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112TH CONGRESS
2D SESSION

S. 743

IN THE HOUSE OF REPRESENTATIVES

MAY 9, 2012

Referred to the Committee on Oversight and Government Reform, and in addition to the Committees on Select Intelligence (Permanent Select), and Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

AN ACT

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the " 'Whistleblower Protection Enhancement Act of 2012' ".

TITLE I—PROTECTION OF CERTAIN DISCLOSURES OF INFORMATION BY FEDERAL EMPLOYEES

SEC. 101. CLARIFICATION OF DISCLOSURES COVERED.

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

(1) in subparagraph (A)(i), by striking ''a violation'' and inserting ''any violation''; and

(2) in subparagraph (B)(i), by striking ''a violation'' and inserting ''any violation (other than a violation of this section)''.

(b) PROHIBITED PERSONNEL PRACTICES UNDER SECTION 2302(b)(9).—

(1) TECHNICAL AND CONFORMING AMENDMENTS.—Title 5, United States Code, is amended in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of section 1214, in subsections (a), (e)(1), and (i) of section 1221, and in subsection (a)(2)(C)(i) of section 2302, by inserting ''or section 2302(b)(9)

(A)(i), (B), (C), or (D)'' after ''section 2302(b)(8)'' or ''(b)(8)'' each place it appears.

(2) OTHER REFERENCES.—(A) Title 5, United States Code, is amended in subsection (b)(4)(B)(i) of section 1214 and in subsection (e)(1) of section 1221, by inserting ''or protected activity'' after ''disclosure'' each place it appears.

(B) Section 2302(b)(9) of title 5, United States Code, is amended—

(i) by striking subparagraph (A) and inserting the following:

''(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 (8); or

''(ii) other than with regard to remedying a violation of paragraph (8);''; and

(ii) in subparagraph (B), by inserting ''(i) or (ii)'' after ''subparagraph (A)''.

(C) Section 2302 of title 5, United States Code, is amended by adding at the end the following:

''(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

"(A) the disclosure was made to a person, including a supervisor, who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(ii);

"(B) the disclosure revealed information that had been previously disclosed;

"(C) of the employee's or applicant's motive for making the disclosure;

"(D) the disclosure was not made in writing;

"(E) the disclosure was made while the employee was off duty; or

"(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

"(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.".

SEC. 102. DEFINITIONAL AMENDMENTS.

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

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

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

(3) by adding at the end the following:

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

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

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

SEC. 103. REBUTTABLE PRESUMPTION.

Section 2302(b) of title 5, United States Code, is amended by amending the matter following paragraph (12) to read as follows:

''This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty

by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.''.

SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PERSONNEL PRACTICES.

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

(1) in clause (x), by striking ''and'' after the semicolon; and

(2) by redesignating clause (xi) as clause (xii) and inserting after clause (x) the following:

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

(b) PROHIBITED PERSONNEL PRACTICE.—

(1) IN GENERAL.—Section 2302(b) of title 5, United States Code, is amended—

(A) in paragraph (11), by striking ''or'' at the end;

(B) in paragraph (12), by striking the period and inserting ''; or''; and

(C) by inserting after paragraph (12) the following:

''(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: 'These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by 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 created by controlling Exec-

utive orders and statutory provisions are incorporated into this agreement and are controlling.'.''.

(2) AGENCY WEBSITES.—Agencies making use of any nondisclosure policy, form, or agreement shall also post the statement required under section 2302(b)(13) of title 5, United States Code, (as added by this Act) on the agency website, accompanied by the specific list of controlling Executive orders and statutory provisions.

(3) NONDISCLOSURE POLICY, FORM, OR AGREEMENT IN EFFECT BEFORE THE EFFECTIVE DATE.—With respect to a nondisclosure policy, form, or agreement that was in effect before the effective date of this Act, but that does not contain the statement required under section 2302(b)(13) of title 5, United States Code, (as added by this Act) for implementation or enforcement—

(A) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement with regard to a current employee if the agency gives such employee notice of the statement; and

(B) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement after the effective date of this Act with re-

gard to a former employee if the agency complies with paragraph (2).

(c) RETALIATORY INVESTIGATIONS.—

(1) AGENCY INVESTIGATION.—Section 1214 of title 5, United States Code, is amended by adding at the end the following:

''(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.''.

(2) DAMAGES.—Section 1221(g) of title 5, United States Code, is amended by adding at the end the following:

''(4) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.''.

SEC. 105. EXCLUSION OF AGENCIES BY THE PRESIDENT.

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

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

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

SEC. 106. DISCIPLINARY ACTION.

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

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

"(i) disciplinary action consisting of removal, reduction in grade, debarment from

Federal employment for a period not to exceed 5 years, suspension, or reprimand;

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

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

"(B) In any case brought under paragraph (1) in which the Board finds that an employee has committed a prohibited personnel practice under section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D), the Board may impose disciplinary action if the Board finds that the activity protected under section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D) was a significant motivating factor, even if other factors also motivated the decision, for the employee's decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by preponderance of evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.".

SEC. 107. REMEDIES.

(a) ATTORNEY FEES.—Section 1204(m)(1) of title 5, United States Code, is amended by striking "agency in-

volved'' and inserting ''agency where the prevailing party was employed or had applied for employment at the time of the events giving rise to the case''.

(b) DAMAGES.—Sections 1214(g)(2) and 1221(g)(1)(A)(ii) of title 5, United States Code, are amended by striking all after ''travel expenses,'' and inserting ''any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).'' each place it appears.

