

103D CONGRESS  
2D SESSION

**S. 622**

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**AN ACT**

To authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes.

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## AN ACT

To authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes.

1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*

1 **SECTION 1. AUTHORIZATION OF APPROPRIATIONS.**

2 (a) MERIT SYSTEMS PROTECTION BOARD.—Section  
3 8(a)(1) of the Whistleblower Protection Act of 1989 (5  
4 U.S.C. 5509 note; Public Law 101–12; 103 Stat. 34) is  
5 amended by striking out “1989, 1990, 1991, 1992, 1993,  
6 and 1994” and inserting in lieu thereof “1993, 1994, and  
7 1995”.

8 (b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2)  
9 of the Whistleblower Protection Act of 1989 (5 U.S.C.  
10 5509 note; Public Law 101–12; 103 Stat. 34) is amended  
11 by striking out “1989, 1990, 1991, and 1992” and insert-  
12 ing in lieu thereof “1993, 1994, and 1995”.

13 **SEC. 2. REASONABLE ATTORNEY FEES IN CERTAIN CASES.**

14 Section 1204 of title 5, United States Code, is  
15 amended by adding at the end thereof the following new  
16 subsection:

17 “(m)(1) Except as provided in paragraph (2) of this  
18 subsection, the Board, or an administrative law judge or  
19 other employee of the Board designated to hear a case  
20 arising under section 1215, may require payment by the  
21 agency involved of reasonable attorney fees incurred by an  
22 employee or applicant for employment if the employee or  
23 applicant is the prevailing party and the Board, adminis-  
24 trative law judge, or other employee (as the case may be)  
25 determines that payment by the agency is warranted in  
26 the interest of justice, including any case in which a pro-

1 hibited personnel practice was engaged in by the agency  
2 or any case in which the agency's action was clearly with-  
3 out merit.

4 “(2) If an employee or applicant for employment is  
5 the prevailing party of a case arising under section 1215  
6 and the decision is based on a finding of discrimination  
7 prohibited under section 2302(b)(1) of this title, the pay-  
8 ment of attorney fees shall be in accordance with the  
9 standards prescribed under section 706(k) of the Civil  
10 Rights Act of 1964 (42 U.S.C. 2000e-5(k)).”.

11 **SEC. 3. OFFICE OF SPECIAL COUNSEL.**

12 (a) SUCCESSION.—Section 1211(b) of title 5, United  
13 States Code, is amended by inserting after the first sen-  
14 tence: “The Special Counsel may continue to serve beyond  
15 the expiration of the term until a successor is appointed  
16 and has qualified, except that the Special Counsel may not  
17 continue to serve for more than one year after the date  
18 on which the term of the Special Counsel would otherwise  
19 expire under this subsection.”.

20 (b) LIMITATIONS ON DISCLOSURES.—Section  
21 1212(g) of title 5, United States Code, is amended—

22 (1) in paragraph (1), by striking out “provide  
23 information concerning” and inserting in lieu thereof  
24 “disclose any information from or about”; and

1           (2) in paragraph (2), by striking out “a matter  
2           described in subparagraph (A) or (B) of section  
3           2302(b)(2) in connection with a” and inserting in  
4           lieu thereof “an evaluation of the work performance,  
5           ability, aptitude, general qualifications, character,  
6           loyalty, or suitability for any personnel action of  
7           any”.

8           (c) STATUS REPORT BEFORE TERMINATION OF IN-  
9           VESTIGATION.—Section 1214(a) of title 5, United States  
10          Code, is amended—

11           (1) in paragraph (1)—

12           (A) by adding at the end thereof the fol-  
13           lowing new subparagraph:

14           “(D) No later than 10 days before the Special Coun-  
15          sel terminates any investigation of a prohibited personnel  
16          practice, the Special Counsel shall provide a written status  
17          report to the person who made the allegation of the pro-  
18          posed findings of fact and legal conclusions. The person  
19          may submit written comments about the report to the Spe-  
20          cial Counsel.”; and

21           (2) in paragraph (2)(A)—

22           (A) in clause (ii) by striking out “and”  
23           after the semicolon;

1 (B) in clause (iii) by striking out the pe-  
2 riod and inserting in lieu thereof a semicolon  
3 and “and”; and

4 (C) by adding at the end thereof the fol-  
5 lowing new clause:

6 “(iv) a response to any comments submitted  
7 under paragraph (1)(D).”.

