7] The rule authorized DOJ's Office of Professional Responsibility (DOJ OPR) to "request the Attorney General to stay any personnel action" if OPR determined "there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a reprisal for a disclosure of information by the employee to the Attorney General (or a Department official designated by the Attorney General for such purpose). . . ."[8]

The Whistleblower Protection Act of 1989 (WPA) was the first update to whistleblower protections for federal employees under the CSRA.[9] The WPA made OSC an independent agency.[10] It revised the protections in 5 U.S.C. § 2302 from covering "mismanagement" to only covering disclosures of "gross mismanagement."[11] It also allowed employees to file a right of action for retaliation for protected disclosures.[12] However, the WPA did not make corresponding changes to 5 U.S.C. § 2303, covering FBI employees.

In April 1997, President William Clinton delegated to Attorney General Janet Reno his responsibilities under 5 U.S.C. § 2303(c) in order to establish an "appropriate process within [DOJ] to carry out these functions."[13] In November 1998, DOJ requested comment on interim regulations with procedures for making protected disclosures in the FBI as well as for reporting and investigating complaints of retaliation for such protected disclosures.[14] The final regulations were issued in November 1999,[15] and have remained largely the same since then, with only minor amendments in 2001[16] and 2008.[17]

Under the procedures, an employee who believes he or she has been retaliated against for making a protected disclosure can sub-

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[5] 5 U.S.C. § 2303(a).
[6] 5 U.S.C. § 2303.
[7] U.S. Dep't of Justice, *Department of Justice Report on Regulations Protecting FBI Whistleblowers*, 3 (Apr. 2014) [hereinafter "DOJ Report"].
[8] *Id.*
[9] Pub. L. No. 101–12, 103 Stat. 16.
[10] *Id.* at §§ 1211–12, 103 Stat. 16, 19–21.
[11] *Id.* at § 1213, 103 Stat. 16, 21.
[12] *Id.* at § 1221, 103 Stat. 16, 29–31.
[13] Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, Memorandum for the Attorney General, 62 Fed. Reg. 23,123 (Apr. 14, 1997).
[14] Whistleblower Protection for Federal Bureau of Investigation Employees, 63 Fed. Reg. 62,937 (Nov. 10, 1998) (to be codified at 28 C.F.R. pt. 27).
[15] Whistleblower Protection for Federal Bureau of Investigation Employees, 64 Fed. Reg. 58,782 (Nov. 1, 1999) (codified at 28 C.F.R. pt. 27).
[16] Whistleblower Protection for Federal Bureau of Investigation Employees, 66 Fed. Reg. 37,904 (July 20, 2001).
[17] Whistleblower Protection for Federal Bureau of Investigation Employees, 73 Fed. Reg. 1,495 (Jan. 9, 2008).

mit a reprisal complaint to the DOJ Office of Inspector General (OIG) or to DOJ OPR.[18] The OIG and DOJ OPR will confer to determine which office will investigate the claim. This determination takes into consideration several factors, including whether one office has prior experience with the complainant, such as if they have previously investigated that individual for misconduct, and whether the complaint is relevant to the OIG's mission. Typically when there are no outstanding reasons for a particular office to take the complaint, they alternate.[19]

If the investigating office reviews a complaint on its merits and determines there has been reprisal for whistleblowing, it will forward its determination to the Office of Attorney Recruitment and Management (OARM) for adjudication, along with any recommendations.[20] If the investigating office, either the OIG or DOJ OPR, opts not to recommend the complaint to OARM, a complainant may file a request for corrective action with OARM directly.[21] This request may be filed any time after 120 days from the date the complainant first notified an investigating office of the alleged reprisal, if the complainant was not notified the investigating office would seek corrective action. Otherwise, if the investigating office opts to terminate the claim, within 60 days the complainant may file a request with OARM for corrective action.[22]

Within 30 days of a final determination by OARM, either party may request an appeal to the Deputy Attorney General (DAG).[23] The DAG has discretion to set aside or modify OARM's actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[24] The DAG must order appropriate corrective action upon determining there has been a reprisal.[25]

The current regulatory process for adjudicating claims of reprisal has proven ineffective for protecting FBI whistleblowers. An April 2014 DOJ report found that of all FBI whistleblower complaints between 2005 and March 15, 2014, fewer than 10 received corrective action.[26] Further, the process for investigation and adjudication of complaints takes place entirely within DOJ and provides little opportunity for independent review.