SEC. 108. JUDICIAL REVIEW.

(a) IN GENERAL.—Section 7703(b) of title 5, United States Code, is amended by striking the matter preceding paragraph (2) and inserting the following:

''(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

''(B) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition to review a final order or final

decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction as provided under paragraph (2).''.

(b) REVIEW OBTAINED BY OFFICE OF PERSONNEL MANAGEMENT.—Section 7703(d) of title 5, United States Code, is amended to read as follows:

''(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before

the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

''(2) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D). The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction as provided under subsection (b)(2) if the Director determines, in the discretion of the Director, that the

Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.''.

SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

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

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

(2) by inserting after section 2303 the following:

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

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

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

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

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

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

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

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

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this section.

SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RESEARCH, ANALYSIS, OR TECHNICAL INFORMATION.

(a) DEFINITIONS.—In this subsection—

(1) the term "agency" has the meaning given under section 2302(a)(2)(C) of title 5, United States Code;

(2) the term "applicant" means an applicant for a covered position;

(3) the term "censorship related to research, analysis, or technical information" means any effort to distort, misrepresent, or suppress research, analysis, or technical information;

(4) the term "covered position" has the meaning given under section 2302(a)(2)(B) of title 5, United States Code;

(5) the term "employee" means an employee in a covered position in an agency; and

(6) the term ''disclosure'' has the meaning given under section 2302(a)(2)(D) of title 5, United States Code.

(b) PROTECTED DISCLOSURE.—

(1) IN GENERAL.—Any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information—

(A) shall come within the protections of section 2302(b)(8)(A) of title 5, United States Code, if—

(i) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—

(I) any violation of 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; and

(ii) such disclosure is not specifically prohibited by law or such information is not specifically required by Executive order

to be kept classified in the interest of national defense or the conduct of foreign affairs; and

(B) shall come within the protections of section 2302(b)(8)(B) of title 5, United States Code, if—

(i) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—

(I) any violation of 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; and

(ii) the disclosure is made to the Special Counsel, or to the Inspector General of an agency or another person designated by the head of the agency to receive such disclosures, consistent with the protection of sources and methods.

(2) DISCLOSURES NOT EXCLUDED.—A disclosure shall not be excluded from paragraph (1) for

any reason described under section 2302(f)(1) or (2) of title 5, United States Code.

(3) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to imply any limitation on the protections of employees and applicants afforded by any other provision of law, including protections with respect to any disclosure of information believed to be evidence of censorship related to research, analysis, or technical information.

SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR CRITICAL INFRASTRUCTURE INFORMATION.

Section 214(c) of the Homeland Security Act of 2002 (6 U.S.C. 133(c)) is amended by adding at the end the following: ''For purposes of this section a permissible use of independently obtained information includes the disclosure of such information under section 2302(b)(8) of title 5, United States Code.''.

SEC. 112. ADVISING EMPLOYEES OF RIGHTS.

Section 2302(c) of title 5, United States Code, is amended by inserting '', 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 to the Special Counsel, the Inspector General of an agency, Con-

gress, or other agency employee designated to receive such disclosures'' after ''chapter 12 of this title''.

SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEARANCE.

Section 1212 of title 5, United States Code, is amended by adding at the end the following:

''(h)(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related to section 2302(b) (8) or (9), or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b) (8) or (9) and the impact court decisions would have on the enforcement of such provisions of law.

''(2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described under subsection (a).''.

SEC. 114. SCOPE OF DUE PROCESS.

(a) SPECIAL COUNSEL.—Section 1214(b)(4)(B)(ii) of title 5, United States Code, is amended by inserting '', after a finding that a protected disclosure was a contributing factor,'' after ''ordered if''.

(b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title 5, United States Code, is amended by inserting '', after

a finding that a protected disclosure was a contributing factor,'' after ''ordered if''.

SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS.

(a) IN GENERAL.—

(1) REQUIREMENT.—Each agreement in Standard Forms 312 and 4414 of the Government and any other nondisclosure policy, form, or agreement of the Government shall contain the following statement: ''These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by 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 created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.''.

(2) AGENCY WEBSITES.—Agencies making use of any nondisclosure policy, form, or agreement shall also post the statement required under paragraph (1) on the agency website, accompanied by the specific list of controlling Executive orders and statutory provisions.

(3) ENFORCEABILITY.—

(A) IN GENERAL.—Any nondisclosure policy, form, or agreement described under paragraph (1) that does not contain the statement required under paragraph (1) may not be implemented or enforced to the extent such policy, form, or agreement is inconsistent with that statement.

(B) NONDISCLOSURE POLICY, FORM, OR AGREEMENT IN EFFECT BEFORE THE EFFECTIVE DATE.—With respect to a nondisclosure policy, form, or agreement that was in effect before the effective date of this Act, but that does not contain the statement required under paragraph (1) for implementation or enforcement—

(i) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement with regard to a cur-

rent employee if the agency gives such employee notice of the statement; and

(ii) it shall not be a prohibited personnel practice to enforce that policy, form, or agreement after the effective date of this Act with regard to a former employee if the agency complies with paragraph (2).

(b) PERSONS OTHER THAN GOVERNMENT EMPLOYEES.—Notwithstanding subsection (a), a nondisclosure policy, form, or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such policy, form, or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure policy, form, or agreement shall also make it clear that such forms do not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial viola-

tion of law, consistent with the protection of sources and methods.

SEC. 116. REPORTING REQUIREMENTS.