8 (d) DETERMINATIONS.—Section 1214(b)(2) of title  
9 5, United States Code, is amended—

10 (1) by redesignating subparagraphs (A), (B)  
11 and (C) as subparagraphs (B), (C) and (D), respec-  
12 tively;

13 (2) by inserting before subparagraph (B) (as  
14 redesignated by paragraph (1) of this subsection)  
15 the following:

16 “(A)(i) Except as provided under clause  
17 (ii), no later than 240 days after the date of re-  
18 ceiving an allegation of a prohibited personnel  
19 practice under paragraph (1), the Special Coun-  
20 sel shall make a determination whether there  
21 are reasonable grounds to believe that a prohib-  
22 ited personnel practice has occurred, exists, or  
23 is to be taken.

24 “(ii) If the Special Counsel is unable to  
25 make the required determination within the

1           240-day period specified under clause (i) and  
2           the person submitting the allegation of a pro-  
3           hibited personnel practice agrees to an exten-  
4           sion of time, the determination shall be made  
5           within such additional period of time as shall be  
6           agreed upon between the Special Counsel and  
7           the person submitting the allegation.”; and

8           (3) by inserting after subparagraph (D) (as re-  
9           designated by paragraph (1) of this subsection) the  
10          following new subparagraph:

11                 “(E) A determination by the Special Coun-  
12                 sel under this paragraph shall not be cited or  
13                 referred to in any proceeding under this para-  
14                 graph or any other administrative or judicial  
15                 proceeding for any purpose, without the consent  
16                 of the person submitting the allegation of a pro-  
17                 hibited personnel practice.”.

18          (e) REPORTS.—Section 1218 of title 5, United States  
19          Code, is amended by inserting “cases in which it did not  
20          make a determination whether there are reasonable  
21          grounds to believe that a prohibited personnel practice has  
22          occurred, exists, or is to be taken within the 240-day pe-  
23          riod specified in section 1214(b)(2)(A)(i),” after “inves-  
24          tigations conducted by it,”.

1 **SEC. 4. INDEPENDENT RIGHT OF ACTION.**

2 (a) SUBPOENAS.—Section 1221(d) of title 5, United  
3 States Code, is amended by striking out paragraph (1)  
4 and inserting in lieu thereof the following:

5 “(1) At the request of an employee, former em-  
6 ployee, or applicant for employment seeking correc-  
7 tive action under subsection (a), the Board shall  
8 issue a subpoena for the attendance and testimony  
9 of any person or the production of documentary or  
10 other evidence from any person if the Board finds  
11 that the testimony or production requested is not  
12 unduly burdensome and appears reasonably cal-  
13 culated to lead to the discovery of admissible evi-  
14 dence.”.

15 (b) CORRECTIVE ACTIONS.—Section 1221(e)(1) is  
16 amended by adding after the last sentence: “The employee  
17 may demonstrate that the disclosure was a contributing  
18 factor in the personnel action through circumstantial evi-  
19 dence, such as evidence that—

20 “(A) the official taking the personnel action  
21 knew of the disclosure; and

22 “(B) the personnel action occurred within a pe-  
23 riod of time such that a reasonable person could  
24 conclude that the disclosure was a contributing fac-  
25 tor in the personnel action.”.

1 (c) REFERRALS.—Section 1221(f) of title 5, United  
2 States Code, is amended by adding after paragraph (2)  
3 the following new paragraph:

4 “(3) If, based on evidence presented to it under  
5 this section, the Merit Systems Protection Board de-  
6 termines that there is reason to believe that a cur-  
7 rent employee may have committed a prohibited per-  
8 sonnel practice, the Board shall refer the matter to  
9 the Special Counsel to investigate and take appro-  
10 priate action under section 1215.”.

11 **SEC. 5. PROHIBITED PERSONNEL PRACTICES.**

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

14 (1) in clause (ix) by striking out “and” after  
15 the semicolon;

16 (2) by striking out clause (x) and inserting in  
17 lieu thereof the following:

18 “(x) a decision to order psychiatric  
19 testing or examination; and

20 “(xi) any other significant change in  
21 duties, responsibilities, or working condi-  
22 tions;”; and

23 (3) in the matter following designated clause  
24 (xi) (as added by paragraph (2) of this subsection)  
25 by inserting before the semicolon the following: “,

1 and in the case of an alleged prohibited personnel  
2 practice described in subsection (b)(8), an employee  
3 or applicant for employment in a Government cor-  
4 poration as defined in section 9101 of title 31”.

