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SENATE

{ REPORT
114-246 }

SECURITY CLEARANCE ACCOUNTABILITY,
REFORM AND ENHANCEMENT ACT OF 2015

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 434

TO STRENGTHEN THE ACCOUNTABILITY OF INDIVIDUALS
INVOLVED IN MISCONDUCT AFFECTING THE INTEGRITY OF
BACKGROUND INVESTIGATIONS, TO UPDATE GUIDELINES FOR
SECURITY CLEARANCES, TO PREVENT CONFLICTS OF INTEREST
RELATING TO CONTRACTORS PROVIDING BACKGROUND
INVESTIGATION FIELDWORK SERVICES AND INVESTIGATIVE
SUPPORT SERVICES, AND FOR OTHER PURPOSES



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Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 434]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 434), to strengthen the accountability of individuals involved in misconduct affecting the integrity of background investigations, to update guidelines for security clearances, to prevent conflicts of interest relating to contractors providing background investigation fieldwork services and investigative support services, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

S. 434, the Security Clearance Accountability, Reform, and Enhancement Act of 2015, prohibits re-employment of background investigators who engage in misconduct and requires agency contractors and subcontractors to report employees who intentionally compromise the integrity of background investigations to the agency within 24 hours. The bill also requires the President, at least every five years, to review and update guidance for agencies to use in de-

termining a position's level of sensitivity and requisite background investigation requirements. Finally, S. 434 prohibits a contractor that performs background investigations from conducting an agency's final quality review on a background investigation conducted by the same contractor. S. 434 is modeled after S. 1744 (113th Congress), the Security Clearance Accountability, Reform, and Enhancement Act, and S. 2061 (113th Congress), the Preventing Conflicts of Interest with Contractors Act, which Congress considered but did not enact in the 113th Congress.¹

II. BACKGROUND AND THE NEED FOR LEGISLATION

The need for background investigations

Over 4.5 million Federal employees and contractors are eligible to hold a security clearance.² Several recent high-profile insider threat cases have shown that it is increasingly important for the Federal Government to control and have a complete understanding of who has access to sensitive documents, employees, and facilities.

In general, Federal agencies conduct background investigations to determine individuals' suitability for employment and access to government facilities, information, and information systems.³ More exhaustive investigations are reserved for determining whether to grant an individual a security clearance to access classified materials, or appoint an individual to a national security sensitive position or a position of public trust.⁴ Individuals who hold national security sensitive positions or positions of public trust are also required to undergo periodic reinvestigations after their initial investigation.⁵

Positions within an agency are designated as "sensitive positions" if an individual occupying a position could bring about "a material adverse effect on the national security."⁶ Most sensitive career civil service positions and some others are categorized by three levels of sensitivity: "Noncritical-Sensitive," "Critical-Sensitive," and "Special-Sensitive."⁷ Positions that require access to

¹The Committee consulted the reports for S. 1744 (113th Cong.), S. REP. NO. 113-276 (2014), and S. 2061 (113th Cong.), S. REP. NO. 113-257 (2014), in drafting this report.

²OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2014 REPORT ON SECURITY CLEARANCE DETERMINATIONS (2014).

³See, e.g., GOV'T ACCOUNTABILITY OFFICE, GAO-14-186T, PERSONNEL SECURITY CLEARANCES: OPPORTUNITIES EXIST TO IMPROVE QUALITY THROUGHOUT THE PROCESS 1, 9-10 (2013) (describing the classification of different sensitivity levels for access to information) [hereinafter GAO-14-186T].

⁴Agency positions are designated at a "high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency or integrity of the service," and "positions at the high or moderate risk levels would normally be designated as 'Public Trust' positions." 5 C.F.R. 731.106 (a)-(b) (2012). OPM's regulations explain: "[s]uch positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain." *Id.*

⁵E.g., Memorandum for Heads of Agencies, Aligning OPM Investigative Levels with Reform Concepts, from John P. Fitzpatrick, Asst. Dep. Director of National Intelligence for Security, Office of the Director of National Intelligence, and Kathy L. Dillaman, Assoc. Director, Federal Investigative Services, Office of Personnel Management (Aug. 24, 2010), available at <https://www.opm.gov/investigations/background-investigations/federal-investigations-notices/2010/aligning-opm-investigative-levels.pdf>; OFFICE OF MGMT & BUDGET, SUITABILITY AND SECURITY PROCESSES REVIEW: REPORT TO THE PRESIDENT 2 (2014) [hereinafter Suitability and Security Report].

⁶See Exec. Order No. 10,450, 3 C.F.R. Comp. 936 (1953).