(a) GOVERNMENT ACCOUNTABILITY OFFICE.—

(1) REPORT.—Not later than 48 months after the date of enactment of this Act, the Comptroller General shall submit a report to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives on the implementation of this title.

(2) CONTENTS.—The report under this paragraph shall include—

(A) an analysis of any changes in the number of cases filed with the United States Merit Systems Protection Board alleging violations of section 2302(b) (8) or (9) of title 5, United States Code, since the effective date of this Act;

(B) the outcome of the cases described under subparagraph (A), including whether or not the United States Merit Systems Protection Board, the Federal Circuit Court of Appeals, or any other court determined the allegations to be frivolous or malicious;

(C) an analysis of the outcome of cases described under subparagraph (A) that were decided by a United States District Court and the impact the process has on the Merit Systems Protection Board and the Federal court system; and

(D) any other matter as determined by the Comptroller General.

(b) MERIT SYSTEMS PROTECTION BOARD.—

(1) IN GENERAL.—Each report submitted annually by the Merit Systems Protection Board under section 1116 of title 31, United States Code, shall, with respect to the period covered by such report, include as an addendum the following:

(A) Information relating to the outcome of cases decided during the applicable year of the report in which violations of section 2302(b) (8) or (9) (A)(i), (B)(i), (C), or (D) of title 5, United States Code, were alleged.

(B) The number of such cases filed in the regional and field offices, the number of petitions for review filed in such cases, and the outcomes of such cases.

(2) FIRST REPORT.—The first report described under paragraph (1) submitted after the date of en-

actment of this Act shall include an addendum required under that subparagraph that covers the period beginning on the effective date of this Act and ending at the end of the fiscal year in which such effective date occurs.

SEC. 117. ALTERNATIVE REVIEW.

(a) IN GENERAL.—Section 1221 of title 5, United States Code, is amended by adding at the end the following:

''(k)(1) In this subsection, the term 'appropriate United States district court', as used with respect to an alleged prohibited personnel practice, means the United States district court for the judicial district in which—

''(A) the prohibited personnel practice is alleged to have been committed; or

''(B) the employee, former employee, or applicant for employment allegedly affected by such practice resides.

''(2)(A) An employee, former employee, or applicant for employment in any case to which paragraph (3) or (4) applies may file an action at law or equity for de novo review in the appropriate United States district court in accordance with this subsection.

''(B) Upon initiation of any action under subparagraph (A), the Board shall stay any other claims of such

employee, former employee, or applicant pending before the Board at that time which arise out of the same set of operative facts. Such claims shall be stayed pending completion of the action filed under subparagraph (A) before the appropriate United States district court and any associated appellate review.

"(3) This paragraph applies in any case in which—

"(A) an employee, former employee, or applicant for employment—

"(i) seeks corrective action from the Merit Systems Protection Board under section 1221(a) based on an alleged prohibited personnel practice described in section 2302(b) (8) or (9) (A)(i), (B), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542; or

"(ii) files an appeal under section 7701(a) alleging as an affirmative defense the commission of a prohibited personnel practice described in section 2302(b) (8) or (9) (A)(i), (B), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542;

"(B) no final order or decision is issued by the Board within 270 days after the date on which a re-

quest for that corrective action or appeal has been duly submitted, unless the Board determines that the employee, former employee, or applicant for employment engaged in conduct intended to delay the issuance of a final order or decision by the Board; and

"(C) such employee, former employee, or applicant provides written notice to the Board of filing an action under this subsection before the filing of that action.

"(4) This paragraph applies in any case in which—

"(A) an employee, former employee, or applicant for employment—

"(i) seeks corrective action from the Merit Systems Protection Board under section 1221(a) based on an alleged prohibited personnel practice described in section 2302(b) (8) or (9) (A)(i), (B), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542; or

"(ii) files an appeal under section 7701(a) alleging as an affirmative defense the commission of a prohibited personnel practice described in section 2302(b) (8) or (9) (A)(i), (B), (C), or (D) for which the associated personnel action

is an action covered under section 7512 or 7542;

"(B)(i) within 30 days after the date on which the request for corrective action or appeal was duly submitted, such employee, former employee, or applicant for employment files a motion requesting a certification consistent with subparagraph (C) to the Board, any administrative law judge appointed by the Board under section 3105 of this title and assigned to the case, or any employee of the Board designated by the Board and assigned to the case; and

"(ii) such employee has not previously filed a motion under clause (i) related to that request for corrective action or that appeal; and

"(C) the Board, any administrative law judge appointed by the Board under section 3105 of this title and assigned to the case, or any employee of the Board designated by the Board and assigned to the case certifies that—

"(i) under the standards applicable to the review of motions to dismiss under rule 12(b)(6) of the Federal Rules of Civil Procedure, including rule 12(d), the request for corrective action or the appeal (including any alle-

gations made with the motion under subparagraph (B)) would not be subject to dismissal; and

"(ii)(I) the Board is not likely to dispose of the case within 270 days after the date on which the request for corrective action or the appeal has been duly submitted; or

"(II) the case—

"(aa) consists of multiple claims;

"(bb) requires complex or extensive discovery;

"(cc) arises out of the same set of operative facts as any civil action against the Government filed by the employee, former employee, or applicant pending in a Federal court; or

"(dd) involves a novel question of law.

"(5) The Board shall grant or deny any motion requesting a certification described under paragraph (4)(ii) within 90 days after the submission of such motion and the Board may not issue a decision on the merits of a request for corrective action within 15 days after granting or denying a motion requesting certification.