One of the most problematic elements of the regulations is a limitation on to whom a protected disclosure must be made. The interim regulations issued in 1998 only protected disclosures to the OIG, DOJ OPR, or FBI's own Office of Professional Responsibility (FBI OPR).[27] In response to comments on this issue, the final regulations issued in November 1999 expanded the list slightly to include the Attorney General and DAG, the FBI Director and Deputy Director, and the highest-ranking official in each FBI field office.[28]

[18] 28 C.F.R. § 27.1.
[19] DOJ Report, *supra* note 7, at 5.
[20] 28 C.F.R. § 27.4(a).
[21] 28 C.F.R. § 27.4(c)(1).
[22] *Id.*
[23] 28 C.F.R. § 27.5.
[24] *Id.*
[25] *Id.*
[26] DOJ Report, *supra* note 7, at 8–10.
[27] Whistleblower Protection for Federal Bureau of Investigation Employees, 63 Fed. Reg. 62,937 (Nov. 10, 1998) (to be codified at 28 C.F.R. pt. 27).
[28] Whistleblower Protection for Federal Bureau of Investigation Employees, 64 Fed. Reg. 58,782 (Nov. 1, 1999) (to be codified at 28 C.F.R. pt. 27).

In 2008, FBI's Internal Investigations Section was also added to the list as a result of FBI OPR being restructured.[29]

FBI employees have received information regarding reporting requirements that may cause them to assume a disclosure made to a superior is a protected disclosure when in fact it is not.[30] For example, the *FBI Domestic Investigations and Operations Guide* specifically states the FBI requires employees to report known or suspected failures to adhere to the law, rules, or regulations to *any supervisor* in the employee's chain of command.[31] Despite ambiguous information regarding protections for reporting, under the current process whistleblowers do not receive corrective action or even a consideration of their claim if they make a disclosure to the wrong person. Rather, any subsequent reprisal complaint will be dismissed—not because the investigating office has examined the complaint for its merits and found there was no retaliation for a disclosure, but because the underlying disclosure was made to the wrong person.

An April 2014 DOJ report noted that of 85 closed cases that were reviewed by the OIG between 2005 and March 15, 2014, 69 were found to be "non-cognizable" and closed.[32] According to the report, the majority of these were "non-cognizable" because they were not made to the proper individual or office under 28 C.F.R. § 27.1(a).[33] Some cases were closed for similar reasons by DOJ OPR.[34]

Similarly, in January 2015 the U.S. Government Accountability Office (GAO) issued a report that examined DOJ's review of FBI whistleblower reprisal cases from 2009 through 2013.[35] Of 62 whistleblower reprisal claims in that period, 48 were dismissed for failing to meet "threshold regulatory requirements."[36] Of 54 reprisal complaints where DOJ (whether the OIG or DOJ OPR) case file documentation was sufficient to determine a specific reason a complaint was closed, 23 had at least one claim dismissed because the disclosure was not made to one of the nine categories of FBI or DOJ officials designated in the regulations.[37] At least 17 of those disclosures were made to an individual in the employee's chain of command or management.[38]

When DOJ's regulations were developed, DOJ officials maintained that due to the sensitive information to which FBI employees have access, Congress intended to limit who could receive disclosures.[39] Yet all other executive branch employees—including intelligence community officials—have protections against retaliation for making disclosures to supervisors. On October 10, 2012, President Obama implemented some intelligence community whistleblower protections by issuing Presidential Policy Directive 19 (PPD–19), which established protections for disclosures made to