⁷See OFFICE OF PERSONNEL MGMT, POSITION DESIGNATION TOOL, POSITION DESIGNATION OF NATIONAL SECURITY AND PUBLIC TRUST POSITIONS (2010), <http://www.opm.gov/investigations/background-investigations/position-designation-tool/oct2010.pdf>.

classified information are always considered sensitive positions.⁸ Aside from whether a position may have an impact on national security, positions within an agency are “moderate risk public trust” positions or “high risk public trust positions,” depending on the level of risk that someone in the position could harm the efficiency or integrity of the agency.⁹

By definition, classified national security information is information which could reasonably be expected to damage our national security if disclosed to an unauthorized person.¹⁰ Therefore, the Federal Government only issues an authorization to access classified national security information—a security clearance—after a satisfactory background investigation.¹¹ All classified national security information is classified at one of three collateral classification levels—“Top Secret,” “Secret,” or “Confidential.”¹² An individual’s security clearance level, and therefore the scope of the individual’s background investigation, corresponds to the highest level of classified national security information the person is authorized to access.¹³ Information classified at the lowest collateral classification level—confidential—is information that could reasonably be expected to cause damage to national security if disclosed to an unauthorized person.¹⁴ Information classified at the next level up—secret—is information that could reasonably be expected to cause serious damage to national security if disclosed to an unauthorized person.¹⁵ Information classified at the highest collateral classification level—top secret—is information that could reasonably be expected to cause exceptionally grave damage to national security if disclosed to an unauthorized person.¹⁶ Particularly sensitive information, such as Sensitive Compartmented Information and information on Special Access Programs, may be protected by controlled access programs which further limit dissemination.¹⁷

Responsibility for background investigations

The Office of Personnel Management’s (OPM) Federal Investigative Services (FIS) conducts the vast majority of background investigations for other agencies.¹⁸ OPM and other agencies use a mix of contractors and Federal employees to conduct background investigations and support those investigations by gathering information on the subjects of investigations.¹⁹

Background investigations typically include interviews of friends, family, and coworkers; reviews of educational, employment, and mental health records; and criminal history and credit checks, all

⁸*Id.*

⁹See 5 C.F.R. 731.106 (2012).

¹⁰Exec. Order No. 13,526, 3 C.F.R. 298 (2009).

¹¹See GAO-14-186T, *supra* note 3 at 1-2.

¹²See Exec. Order No. 13,526.

¹³See *e.g.*, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY POLICY GUIDANCE NUMBER 704.1, PERSONNEL SECURITY INVESTIGATIVE STANDARDS AND PROCEDURES GOVERNING ELIGIBILITY FOR ACCESS TO SENSITIVE COMPARTMENTED INFORMATION AND OTHER CONTROLLED ACCESS PROGRAM INFORMATION (2008) (describing the scope of background check standards “A”, “B”, and “C”) [hereinafter ODNI Guidance 704.1]; *see also* GAO-14-186T, *supra* note 3 at 8.

¹⁴See Exec. Order No. 13,526; *see also* OFFICE OF PERSONNEL MGMT, *supra* note 7 at 1.

¹⁵See sources cited *supra* note at 14.

¹⁶See *id.*

¹⁷*E.g.*, ODNI GUIDANCE 704.1, *supra* note 13; Exec. Order No. 12,958 § 4.1(h), 4.4 (1995).

¹⁸See SUITABILITY AND SECURITY REPORT, *supra* note 5, at 3 (noting that OPM conducts approximately 95 percent of all background checks across government).

¹⁹See *id.*

of which can be conducted by either Federal employees or contractors.²⁰ However, final adjudication rests with the Federal Government—in other words, the decision whether an individual is suitable for Federal employment and the decision whether to grant a security clearance is an inherently governmental function and must be made by a Federal employee (generally an employee of the requesting agency).²¹

Integrity of background investigations conducted by Federal and contractor employees

Because agencies rely on background investigations to adjudicate an employee's suitability for a sensitive position or clearance, errors or falsifications in those background investigations can lead to inaccurate assessments of an employee's suitability for a sensitive position or a security clearance. Such investigations may omit or incorrectly characterize derogatory information upon which an adjudicator would have denied suitability or a security clearance. Quality assurance is therefore an essential part of the investigative process. Such quality reviews ensure that investigations are thorough and comply with all applicable standards.