"(6)(A) Any decision of the Board, any administrative law judge appointed by the Board under section 3105

of this title and assigned to the case, or any employee of the Board designated by the Board and assigned to the case to grant or deny a certification described under paragraph (4)(ii) shall be reviewed on appeal of a final order or decision of the Board under section 7703 only if—

"(i) a motion requesting a certification was denied; and

"(ii) the reviewing court vacates the decision of the Board on the merits of the claim under the standards set forth in section 7703(c).

"(B) The decision to deny the certification shall be overturned by the reviewing court, and an order granting certification shall be issued by the reviewing court, if such decision is found to be arbitrary, capricious, or an abuse of discretion.

"(C) The reviewing court's decision shall not be considered evidence of any determination by the Board, any administrative law judge appointed by the Board under section 3105 of this title, or any employee of the Board designated by the Board on the merits of the underlying allegations during the course of any action at law or equity for de novo review in the appropriate United States district court in accordance with this subsection.

"(7) In any action filed under this subsection—

"(A) the district court shall have jurisdiction without regard to the amount in controversy;

"(B) at the request of either party, such action shall be tried by the court with a jury;

"(C) the court—

"(i) subject to clause (iii), shall apply the standards set forth in subsection (e); and

"(ii) may award any relief which the court considers appropriate under subsection (g), except—

"(I) relief for compensatory damages may not exceed $300,000; and

"(II) relief may not include punitive damages; and

"(iii) notwithstanding subsection (e)(2), may not order relief if the agency demonstrates by a preponderance of the evidence that the agency would have taken the same personnel action in the absence of such disclosure; and

"(D) the Special Counsel may not represent the employee, former employee, or applicant for employment.

"(8) An appeal from a final decision of a district court in an action under this subsection shall be taken

to the Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.

"(9) This subsection applies with respect to any appeal, petition, or other request for corrective action duly submitted to the Board, whether under section 1214(b)(2), the preceding provisions of this section, section 7513(d), section 7701, or any otherwise applicable provisions of law, rule, or regulation.".

(b) SUNSET.—

(1) IN GENERAL.—Except as provided under paragraph (2), the amendments made by this section shall cease to have effect 5 years after the effective date of this Act.

(2) PENDING CLAIMS.—The amendments made by this section shall continue to apply with respect to any claim pending before the Board on the last day of the 5-year period described under paragraph (1).

SEC. 118. MERIT SYSTEMS PROTECTION BOARD SUMMARY JUDGMENT.

(a) IN GENERAL.—Section 1204(b) of title 5, United States Code, is amended—

(1) by redesignating paragraph (3) as paragraph (4);

(2) by inserting after paragraph (2) the following:

"(3) With respect to a request for corrective action based on an alleged prohibited personnel practice described in section 2302(b) (8) or (9) (A)(i), (B), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542, the Board, any administrative law judge appointed by the Board under section 3105 of this title, or any employee of the Board designated by the Board may, with respect to any party, grant a motion for summary judgment when the Board or the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.".

(b) SUNSET.—

(1) IN GENERAL.—Except as provided under paragraph (2), the amendments made by this section shall cease to have effect 5 years after the effective date of this Act.

(2) PENDING CLAIMS.—The amendments made by this section shall continue to apply with respect to any claim pending before the Board on the last

day of the 5-year period described under paragraph (1).

SEC. 119. DISCLOSURES OF CLASSIFIED INFORMATION.

(a) PROHIBITED PERSONNEL PRACTICES.—Section 2302(b)(8) of title 5, United States Code, is amended—

(1) in subparagraph (A), by striking ''or'' after the semicolon;

(2) in subparagraph (B), by adding ''or'' after the semicolon; and

(3) by adding at the end the following:

''(C) any communication that complies with subsection (a)(1), (d), and (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);''.

(b) INSPECTOR GENERAL ACT OF 1978.—Section 8H of the Inspector General Act of 1978 (5 U.S.C. App.) is amended—

(1) in subsection (a)(1), by adding at the end the following:

''(D) An employee of any agency, as that term is defined under section 2302(a)(2)(C) of title 5, United States Code, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspector

General (or designee) of the agency at which that employee is employed.''; (2) in subsection (c), by striking ''intelligence committees'' and inserting ''appropriate committees''; (3) in subsection (d)—

(A) in paragraph (1), by striking ''either or both of the intelligence committees'' and inserting ''any of the appropriate committees''; and

(B) in paragraphs (2) and (3), by striking ''intelligence committees'' each place that term appears and inserting ''appropriate committees''; (4) in subsection (h)—

(A) in paragraph (1)—

(i) in subparagraph (A), by striking ''intelligence''; and

(ii) in subparagraph (B), by inserting ''or an activity involving classified information'' after ''an intelligence activity''; and

(B) by striking paragraph (2), and inserting the following:

''(2) The term 'appropriate committees' means the Permanent Select Committee on Intelligence of

the House of Representatives and the Select Committee on Intelligence of the Senate, except that with respect to disclosures made by employees described in subsection (a)(1)(D), the term 'appropriate committees' means the committees of appropriate jurisdiction.''.

SEC. 120. WHISTLEBLOWER PROTECTION OMBUDSMAN.

(a) IN GENERAL.—Section 3 of the Inspector General Act of 1978 (5 U.S.C. App.) is amended by striking subsection (d) and inserting the following:

''(d)(1) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—

''(A) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment;

''(B) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations; and

''(C) designate a Whistleblower Protection Ombudsman who shall educate agency employees—

''(i) about prohibitions on retaliation for protected disclosures; and

"(ii) who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures.