5 (b) COVERED POSITIONS.—Section 2302(a)(2)(B) of  
6 title 5, United States Code, is amended to read as follows:

7 “(B) ‘covered position’ means, with respect to  
8 any personnel action, any position in the competitive  
9 service, a career appointee position in the Senior Ex-  
10 ecutive Service, or a position in the excepted service,  
11 but does not include any position which is, prior to  
12 the personnel action—

13 “(i) excepted from the competitive service  
14 because of its confidential, policy-determining,  
15 policy-making, or policy-advocating character;  
16 or

17 “(ii) excluded from the coverage of this  
18 section by the President based on a determina-  
19 tion by the President that it is necessary and  
20 warranted by conditions of good administration;  
21 and”.

22 (c) AGENCIES.—Section 2302(a)(2)(C) of title 5,  
23 United States Code, is amended in clause (i) by inserting  
24 before the semicolon: “, except in the case of an alleged

1 prohibited personnel practice described under subsection  
2 (b)(8)”.

3 (d) INFORMATIONAL PROGRAM.—Section 2302(c) of  
4 title 5, United States Code, is amended in the first sen-  
5 tence by inserting before the period “, and for ensuring  
6 (in consultation with the Office of Special Counsel) that  
7 agency employees are informed of the rights and remedies  
8 available to them under this chapter and chapter 12 of  
9 this title”.

10 **SEC. 6. PERFORMANCE APPRAISALS.**

11 Section 4313(5) of title 5, United States Code, is  
12 amended to read as follows:

13 “(5) meeting affirmative action goals, achieve-  
14 ment of equal employment opportunity requirements,  
15 and compliance with the merit systems principles set  
16 forth under section 2301 of this title.”.

17 **SEC. 7. MERIT SYSTEMS APPLICATION TO CERTAIN VETER-**  
18 **ANS AFFAIRS PERSONNEL.**

19 Section 2105 of title 5, United States Code, is  
20 amended by adding at the end thereof the following new  
21 subsection:

22 “(f) For purposes of sections 1212, 1213, 1214,  
23 1215, 1216, 1221, 1222, 2302, and 7701, employees ap-  
24 pointed under chapter 73 or 74 of title 38 shall be employ-  
25 ees.”.

1 **SEC. 8. CORRECTIVE ACTIONS ORDERED BY THE MERIT**  
2 **SYSTEMS PROTECTION BOARD.**

3 (a) IN GENERAL.—Section 1214 of title 5, United  
4 States Code, is amended by adding at the end thereof the  
5 following new subsection:

6 “(g) If the Board orders corrective action under this  
7 section, such corrective action may include—

8 “(1) that the individual be placed, as nearly as  
9 possible, in the position the individual would have  
10 been in had the prohibited personnel practice not oc-  
11 curred; and

12 “(2) reimbursement for attorney’s fees, back  
13 pay and related benefits, medical costs incurred,  
14 travel expenses, and any other reasonable and fore-  
15 seeable consequential damages.”.

16 (b) CERTAIN REPRISAL CASES.—Section 1221(g) of  
17 title 5, United States Code (as amended by section 4(d)  
18 of this Act) is further amended—

19 (1) by redesignating paragraphs (1) and (2) as  
20 paragraphs (2) and (3), respectively; and

21 (2) by inserting before paragraph (2) (as reded-  
22 igned by paragraph (1) of this subsection) the fol-  
23 lowing new paragraph:

24 “(1)(A) If the Board orders corrective action  
25 under this section, such corrective action may in-  
26 clude—

1           “(i) that the individual be placed, as nearly  
2           as possible, in the position the individual would  
3           have been in had the prohibited personnel prac-  
4           tice not occurred; and

5           “(ii) back pay and related benefits, medical  
6           costs incurred, travel expenses, and any other  
7           reasonable and foreseeable consequential  
8           changes.

9           “(B) Corrective action shall include attorney’s  
10          fees and costs as provided for under paragraphs (2)  
11          and (3).”.