[29] GAO Report, *supra* note 4, at 16 fn. 36.
[30] GAO Report, *supra* note 4, at 20–22.
[31] Fed. Bureau of Investigation, *Domestic Investigations and Operations Guide*, October 15, 2011.
[32] DOJ Report, supra note 7, at 7.
[33] *Id.*
[34] *Id.* at 8.
[35] GAO Report, supra note 4.
[36] *Id.* at 13 fn. b.
[37] *Id.* at 14.
[38] *Id.*
[39] *Id.* at 15–16.

those in an intelligence community employee's direct chain of command.[40]

PPD–19 also required the Attorney General to report within 180 days on the efficacy of DOJ's regulations regarding FBI whistleblower protections.[41] When the report was finalized over 600 days later, it recommended expanding the list of persons to whom an employee can make a protected disclosure—but only to include the second highest ranking official in a field office.[42] According to GAO's subsequent review of the DOJ report:

> DOJ officials gave us several explanations about why DOJ did not recommend expanding the list to include supervisors and others in the employee's chain of command. . . . First, in DOJ's April 2014 report, DOJ officials state that "the Department believes the set of persons to whom a protected disclosure can be made is extensive and diverse, and has seen no indication that the list has impeded disclosures of wrongdoing." However, when we asked officials how they arrived as this conclusion—particularly in light of our and DOJ's previous findings that numerous complainants had at least one claim dismissed for making a disclosure to someone in management or their chain of command—they could not provide supporting evidence or analysis for their conclusions.[43]

GAO expressed concern that dismissing retaliation complaints against whistleblowers who had failed to make their disclosures to designated persons "would permit retaliatory activity to go uninvestigated, and may have a chilling effect on other potential whistleblowers."[44] GAO recommended Congress consider whether FBI employees should have a means to obtain corrective action for retaliation for disclosures of wrongdoing made to supervisors and others in the employee's chain of command who are not already designated officials.[45]

GAO also noted other problems with DOJ's process for adjudicating reprisal claims. For example, GAO's review revealed lengthy delays in DOJ's adjudication of such claims. Of 22 whistleblower reprisal claims in the examined time period that met threshold regulatory requirements, only four were closed within one year—one because the complainant withdrew the complaint.[46] Fifteen took between one and four years to close, with three of those withdrawing their complaint.[47] Three other cases took between eight and 11 years each to close.[48] In some cases, parties waited a year

[40] The White House, Presidential Policy Directive/PPD–19 (Washington, D.C.: October 10, 2012) [hereinafter PPD-19]. Additionally, the Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113–126, § 602, 128 Stat. 1390, 1418, provided certain statutory protections for disclosures to supervisors. See 50 U.S.C. § 3341(j)(3)(A)(i).

[41] *Id.*

[42] DOJ Report, *supra* note 7, at 13–14. In 2014, senior DOJ officials told GAO DOJ leadership approved the change and the agency would be beginning the public notice and comment process. GAO Report at 17. However, as of November 2016, DOJ has not issued any notice of proposed rulemaking.

[43] GAO Report, *supra* note 4, at 17–18.

[44] *Id.* at 20.

[45] *Id.* at 41.

[46] *Id.* at 13, 13 fn. 29.

[47] *Id.* at 12.

[48] *Id.*

or more for a DOJ decision without information on when they might receive it.[49]

LEGISLATIVE HISTORY

H.R. 5790, the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, was introduced by Representative Jason Chaffetz (R–UT) on July 14, 2016 and referred to the Committee on Oversight and Government Reform. The bill had nine original cosponsors. On September 15, 2016, the Committee favorably reported the bill without amendment by unanimous consent.