"(2) The Whistleblower Protection Ombudsman shall not act as a legal representative, agent, or advocate of the employee or former employee.

"(3) For the purposes of this section, the requirement of the designation of a Whistleblower Protection Ombudsman under paragraph (1)(C) shall not apply to—

"(A) any agency that is an element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))); or

"(B) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counter intelligence activities.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 8D(j) of the Inspector General Act of 1978 (5 U.S.C. App.) is amended—

(1) by striking "section 3(d)(1)" and inserting "section 3(d)(1)(A)"; and

(2) by striking "section 3(d)(2)" and inserting "section 3(d)(1)(B)".

(c) SUNSET.—

(1) IN GENERAL.—The amendments made by this section shall cease to have effect on the date that is 5 years after the date of enactment of this Act.

(2) RETURN TO PRIOR AUTHORITY.—Upon the date described in paragraph (1), section 3(d) and section 8D(j) of the Inspector General Act of 1978 (5 U.S.C. App.) shall read as such sections read on the day before the date of enactment of this Act.

TITLE II—INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS

SEC. 201. PROTECTION OF INTELLIGENCE COMMUNITY WHISTLEBLOWERS.

(a) IN GENERAL.—Chapter 23 of title 5, United States Code, is amended by inserting after section 2303 the following:

"§ 2303A. Prohibited personnel practices in the intelligence community

''(a) DEFINITIONS.—In this section—

''(1) the term 'agency' means an executive department or independent establishment, as defined under sections 101 and 104, that contains an intel-

ligence community element, except the Federal Bureau of Investigation;

"(2) the term 'intelligence community element'—

"(A) means—

"(i) the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

"(ii) any executive agency or unit thereof determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities; and

"(B) does not include the Federal Bureau of Investigation; and

"(3) the term 'personnel action' means any action described in clauses (i) through (x) of section 2302(a)(2)(A) with respect to an employee in a position in an intelligence community element (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

1 "(b) IN GENERAL.—Any employee of an agency who
2 has authority to take, direct others to take, recommend,
3 or approve any personnel action, shall not, with respect
4 to such authority, take or fail to take a personnel action
5 with respect to any employee of an intelligence community
6 element as a reprisal for a disclosure of information by
7 the employee to the Director of National Intelligence (or
8 an employee designated by the Director of National Intel-
9 ligence for such purpose), or to the head of the employing
10 agency (or an employee designated by the head of that
11 agency for such purpose), which the employee reasonably
12 believes evidences—
13 "(1) a violation of any law, rule, or regulation;
14 or
15 "(2) mismanagement, a gross waste of funds,
16 an abuse of authority, or a substantial and specific
17 danger to public health or safety.
18 "(c) ENFORCEMENT.—The President shall provide
19 for the enforcement of this section in a manner consistent
20 with applicable provisions of sections 1214 and 1221.
21 "(d) EXISTING RIGHTS PRESERVED.—Nothing in
22 this section shall be construed to—
23 "(1) preempt or preclude any employee, or ap-
24 plicant for employment, at the Federal Bureau of
25 Investigation from exercising rights currently pro-

vided under any other law, rule, or regulation, including section 2303;

"(2) repeal section 2303; or

"(3) provide the President or Director of National Intelligence the authority to revise regulations related to section 2303, codified in part 27 of the Code of Federal Regulations.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 23 of title 5, United States Code, is amended by inserting after the item relating to section 2303 the following:

"2303A. Prohibited personnel practices in the intelligence community.".

SEC. 202. REVIEW OF SECURITY CLEARANCE OR ACCESS DETERMINATIONS.

(a) IN GENERAL.—Section 3001(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 435b(b)) is amended—

(1) in the matter preceding paragraph (1), by striking "Not" and inserting "Except as otherwise provided, not";

(2) in paragraph (5), by striking "and" after the semicolon;

(3) in paragraph (6), by striking the period at the end and inserting "; and"; and

(4) by inserting after paragraph (6) the following:

"(7) not later than 180 days after the date of enactment of the Whistleblower Protection Enhancement Act of 2011—

"(A) developing policies and procedures that permit, to the extent practicable, individuals who in good faith appeal a determination to suspend or revoke a security clearance or access to classified information to retain their government employment status while such challenge is pending; and

"(B) developing and implementing uniform and consistent policies and procedures to ensure proper protections during the process for denying, suspending, or revoking a security clearance or access to classified information, including the provision of a right to appeal such a denial, suspension, or revocation, except that there shall be no appeal of an agency's suspension of a security clearance or access determination for purposes of conducting an investigation, if that suspension lasts no longer than 1 year or the head of the agency certifies that a longer suspension is needed before a final decision on denial or revocation to prevent imminent harm to the national security.

"Any limitation period applicable to an agency appeal under paragraph (7) shall be tolled until the head of the agency (or in the case of any component of the Department of Defense, the Secretary of Defense) determines, with the concurrence of the Director of National Intelligence, that the policies and procedures described in paragraph (7) have been established for the agency or the Director of National Intelligence promulgates the policies and procedures under paragraph (7). The policies and procedures for appeals developed under paragraph (7) shall be comparable to the policies and procedures pertaining to prohibited personnel practices defined under section 2302(b)(8) of title 5, United States Code, and provide—

"(A) for an independent and impartial fact-finder;

"(B) for notice and the opportunity to be heard, including the opportunity to present relevant evidence, including witness testimony;

"(C) that the employee or former employee may be represented by counsel;

"(D) that the employee or former employee has a right to a decision based on the record developed during the appeal;

"(E) that not more than 180 days shall pass from the filing of the appeal to the report of the im-

partial fact-finder to the agency head or the designee of the agency head, unless—

"(i) the employee and the agency concerned agree to an extension; or

"(ii) the impartial fact-finder determines in writing that a greater period of time is required in the interest of fairness or national security;

"(F) for the use of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs in a manner consistent with the interests of national security, including ex parte submissions if the agency determines that the interests of national security so warrant; and

"(G) that the employee or former employee shall have no right to compel the production of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, except evidence necessary to establish that the employee made the disclosure or communication such employee alleges was protected by subparagraphs (A), (B), and (C) of subsection (j)(1).".