Unfortunately, recent investigations and events have highlighted serious errors and falsifications in background investigations over a period of many years. Some cleared Federal employees and contractors have even used their privileges to commit serious crimes, highlighting the need for better investigations and quality controls on those investigations.²² As then—OPM Inspector General (IG) Patrick McFarland testified in 2013:

One of the most flagrant criminal violations that we encounter is the falsification of background investigation reports [. . .] There are situations where the Federal Investigative Services' background investigators, either Federal employees or contractors, report interviews that never occurred, record answers to questions that were never asked, and document records checks that were never conducted. For example, a record searcher fabricated 1,600 credit checks that she never actually completed. Ironically, her own background investigation had been falsified by a background investigator convicted in a *different* fabrication case.²³

In October 2013, the Department of Justice joined a *qui tam* False Claims Act complaint by a former employee of OPM's then primary background investigations contractor, U.S. Investigative Services (USIS). At the time, USIS was OPM's largest background

²⁰ See generally ODNI GUIDANCE 704.1.

²¹ *Id.* at 3.

²² See DEP'T OF DEFENSE, INTERNAL REVIEW OF THE WASHINGTON NAVY YARD SHOOTING (2013) [hereinafter DoD Internal Review]; DEP'T OF DEFENSE, SECURITY FROM WITHIN: INDEPENDENT REVIEW OF THE WASHINGTON NAVY YARD SHOOTING (2013) [hereinafter DoD External Review], available at <http://www.defense.gov/Portals/1/Documents/pubs/Independent-Review-of-the-WNY-Shooting-14-Nov-2013.pdf>.

²³ See *Safeguarding our Nation's Secrets: Examining the Security Clearance Process: Joint Hearing Before the S. Subcomm. on Efficiency and Effectiveness of Federal Programs and the Federal Workforce and the S. Subcomm. on Financial and Contracting Oversight, of the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. (2013) [hereinafter *Safeguarding our Nation's Secrets Hearing*] (statement of Patrick McFarland, Inspector General, U.S. Office of Personnel Management).

investigation contractor by number of investigations.²⁴ In its complaint, the United States alleged that,

Beginning in at least March 2008, and continuing through at least September 2012, USIS management devised and executed a scheme to deliberately circumvent contractually required quality reviews of completed background investigations in order to increase the company's revenues and profits. Specifically, USIS devised a practice referred to internally as "dumping" or "flushing," which involved releasing cases to OPM and representing them as complete when, in fact, not all [Reports of Investigation] comprising those cases had received a quality review as required by the Fieldwork Contracts. [. . .] During the time period March 2008 through September 2012, USIS released at least 665,000 background investigations to OPM and represented them as complete when, in fact, one or more of the [Reports of Investigation] comprising those background investigations had not received a quality review as required by the Fieldwork Contracts. This represented approximately forty percent of the total background investigations conducted by USIS during that time frame.²⁵

In a 2013 letter to then-Ranking Minority Member Tom Coburn, the acting Director of OPM explained that some lower-level investigations may be reviewed by contract employees rather than Federal employees.²⁶ This type of work, in fact, was performed by former OPM investigations contractor USIS under its support contract with OPM and had previously been identified by the OPM IG as raising quality concerns.²⁷

There have even been several examples in the past few years of cleared Federal employees and contractors who committed grave crimes. For example, on September 16, 2013, Aaron Alexis, a cleared United States Navy contractor killed 12 employees and wounded several others in a mass shooting at the Washington, D.C., Navy Yard.²⁸ When Alexis first applied for a security clearance in 2007, he failed to disclose a Seattle arrest for "malicious mischief" after shooting the rear tires of a vehicle.²⁹ Alexis was required to disclose this arrest on his SF-86 form and when the incident was uncovered during the course of Alexis' investigation, he claimed to have simply "deflated" the tires on a vehicle.³⁰ However, the police report from Seattle was never obtained during Alexis' background investigation.³¹ Alexis was subsequently granted a

²⁴ Notice of Election to Intervene by United States of America, United States Ex Rel Blake Percival v. U.S. Investigations Services, LLC, No. 11-CV-527 (M.D. Ala. Oct. 24, 2013).

²⁵ United States' Complaint, *United States Ex Rel Blake Percival*, No. 11-CV-527.

²⁶ Letter from Acting Director Elaine Kaplan, U.S. Office of Personnel Management, to Ranking Member Tom Coburn, Committee on Homeland Security and Governmental Affairs (Oct. 31, 2013).

²⁷ OFFICE OF INSPECTOR GENERAL, OFFICE OF PERSONNEL MANAGEMENT, 4A-IS-00-09-060, AUDIT OF THE QUALITY ASSURANCE PROCESS OVER BACKGROUND INVESTIGATIONS 10-11 (2010).

²⁸ S. REP. NO. 113-276 (2014); see DOD INTERNAL REVIEW, *supra* note 22; DOD EXTERNAL REVIEW, *supra* note 22.