H.R. 5790 was introduced as a companion to S. 2390, the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2015, which was introduced in the Senate on December 10, 2015 by Senate Judiciary Committee Chairman Charles Grassley (R–IA) and Ranking Member Patrick Leahy (D–VT). S. 2390 was referred to the Senate Judiciary Committee. When the Committee considered the bill on April 14, 2016, Senators Grassley and Leahy offered an amendment in the nature of a substitute, which was accepted by voice vote. The measure was then favorably reported, as amended, by voice vote.

SECTION-BY-SECTION

Section 1. Short title

Designates the short title of the bill as the "Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016."

Section 2. FBI whistleblower protections

This section amends 5 U.S.C. § 2303.

Definitions

This section provides new definitions for terms in the Act. It defines a personnel action as any action in section 2302(a)(2)(A), which expands the definition of personnel action for FBI employees to match that of nearly all other federal employees. Of note, the FBI would be subject to two additional personnel actions, the first regarding enforcement of nondisclosure policies, the second regarding other significant change in responsibilities. These were added for other federal employees in 1994 and 2012, respectively, but the definition of personnel action in § 2303, applicable to FBI employees, did not include them.[50]

The Act also expands the definition of protected disclosure to include those persons and entities designated by DOJ, as well as supervisors and those in an employee's chain of command. This is consistent with the protections afforded to other employees in the intelligence community as provided by PPD–19.[51]

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[49] *Id.*

[50] Pub. L. No. 103–424, 5, 108 Stat. 4361, 4363 (1994) (adding a new clause (x) to read "a decision to order psychiatric testing or examination," and moving the prior clause (x), which read "any other significant change in duties, responsibilities, or working conditions," to clause (xi)); Pub. L. No. 112–199, § 104, 126 Stat. at 1467 (adding a new clause (xi) to read, "the implementation or enforcement of any nondisclosure policy, form, or agreement," and moving the clause regarding a significant change in duties to clause (xii)).

[51] PPD–19, *supra* note 40, at 7.

Prohibited practices

This section updates the definition of prohibited practice to conform to the current law protecting other federal employees. The new definition for prohibited personnel practice prohibits retaliation against FBI employees for: the exercise of an appeal, complaint, or grievance right granted by any law, rule, or regulation; testifying for or lawfully assisting any individual in the exercise of those rights; cooperating with or disclosing information to the Inspector General of an agency or OSC; or refusing to obey an order that would require the individual to violate a law. These protections mirror those granted to other federal employees under 5 U.S.C. § 2303(b)(9).

This section also prohibits the enforcement or implementation of any nondisclosure agreement if it does not contain the statement in 5 U.S.C. § 2302(b)(13), which reads:

> These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities create by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.[52]

Although not previously codified in § 2303, this provision has applied to the FBI as a result of the government-wide "anti-gag" appropriations restriction in place for nearly 30 years.[53]

Filing of a complaint/investigation

The Act makes the OIG the sole entity responsible for investigating whistleblower reprisal complaints. The OIG must investigate complaints consistent with the requirements for OSC in 5 U.S.C. § 1214.

Preliminary Relief

The Act provides that if the OIG determines there are reasonable grounds to believe a personnel action occurred, it shall request a preliminary order from an administrative law judge (ALJ). The OIG must issue a decision containing the findings that it relied on in making its conclusion. Further, the Act includes the authority to request a 45-day stay of a personnel action from an ALJ, subject to extension, if the OIG determines there are reasonable grounds to believe the personnel action was taken as a result of a protected disclosure.

The ALJ must issue an order providing for the preliminary relief without further proceedings. The ALJ is also given authority to return an employee to their previous position, or as close to such po-

[52] 5 U.S.C. § 2302(b)(13).

[53] *See, e.g.,* Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, Div. E, § 713.

sition as is practicable, in instances where a personnel action has already been taken.