(b) RETALIATORY REVOCATION OF SECURITY CLEARANCES AND ACCESS DETERMINATIONS.—Section

3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 435b) is amended by adding at the end the following:

"(j) RETALIATORY REVOCATION OF SECURITY CLEARANCES AND ACCESS DETERMINATIONS.—

"(1) IN GENERAL.—Agency personnel with authority over personnel security clearance or access determinations shall not take or fail to take, or threaten to take or fail to take, any action with respect to any employee's security clearance or access determination because of—

"(A) any disclosure of information to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose) or the head of the employing agency (or employee designated by the head of that agency for such purpose) by an employee that the employee reasonably believes evidences—

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

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

"(B) any disclosure to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee reasonably believes evidences—

"(i) a 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;

"(C) any communication that complies with—

"(i) subsection (a)(1), (d), and (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);

"(ii) subsection (d)(5)(A), (D), and (G) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q); or

"(iii) subsection (k)(5)(A), (D), and (G), of section 103H of the National Security Act of 1947 (50 U.S.C. 403–3h);

"(D) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

"(E) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (D); or

"(F) cooperating with or disclosing information to the Inspector General of an agency, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General,

if the actions described under subparagraphs (D) through (F) do not result in the employee or applicant unlawfully disclosing information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs.

"(2) RULE OF CONSTRUCTION.—Consistent with the protection of sources and methods, nothing in paragraph (1) shall be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

"(3) DISCLOSURES.—

"(A) IN GENERAL.—A disclosure shall not be excluded from paragraph (1) because—

"(i) the disclosure was made to a person, including a supervisor, who participated in an activity that the employee reasonably believed to be covered by paragraph (1)(A)(ii);

"(ii) the disclosure revealed information that had been previously disclosed;

"(iii) of the employee's motive for making the disclosure;

"(iv) the disclosure was not made in writing;

"(v) the disclosure was made while the employee was off duty; or

"(vi) of the amount of time which has passed since the occurrence of the events described in the disclosure.

"(B) REPRISALS.—If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from paragraph (1) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed

to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

"(4) AGENCY ADJUDICATION.—

"(A) REMEDIAL PROCEDURE.—An employee or former employee who believes that he or she has been subjected to a reprisal prohibited by paragraph (1) of this subsection may, within 90 days after the issuance of notice of such decision, appeal that decision within the agency of that employee or former employee through proceedings authorized by paragraph (7) of subsection (a), except that there shall be no appeal of an agency's suspension of a security clearance or access determination for purposes of conducting an investigation, if that suspension lasts not longer than 1 year (or a longer period in accordance with a certification made under subsection (b)(7)).

"(B) CORRECTIVE ACTION.—If, in the course of proceedings authorized under subparagraph (A), it is determined that the adverse security clearance or access determination violated paragraph (1) of this subsection, the agency shall take specific corrective action to

return the employee or former employee, as nearly as practicable and reasonable, to the position such employee or former employee would have held had the violation not occurred. Such corrective action shall include reasonable attorney's fees and any other reasonable costs incurred, and may include back pay and related benefits, travel expenses, and compensatory damages not to exceed $300,000.

"(C) CONTRIBUTING FACTOR.—In determining whether the adverse security clearance or access determination violated paragraph (1) of this subsection, the agency shall find that paragraph (1) of this subsection was violated if a disclosure described in paragraph (1) was a contributing factor in the adverse security clearance or access determination taken against the individual, unless the agency demonstrates by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter.

"(5) APPELLATE REVIEW OF SECURITY CLEARANCE ACCESS DETERMINATIONS BY DIRECTOR OF NATIONAL INTELLIGENCE.—

"(A) DEFINITION.—In this paragraph, the term 'Board' means the appellate review board established under section 204 of the Whistleblower Protection Enhancement Act of 2012.

"(B) APPEAL.—Within 60 days after receiving notice of an adverse final agency determination under a proceeding under paragraph (4), an employee or former employee may appeal that determination to the Board.

"(C) POLICIES AND PROCEDURES.—The Board, in consultation with the Attorney General, Director of National Intelligence, and the Secretary of Defense, shall develop and implement policies and procedures for adjudicating the appeals authorized by subparagraph (B). The Director of National Intelligence and Secretary of Defense shall jointly approve any rules, regulations, or guidance issued by the Board concerning the procedures for the use or handling of classified information.

"(D) REVIEW.—The Board's review shall be on the complete agency record, which shall

be made available to the Board. The Board may not hear witnesses or admit additional evidence. Any portions of the record that were submitted ex parte during the agency proceedings shall be submitted ex parte to the Board.