²⁹ See DOD INTERNAL REVIEW, *supra* note 22, at App'x B (Seattle Police Department Incident Report and Related Documents); DOD EXTERNAL REVIEW, *supra* note 22, at 36.

³⁰ DOD EXTERNAL REVIEW, *supra* note 22, at 36.

³¹ DOD EXTERNAL REVIEW, *supra* note 22, at 12, 36.

clearance by adjudicators who had never reviewed the police report despite knowing he had misled them on his SF-86.³²

Additionally, in June, 2013, computer systems administrator Edward Snowden leaked 50,000–200,000 classified documents that he obtained from the National Security Agency while working for intelligence contractors Dell and Booz Allen.³³

Conflicts of interest

One of the requirements for background investigations is a final quality review of the investigation to ensure its integrity, completeness, and accuracy. Until recently, contractors could conduct the final quality review of background investigations, resulting in a potential conflict of interest where a contractor reviewed its own work or the work of a competitor. This meant that a contractor that conducted a review could show bias toward approving its own work or against approving the work of its competitors. For example, according to the Department of Justice complaint, USIS management, in organizing its reviews of its own reports of investigation, established a priority level system to identify the risk that a report of investigation would be reviewed by Federal agencies. The management then passed this information to their investigative branch, instructing them to dump cases likely to be federally reviewed.³⁴

In February 2014, OPM announced a change in this policy—by requiring that only Federal employees conduct final investigative quality reviews.³⁵ However, the decision does not preclude OPM from reverting the policy in the future to allow contractors to conduct the final quality-review of their own work. In order to prevent such conflicts of interest, this bill prohibits contractors from conducting the final quality review of background investigations in which the contractor participated. It does not prohibit a contractor from reviewing its work for internal quality control. However an independent third party or Federal employee must conduct the final quality review.

Accountability measures for misconduct

OPM's usual response to misconduct by a contractor—administrative removal of the employee from the contract—has been “insufficient” according to former Inspector General McFarland.³⁶ Such an action does not prohibit the same individual from performing background investigations for the Federal Government under another contract. This bill would prevent these types of abuses by demanding better accountability from OPM and its contractors through timely reporting of misconduct, stiffer penalties for misconduct, and improved reporting to Congress.

³²*Id.*

³³S. REP. NO. 113–276 (2014); see *Safeguarding our Nation's Secrets*, *supra* note 23; *Current and Projected National Security Threats to the United States: Hearing Before the S. Comm. on Intelligence*, 113th Cong. (2014) (statement of James R. Clapper, Director, National Intelligence); Mark Hosenball, *NSA chief says Snowden leaked up to 200,000 secret documents*, REUTERS, Nov. 14, 2013, available at <http://www.reuters.com/article/us-usa-security-nsa-idUSBRE9AD19B20131114>; see also Mark Hosenball, *Snowden Downloaded NSA Secrets While Working for Dell, Sources Say*, REUTERS, Aug. 15, 2013, available at <http://www.reuters.com/article/2013/08/15/usa-security-snowden-dell-idUSL2N0GF11220130815>.

³⁴United States' Complaint, *supra* note 25.

³⁵SUITABILITY AND SECURITY REPORT, *supra* note 5, at 13.

³⁶See *Safeguarding our Nation's Secrets Hearing*, *supra* note 23 (statement of Patrick McFarland, Inspector General, U.S. Office of Personnel Management).

Guidance for designating the sensitivity level of positions

Inconsistent and outdated guidance for agencies in designating the sensitive level for national security sensitive positions also creates a potential vulnerability in the security clearance process. Current guidance is ambiguous and has led to Federal agencies inconsistently and sometimes incorrectly designating a position's sensitivity level.³⁷ Both overstating and understating a position's sensitivity level is problematic.

As a result, the Government Accountability Office (GAO) recommended that Federal agencies establish "clearly defined policies and procedures" in "determining if Federal civilian positions require a security clearance" or designation as a national security position.³⁸ GAO also recommended periodic review of the designation of these positions since circumstances change over time.³⁹ According to GAO, regulations OPM and the Director of National Intelligence promulgated in December, 2010, would result in clearly defined policies and procedures for determining whether civilian positions need security clearances.⁴⁰

S. 434 would adopt similar requirements to those recommended by GAO. Specifically the bill would require the President, acting through relevant agencies, to review and update guidance for agencies to use in determining the sensitivity designation of positions and the appropriate background investigation to initiate for each position designation. The bill also requires that at least every five years the President review and revise position designations in accordance with the guidance if necessary.

III. LEGISLATIVE HISTORY

On February 10, 2015, Senator Tester introduced S. 434, the Security Clearance Accountability, Reform, and Enhancement Act of 2015, with Senators McCaskill and Vitter, which was referred to the Committee.