Filing of objections; Review by Administrative Law Judge; Review by Attorney General

The Act provides that not later than 60 days after the OIG issues a decision, either party may file objections to the decision and request a hearing on the record. This is the amount of time currently provided for under 5 U.S.C. § 1214[54] and DOJ's regulations.[55] If either party files an objection, an ALJ must review the decision of the OIG after opportunity for a hearing. The adjudication procedures of the Administrative Procedures Act (APA) apply to these proceedings.[56] Current procedure provides for OARM to hold hearings at its discretion,[57] which has resulted in the hearings typically not being held.[58] The Act provides that the ALJ must issue a written decision explaining its determination. These decisions must be supported by reliable and substantial evidence.[59] The APA provides that the ALJ can regulate the course of the hearing, issue subpoenas, rule on and receive evidence, have depositions taken, hold settlement conferences, rule on procedural requests, and make findings of fact and conclusions of law.[60]

If neither party files an objection, the ALJ must provide an order of permanent relief from the personnel action that is consistent with the preliminary order. The ALJ may also provide corrective action under 5 U.S.C. § 1221(g).

Parties may appeal the decision from the ALJ to the Attorney General, the timeline for which shall be established by the Attorney General. If the Attorney General fails to review a decision in the announced timeline, it shall publicly announce a new date. The Attorney General is required to issue a written decision explaining the grounds for the determination.

Publication of determinations

The Act requires decisions from the ALJ and the Attorney General to be made publicly available consistent with the Freedom of Information Act. The Act also requires that DOJ proactively publish these decisions consistent with the manner of the Merit Systems Protection Board. DOJ has not historically made precedents from OARM or DAG decisions available to FBI whistleblowers.

Judicial Review

The Act provides for judicial review in a federal circuit court of appeals, pursuant to chapter 7 of title 5. This is consistent with the Whistleblower Protection Enhancement Act's procedures to appeal from the Merit Systems Protection Board.[61] Judicial review will improve that process by ensuring cases are reviewed by a truly independent entity outside DOJ.

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[54] 5 U.S.C. § 1214(a)(3)(A)(ii).
[55] 28 C.F.R. § 27.4(c).
[56] 5 U.S.C. § 554.
[57] 28 C.F.R. § 27.4(e)(3).
[58] DOJ Report, *supra* note 7, at 20.
[59] 5 U.S.C. § 556(d).
[60] 5 U.S.C. §§ 556(c), 557(c).
[61] 5 U.S.C. § 7701.

Regulations

This section of the Act requires the Attorney General to prescribe regulations to:

(1) Ensure prohibited personnel practices aren't taken against employees in, or applicants for, positions in the FBI;

(2) Provide for the administration and enforcement of the Act in a manner consistent with the sections governing the Office of Special Counsel and the Merit Systems Protection Board, as well as with the Administrative Protection Act;

(3) Ensure FBI employees are informed of the rights and remedies available to them, including how to make a protected disclosure of classified information; and

(4) Provide for the protection of classified information and intelligence sources and methods.

Reporting

The Act codifies annual reporting requirements for DOJ currently in place from the President's memorandum to the Attorney General.[62] The requirements include that the Attorney General shall report on the number and nature of allegations of a prohibited personnel practice during the previous year, the disposition of each of those allegations, the number of unresolved allegations of a prohibited personnel practice, the number of disciplinary actions taken, the number of instances in which the IG found reasonable grounds to believe that a prohibited personnel practice had occurred, and the number of allegations that were resolved through settlement.

Rules of construction

This section clarifies that other laws and regulations are not affected by the provisions, and that the preexisting jurisdiction of other offices to conduct investigations into prohibited personnel practices is not limited. The second rule of construction ensures that rules regarding the safeguarding of information are adhered to by all parties involved.

GAO report

This section requires that within four years after the enactment of this Act, GAO issue a follow-up to its January 2015 report and evaluate the amendments made by this Act. This analysis will assist Congress in determining whether the new protections are sufficient.