12 **SEC. 9. EXPENSES RELATED TO FEDERAL RETIREMENT AP-**  
13 **PEALS.**

14          Section 8348(a) of title 5, United States Code, is  
15          amended—

16               (1) in paragraph (1)(B) by striking out “and”  
17               at the end thereof;

18               (2) in paragraph (2) by striking out the period  
19               and inserting in lieu thereof a semicolon and “and”;  
20               and

21               (3) by adding at the end thereof the following  
22               new paragraph:

23               “(3) is made available, subject to such annual  
24               limitation as the Congress may prescribe, for any ex-  
25               penses incurred by the Merit Systems Protection

1 Board in the administration of appeals authorized  
2 under sections 8347(d) and 8461(e) of this title.”.

3 **SEC. 10. ELECTION OF APPLICATION OF LAWS BY EMPLOY-**  
4 **EES OF THE RESOLUTION TRUST CORPORA-**  
5 **TION AND THRIFT DEPOSITOR PROTECTION**  
6 **OVERSIGHT BOARD.**

7 (a) ELECTION OF PROVISIONS OF TITLE 5, UNITED  
8 STATES CODE.—If an individual who believes he has been  
9 discharged or discriminated against in violation of section  
10 21a(q)(1) of the Federal Home Loan Bank Act (12 U.S.C.  
11 1441a(q)(1)) seeks an administrative corrective action or  
12 judicial remedy for such violation under the provisions of  
13 chapters 12 and 23 of title 5, United States Code, the  
14 provisions of section 21a(q) of such Act shall not apply  
15 to such alleged violation.

16 (b) ELECTION OF PROVISIONS OF FEDERAL HOME  
17 LOAN BANK ACT.—If an individual files a civil action  
18 under section 21a(q)(2) of the Federal Home Loan Bank  
19 Act (12 U.S.C. 1441a(q)(2)), the provisions of chapters  
20 12 and 23 of title 5, United States Code, shall not apply  
21 to any alleged violation of section 21a(q)(1) of such Act.

22 **SEC. 11. IMPLEMENTATION.**

23 (a) POLICY STATEMENT.—No later than 6 months  
24 after the date of enactment of this Act, the Special Coun-  
25 sel shall issue a policy statement regarding the implemen-

1 tation of the Whistleblower Protection Act of 1989. Such  
2 policy statement shall be made available to each person  
3 alleging a prohibited personnel practice described under  
4 section 2302(b)(8) of title 5, United States Code, and  
5 shall include detailed guidelines identifying specific cat-  
6 egories of information that may (or may not) be commu-  
7 nicated to agency officials for an investigative purpose, or  
8 for the purpose of obtaining corrective action under sec-  
9 tion 1214 of title 5, United States Code, or disciplinary  
10 action under section 1215 of such title, the circumstances  
11 under which such information is likely to be disclosed, and  
12 whether or not the consent of any person is required in  
13 advance of any such communication.

14 (b) TERMINATION STATEMENT.—The Special Coun-  
15 sel shall include in any letter terminating an investigation  
16 under section 1214(a)(2) of title 5, United States Code,  
17 the name and telephone number of an employee of the  
18 Special Counsel who is available to respond to reasonable  
19 questions from the person regarding the investigation or  
20 review conducted by the Special Counsel, the relevant facts  
21 ascertained by the Special Counsel, and the law applicable  
22 to the person's allegations.

1 **SEC. 12. ANNUAL SURVEY OF INDIVIDUALS SEEKING AS-**  
2 **SISTANCE.**

3 (a) **IN GENERAL.**—The Office of Special Counsel  
4 shall, after consulting with the Office of Policy and Eval-  
5 uation of the Merit Systems Protection Board, conduct an  
6 annual survey of all individuals who contact the Office of  
7 Special Counsel for assistance. The survey shall—

8 (1) determine if the individual seeking assist-  
9 ance was fully apprised of their rights;

10 (2) determine whether the individual was suc-  
11 cessful either at the Office of Special Counsel or the  
12 Merit Systems Protection Board; and

13 (3) determine if the individual, whether success-  
14 ful or not, was satisfied with the treatment received  
15 from the Office of Special Counsel.

16 (b) **REPORT.**—The results of the survey conducted  
17 under subsection (a) shall be published in the annual re-  
18 port of the Office of Special Counsel.

1 **SEC. 13. EFFECTIVE DATE.**

2       The provisions of this Act and the amendments made  
3 by this Act shall be effective on and after the date of the  
4 enactment of this Act.

      Passed the Senate October 3 (legislative day, Sep-  
tember 12), 1994.

Attest:

*Secretary.*

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