"(E) FURTHER FACT-FINDING OR IMPROPER DENIAL.—If the Board concludes that further fact-finding is necessary or finds that the agency improperly denied the employee or former employee the opportunity to present evidence that, if admitted, would have a substantial likelihood of altering the outcome, the Board shall remand the matter to the agency from which it originated for additional proceedings in accordance with the rules of procedure issued by the Board.

"(F) DE NOVO DETERMINATION.—The Board shall make a de novo determination, based on the entire record and under the standards specified in paragraph (4), of whether the employee or former employee received an adverse security clearance or access determination in violation of paragraph (1). In considering the record, the Board may weigh the evidence, judge the credibility of witnesses, and determine

1 controverted questions of fact. In doing so, the
2 Board may consider the prior fact-finder's op-
3 portunity to see and hear the witnesses.

4 "(G) ADVERSE SECURITY CLEARANCE OR
5 ACCESS DETERMINATION.—If the Board finds
6 that the adverse security clearance or access de-
7 termination violated paragraph (1), it shall then
8 separately determine whether reinstating the se-
9 curity clearance or access determination is
10 clearly consistent with the interests of national
11 security, with any doubt resolved in favor of na-
12 tional security, under Executive Order 12968
13 (60 Fed. Reg. 40245; relating to access to clas-
14 sified information) or any successor thereto (in-
15 cluding any adjudicative guidelines promulgated
16 under such orders) or any subsequent Executive
17 order, regulation, or policy concerning access to
18 classified information.

19 "(H) REMEDIES.—

20 "(i) CORRECTIVE ACTION.—If the
21 Board finds that the adverse security
22 clearance or access determination violated
23 paragraph (1), it shall order the agency
24 head to take specific corrective action to
25 return the employee or former employee,

as nearly as practicable and reasonable, to the position such employee or former employee would have held had the violation not occurred. Such corrective action shall include reasonable attorney's fees and any other reasonable costs incurred, and may include back pay and related benefits, travel expenses, and compensatory damages not to exceed $300,000. The Board may recommend, but may not order, reinstatement or hiring of a former employee. The Board may order that the former employee be treated as though the employee were transferring from the most recent position held when seeking other positions within the executive branch. Any corrective action shall not include the reinstating of any security clearance or access determination. The agency head shall take the actions so ordered within 90 days, unless the Director of National Intelligence, the Secretary of Energy, or the Secretary of Defense, in the case of any component of the Department of Defense, determines that doing so would endanger national security.

"(ii) RECOMMENDED ACTION.—If the Board finds that reinstating the employee or former employee's security clearance or access determination is clearly consistent with the interests of national security, it shall recommend such action to the head of the entity selected under subsection (b) and the head of the affected agency.

"(I) CONGRESSIONAL NOTIFICATION.—

"(i) ORDERS.—Consistent with the protection of sources and methods, at the time the Board issues an order, the Chairperson of the Board shall notify—

"(I) the Committee on Homeland Security and Government Affairs of the Senate;

"(II) the Select Committee on Intelligence of the Senate;

"(III) the Committee on Oversight and Government Reform of the House of Representatives;

"(IV) the Permanent Select Committee on Intelligence of the House of Representatives; and

"(V) the committees of the Senate and the House of Representatives that have jurisdiction over the employing agency, including in the case of a final order or decision of the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, or the National Reconnaissance Office, the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

"(ii) RECOMMENDATIONS.—If the agency head and the head of the entity selected under subsection (b) do not follow the Board's recommendation to reinstate a clearance, the head of the entity selected under subsection (b) shall notify the committees described in subclauses (I) through (V) of clause (i).

"(6) JUDICIAL REVIEW.—Nothing in this section shall be construed to permit or require judicial review of any—

"(A) agency action under this section; or

"(B) action of the appellate review board established under section 204 of the Whistleblower Protection Enhancement Act of 2012.

"(7) PRIVATE CAUSE OF ACTION.—Nothing in this section shall be construed to permit, authorize, or require a private cause of action to challenge the merits of a security clearance determination.".

(c) ACCESS DETERMINATION DEFINED.—Section 3001(a) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 435b(a)) is amended by adding at the end the following:

"(9) The term 'access determination' means the determination regarding whether an employee—

"(A) is eligible for access to classified information in accordance with Executive Order 12968 (60 Fed. Reg. 40245; relating to access to classified information), or any successor thereto, and Executive Order 10865 (25 Fed. Reg. 1583; relating to safeguarding classified information with industry); and

"(B) possesses a need to know under that Order.".

(d) RULE OF CONSTRUCTION.—Nothing in section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 435b), as amended by this Act,

shall be construed to require the repeal or replacement of agency appeal procedures implementing Executive Order 12968 (60 Fed. Reg. 40245; relating to classified national security information), or any successor thereto, and Executive Order 10865 (25 Fed. Reg. 1583; relating to safeguarding classified information with industry), or any successor thereto, that meet the requirements of section 3001(b)(7) of such Act, as so amended.

SEC. 203. REVISIONS RELATING TO THE INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION ACT.

(a) IN GENERAL.—Section 8H of the Inspector General Act of 1978 (5 U.S.C. App.) is amended—

(1) in subsection (b)—

(A) by inserting ''(1)'' after ''(b)''; and

(B) by adding at the end the following:

''(2) If the head of an establishment determines that a complaint or information transmitted under paragraph (1) would create a conflict of interest for the head of the establishment, the head of the establishment shall return the complaint or information to the Inspector General with that determination and the Inspector General shall make the transmission to the Director of National Intelligence and, if the establishment is within the Department of Defense, to the Secretary of Defense. In such a case, the

requirements of this section for the head of the establishment apply to each recipient of the Inspector General's transmission. Each recipient of the Inspector General's transmission shall consult with the members of the appellate review board established under section 204 of the Whistleblower Protection Enhancement Act of 2012 regarding all transmissions under this paragraph.'';

(2) by designating subsection (h) as subsection (i); and

(3) by inserting after subsection (g), the following:

''(h) An individual who has submitted a complaint or information to an Inspector General under this section may notify any member of Congress or congressional staff member of the fact that such individual has made a submission to that particular Inspector General, and of the date on which such submission was made.''.