Effective date; implementation

The Act would be effective upon enactment and apply to cases currently pending in DOJ, subject to exceptions. This will prevent cases from being dismissed where the applicant or employee made a disclosure to a person who is now authorized under the Act to receive disclosures, but was not so designated at the time of the disclosure. This section also gives DOJ 18 months from the date of enactment to issue regulations necessary to implement the new procedures.

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[62] Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, Memorandum for the Attorney General, 62 Fed. Reg. 23,123 (Apr. 14, 1997).

EXPLANATION OF AMENDMENTS

No amendments to H.R. 5790 were offered or adopted during Full Committee consideration of the bill.

COMMITTEE CONSIDERATION

On September 15, 2016, the Committee met in open session and ordered reported favorably the bill, H.R. 5790, by unanimous consent, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 5790.

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 adequate protections for whistleblowers at the Federal Bureau of Investigation. 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 goal and objective of the bill is to provide adequate protections for whistleblowers at the Federal Bureau of Investigation.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

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 Mandates Reform Act, P.L. 104–4) requires a statement as to 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.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) 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 this bill. However, clause 3(d)(2)(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 of 1974.

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 this bill from the Director of Congressional Budget Office:

NOVEMBER 28, 2016.

Hon. JASON CHAFFETZ,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5790, the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016.

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

Sincerely,

KEITH HALL.

Enclosure.

H.R. 5790—Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016

CBO estimates that implementing H.R. 5790 would cost $1 million annually; such spending would be subject to the availability of appropriated funds. Enacting the legislation would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 5790 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 5790 would aim to improve legal protections for employees at the Federal Bureau of Investigation (FBI) who report abuse, fraud, and waste related to government activities (such individuals are known as whistleblowers). The legislation would change the process for investigating and adjudicating complaints regarding reprisals against whistleblowers. The bill also would require the Department of Justice (DOD and the Government Accountability Office (GAO) to prepare reports related to complaints of whistleblower retaliation and the handling of those cases by the FBI.

H.R. 5790 would expand reporting requirements for DOJ and could lengthen the time required to adjudicate some complaints of retaliation. The legislation also could lead to an increase in the number of such cases (about one dozen annually in recent years). Based on the costs of similar activities, CBO estimates that implementing H.R. 5790 would increase administrative costs for DOJ and GAO by a total of about $1 million annually.

H.R. 5790 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On November 22, 2016, CBO transmitted a cost estimate for S. 2390, the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, as reported by the Senate Committee on the Judiciary on April 14, 2016. Both pieces of legislation are similar and CBO's estimates of the budgetary effects are the same.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, 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, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART III—EMPLOYEES

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SUBPART A—GENERAL PROVISIONS

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CHAPTER 23—MERIT SYSTEM PRINCIPLES

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[§ 2303. Prohibited personnel practices in the Federal Bureau of Investigation

[(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—

[(1) a violation of any law, rule, or regulation, or

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

For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

[(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

[(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.]

§ 2303. Prohibited personnel practices in the Federal Bureau of Investigation

(a) DEFINITIONS.—In this section—

(1) the term "administrative law judge" means an administrative law judge appointed by the Attorney General under section 3105 or used by the Attorney General under section 3344;

(2) the term "Inspector General" means the Inspector General of the Department of Justice;

(3) the term "personnel action" means any action described in section 2302(a)(2)(A) with respect to an employee in, or applicant for, a position in the Federal Bureau of Investigation (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character);

(4) the term "prohibited personnel practice" means a prohibited personnel practice described in subsection (b); and

(5) the term "protected disclosure" means any disclosure of information by an employee in, or applicant for, a position in the Federal Bureau of Investigation—

(A) made—

(i) in the case of an employee, to a supervisor in the direct chain of command of the employee, up to and including the head of the employing agency;

(ii) to the Inspector General;

(iii) to the Office of Professional Responsibility of the Department of Justice;

(iv) to the Office of Professional Responsibility of the Federal Bureau of Investigation;