S. 434 is based on two acts from the previous Congress: S. 1744 (113th Congress), the Security Clearance Accountability, Reform, and Enhancement Act, and S. 2061 (113th Congress), the Preventing Conflicts of Interest with Contractors Act. Both S. 1744 and S. 2061 were reported out of the Committee and passed the Senate by voice vote, but were not taken up in the House before the end of the Congress.

The Committee considered S. 434 at a business meeting on May 6, 2015 and ordered the bill, without amendment, reported favorably by voice vote. Senators present for the vote were: Johnson, McCain, Portman, Lankford, Ernst, Sasse, Carper, McCaskill, Baldwin, Heitkamp, and Peters.

³⁷ *Id.* (statement of Brenda S. Farrell, Director, Defense Capabilities and Management, Government Accountability Office).

³⁸ GOV'T ACCOUNTABILITY OFFICE, GAO-12-800, SECURITY CLEARANCES: AGENCIES NEED CLEARLY DEFINED POLICY FOR DETERMINING CIVILIAN POSITION REQUIREMENTS 20 (2012).

³⁹ *Id.* at 21.

⁴⁰ *Id.*; see Safeguarding our Nation's Secrets Hearing, *supra* note 23 (statement of Brenda S. Farrell, Director, Defense Capabilities and Management, Government Accountability Office).

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section provides the bill's short title, the "Security Clearance Accountability, Reform, and Enhancement Act of 2015."

Section 2. Table of contents

This section provides a table of contents for the bill.

TITLE I—SECURITY CLEARANCE ACCOUNTABILITY,
REFORM, AND ENHANCEMENT*Section 101. Definitions*

This section defines terms used in the title including "appropriate agency," "appropriate congressional committees," "covered contract," "covered individual," and "covered misconduct."

Section 102. Accountability of individuals involved in misconduct affecting the integrity of agency background investigations

Subsection (a) states that a Federal employee who engages in covered misconduct is unfit for Federal employment and bars the individual from working on background investigations.

Subsection (b) similarly bars a Federal contractor who engages in covered misconduct from the contract and from working on background investigation under any contract. This section also requires current and future contracts for background investigations include a provision requiring disclosure of misconduct to the contracting agency within 24 hours of discovery, and referral of the allegation for agency investigation within 5 days.

Subsection (c) requires an annual report from the President on implementation of this section.

Section 103. Review and update of position designation guidance

This section requires that—within 180 days and every five years thereafter—the President update guidance for agencies to use in determining the sensitivity designation of positions and background investigation necessary for the position. This section also requires a report from the President within 30 days of each required review.

TITLE II—PREVENTING CONFLICTS OF INTEREST WITH CONTRACTORS

Section 201. Definitions

This section defines terms used in the title

Section 202. Limitation on contracting to prevent organizational conflicts of interest

This section prohibits a contractor from performing the agency's final quality review of the contractor's own work. This provision is intended to prevent conflicts of interest that might otherwise undermine the impartiality and objectivity of the quality review or give a contractor an unfair competitive advantage over other contractors.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

MAY 21, 2015.

Hon. RON JOHNSON,
Chairman Committee on Homeland Security and Governmental Affairs, U.S. Senate Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 434, the Security Clearance Accountability, Reform, and Enhancement Act of 2015.

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

Sincerely,

KEITH HALL.

Enclosure.

S. 434—Security Clearance Accountability, Reform, and Enhancement Act of 2015

S. 434 would amend federal law to reform the security clearance process. A security clearance is a determination that a federal employee or contractor is eligible for access to classified national security information. The bill would require all federal agencies to terminate or place on administrative leave any employee that is involved in misconduct involving the security clearance process and prohibit employees of contractors and subcontractors involved in similar misconduct from performing background investigations. S. 434 also would prevent security clearance contractors from reviewing and approving their own background investigations.

Based on information from the Office of Personnel Management, which oversees the private firms that conduct the majority of investigations needed for security clearances, most of the provisions of the legislation would codify and expand current federal policies and practices regarding security clearances. Therefore, CBO estimates that implementing this legislation would have an insignificant cost. Enacting S. 434 could affect direct spending by some agencies (such as the Tennessee Valley Authority) because they are authorized to use receipts from the sale of goods, fees, and other collections to cover their operating costs. Therefore, pay-as-you-go procedures apply. Because most of those agencies can adjust the amounts they collect, CBO estimates that any net changes in direct spending by those agencies would not be significant. Enacting the bill would not affect revenues.

S. 434 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.

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

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because this legislation would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.