(b) CENTRAL INTELLIGENCE AGENCY.—Section 17(d)(5) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q) is amended—

(1) in subparagraph (B)—

(A) by inserting ''(i)'' after ''(B)''; and

(B) by adding at the end the following:

''(ii) If the Director determines that a complaint or information transmitted under paragraph (1) would create

a conflict of interest for the Director, the Director shall return the complaint or information to the Inspector General with that determination and the Inspector General shall make the transmission to the Director of National Intelligence. In such a case, the requirements of this subsection for the Director apply to the Director of National Intelligence. The Director of National Intelligence shall consult with the members of the appellate review board established under section 204 of the Whistleblower Protection Enhancement Act of 2012 regarding all transmissions under this clause.''; and

(2) by adding at the end the following:

''(H) An individual who has submitted a complaint or information to the Inspector General under this section may notify any member of Congress or congressional staff member of the fact that such individual has made a submission to the Inspector General, and of the date on which such submission was made.''.

SEC. 204. REGULATIONS; REPORTING REQUIREMENTS; NONAPPLICABILITY TO CERTAIN TERMINATIONS.

(a) DEFINITIONS.—In this section—

(1) the term ''congressional oversight committees'' means—

(A) the Committee on Homeland Security and Government Affairs of the Senate;

(B) the Select Committee on Intelligence of the Senate;

(C) the Committee on Oversight and Government Reform of the House of Representatives; and

(D) the Permanent Select Committee on Intelligence of the House of Representatives; and

(2) the term ''intelligence community element''—

(A) means—

(i) the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(ii) any executive agency or unit thereof determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities; and

(B) does not include the Federal Bureau of Investigation.

(b) REGULATIONS.—

(1) IN GENERAL.—In consultation with the Secretary of Defense, the Director of National Intelligence shall prescribe regulations to ensure that a personnel action shall not be taken against an employee of an intelligence community element as a reprisal for any disclosure of information described in section 2303A(b) of title 5, United States Code, as added by this Act.

(2) APPELLATE REVIEW BOARD.—Not later than 180 days after the date of enactment of this Act, the Director of National Intelligence, in consultation with the Secretary of Defense, the Attorney General, and the heads of appropriate agencies, shall establish an appellate review board that is broadly representative of affected Departments and agencies and is made up of individuals with expertise in merit systems principles and national security issues—

(A) to hear whistleblower appeals related to security clearance access determinations described in section 3001(j) of the Intelligence

Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 435b), as added by this Act; and

(B) that shall include a subpanel that reflects the composition of the intelligence community, which shall—

(i) be composed of intelligence community elements and inspectors general from intelligence community elements, for the purpose of hearing cases that arise in elements of the intelligence community; and

(ii) include the Inspector General of the Intelligence Community and the Inspector General of the Department of Defense.

(c) REPORT ON THE STATUS OF IMPLEMENTATION OF REGULATIONS.—Not later than 2 years after the date of enactment of this Act, the Director of National Intelligence shall submit a report on the status of the implementation of the regulations promulgated under subsection (b) to the congressional oversight committees.

(d) NONAPPLICABILITY TO CERTAIN TERMINATIONS.—Section 2303A of title 5, United States Code, as added by this Act, and section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C.

435b), as amended by this Act, shall not apply if the affected employee is concurrently terminated under—

(1) section 1609 of title 10, United States Code;

(2) the authority of the Director of National Intelligence under section 102A(m) of the National Security Act of 1947 (50 U.S.C. 403–1(m)), if—

(A) the Director personally summarily terminates the individual; and

(B) the Director—

(i) determines the termination to be in the interest of the United States;

(ii) determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such employee cannot be invoked in a manner consistent with the national security; and

(iii) not later than 5 days after such termination, notifies the congressional oversight committees of the termination;

(3) the authority of the Director of the Central Intelligence Agency under section 104A(e) of the National Security Act of 1947 (50 U.S.C. 403–4a(e)), if—

(A) the Director personally summarily terminates the individual; and

(B) the Director—

(i) determines the termination to be in the interest of the United States;

(ii) determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such employee cannot be invoked in a manner consistent with the national security; and

(iii) not later than 5 days after such termination, notifies the congressional oversight committees of the termination; or

(4) section 7532 of title 5, United States Code, if—

(A) the agency head personally terminates the individual; and

(B) the agency head—

(i) determines the termination to be in the interest of the United States;

(ii) determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such employee cannot be invoked

in a manner consistent with the national security; and

(iii) not later than 5 days after such termination, notifies the congressional oversight committees of the termination.

TITLE III—SAVINGS CLAUSE; EFFECTIVE DATE

SEC. 301. SAVINGS CLAUSE.

Nothing in this Act shall be construed to imply any limitation on any protections afforded by any other provision of law to employees and applicants.

SEC. 302. EFFECTIVE DATE.

This Act shall take effect 30 days after the date of enactment of this Act.

Passed the Senate May 8, 2012.

Attest: NANCY ERICKSON,

Secretary.