(v) to the Inspection Division of the Federal Bureau of Investigation;

(vi) as described in section 7211;

(vii) to the Office of Special Counsel; or

(viii) to an employee designated by any officer, employee, office, or division described in clauses (i) through (vii) for the purpose of receiving such disclosures; and

(B) which the employee or applicant reasonably believes 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) PROHIBITED PRACTICES.—Any employee of the Federal Bureau of Investigation or another component of the Department of Justice who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) take or fail to take, or threaten to take or fail to take, a personnel action with respect to an employee in, or applicant for, a position in the Federal Bureau of Investigation because of a protected disclosure;

(2) take or fail to take, or threaten to take or fail to take, any personnel action against an employee in, or applicant for, a position in the Federal Bureau of Investigation because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (1); or

(ii) other than with regard to remedying a violation of paragraph (1);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in clause (i) or (ii) of subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law; or

(3) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the statement described in section 2302(b)(13).

(c) PROCEDURES.—

(1) FILING OF A COMPLAINT.—An employee in, or applicant for, a position in the Federal Bureau of Investigation may seek review of a personnel action alleged to be in violation of sub-

section (b) by filing a complaint with the Office of the Inspector General.

(2) INVESTIGATION.—

(A) IN GENERAL.—The Inspector General shall investigate any complaint alleging a personnel action in violation of subsection (b), consistent with the procedures and requirements described in section 1214.

(B) DETERMINATION.—The Inspector General shall issue a decision containing the findings of the Inspector General supporting the determination of the Inspector General.

(C) PRELIMINARY RELIEF.—

(i) IN GENERAL.—If the Inspector General determines under subparagraph (B) that reasonable grounds exist to believe that a personnel action occurred, exists, or is to be taken, in violation of subsection (b)—

(I) the Inspector General shall request from an administrative law judge a preliminary order providing relief from the personnel action; and

(II) except as provided in clause (ii), the administrative law judge, without further proceedings, shall issue such an order.

(ii) GOOD CAUSE.—Upon motion by the Government, after notice and an opportunity to be heard, and if the administrative law judge determines that there is a particularized showing of good cause that an order should not be issued returning an employee to the position the employee would have held had the personnel action not been taken, the administrative law judge shall issue an order directing that the employee be returned, as nearly as practicable and reasonable, to such position.

(3) FILING OF OBJECTIONS.—

(A) IN GENERAL.—Not later than 60 days after the Inspector General issues a decision under paragraph (2)(B), either party may file objections to the decision and request a hearing on the record.

(B) NO EFFECT ON PRELIMINARY RELIEF.—The filing of objections under subparagraph (A) shall not affect an order issued under clause (i) or (ii) of paragraph (2)(C).

(C) NO OBJECTIONS FILED.—If no party has filed objections as of the date that is 61 days after the date the Inspector General issues a decision—

(i) the decision is final and not subject to further review; and

(ii) if the Inspector General had determined that reasonable grounds exist to believe that a personnel action occurred, exists, or is to be taken, in violation of subsection (b)—

(I) an administrative law judge, without further proceedings, shall issue an order providing permanent relief from the personnel action; and

(II) upon motion by the employee or applicant, and after an opportunity for a hearing, an administrative law judge may issue an order that provides for corrective action as described under sec-

tion 1221(g), which shall be accompanied by a written decision explaining the grounds for the order.

(4) REVIEW BY ADMINISTRATIVE LAW JUDGE.—

(A) IN GENERAL.—If objections are filed under paragraph (3)(A), an administrative law judge shall review the decision by the Inspector General on the record after opportunity for agency hearing.

(B) CORRECTIVE ACTION.—An administrative law judge may issue an order providing for corrective action as described under section 1221(g).

(C) DETERMINATION.—An administrative law judge shall issue a written decision explaining the grounds for the determination by the administrative law judge under this paragraph.

(D) EFFECT OF DETERMINATION.—The determination by an administrative law judge under this paragraph shall become the decision of the Department of Justice without further proceedings, unless there is an appeal to, or review on motion of, the Attorney General within such time as the Attorney General shall by rule establish.

(5) REVIEW BY ATTORNEY GENERAL.—

(A) TIMEFRAME.—

(i) IN GENERAL.—Upon an appeal to, or review on motion of, the Attorney General under paragraph (4)(D), the Attorney General, through reference to such categories of cases, or other means, as the Attorney General determines appropriate, shall establish and announce publicly the date by which the Attorney General intends to complete action on the matter, which shall ensure expeditious consideration of the appeal or review, consistent with the interests of fairness and other priorities of the Attorney General.

(ii) FAILURE TO MEET DEADLINE.—If the Attorney General fails to complete action on an appeal or review by the announced date, and the expected delay will exceed 30 days, the Attorney General shall publicly announce the new date by which the Attorney General intends to complete action on the appeal or review.

(B) DETERMINATION.—The Attorney General shall issue a written decision explaining the grounds for the determination by the Attorney General in an appeal or review under paragraph (4)(D).

(6) PUBLICATION OF DETERMINATIONS.—

(A) PUBLIC AVAILABILITY.—Except as provided in subparagraph (B), the Attorney General shall make written decisions issued by administrative law judges under paragraph (3)(C) or (4)(C) and written decisions issued by the Attorney General under paragraph (5)(B) publicly available in a manner that is—

(i) to the maximum extent practicable, consistent with the manner in which the Merit Systems Protection Board makes decisions of the Board available to the public; and

(ii) in accordance with section 552.

(B) RULE OF CONSTRUCTION.—Nothing in subparagraph (A) shall be construed to limit the authority of an administrative law judge or the Attorney General to limit the public disclosure of information under law or regulations.

(7) JUDICIAL REVIEW.—Any determination by an administrative law judge or the Attorney General under this subsection shall be subject to judicial review under chapter 7. A petition for judicial review of such a determination shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.

(d) REGULATIONS.—Not later than 18 months after the date of enactment of the Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, the Attorney General shall prescribe regulations to carry out subsection (c) that—

(1) ensure that prohibited personnel practices shall not be taken against an employee in, or applicant for, a position in the Federal Bureau of Investigation;

(2) provide for the administration and enforcement of subsection (c) in a manner consistent with applicable provisions of sections 1214 and 1221 and in accordance with the procedures under subchapter II of chapter 5 and chapter 7;

(3) ensure that employees of the Federal Bureau of Investigation are informed of the rights and remedies available to the employees under this section, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs; and

(4) provide for the protection of classified information and intelligence sources and methods.

(e) REPORTING.—Not later than March 1 of each year, the Attorney General shall make publicly available a report containing—

(1) the number and nature of allegations of a prohibited personnel practice received during the previous year;

(2) the disposition of each allegation of a prohibited personnel practice resolved during the previous year;

(3) the number of unresolved allegations of a prohibited personnel practice pending as of the end of the previous year and, for each such unresolved allegation, how long the allegation had been pending as of the end of the previous year;

(4) the number of disciplinary investigations and actions taken with respect to each allegation of a prohibited personnel practice during the previous year;

(5) the number of instances during the previous year in which the Inspector General found reasonable grounds existed to believe that a prohibited personnel practice had occurred that were appealed by the Federal Bureau of Investigation; and

(6) the number of allegations of a prohibited personnel practice resolved through settlement, including the number that were resolved as a result of mediation.

(f) RULES OF CONSTRUCTION.—Nothing in this section shall be construed to—

(1) limit the jurisdiction of any office under any other provision of law to conduct an investigation to determine whether a prohibited personnel practice has been or will be taken; or

(2) alter or amend any law, regulation, or Executive order regarding the handling or disclosure of information, including classified information.

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