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Calendar No. 421

114TH CONGRESS
2D SESSION

S. 2390

To provide adequate protections for whistleblowers at the Federal Bureau of Investigation.

IN THE SENATE OF THE UNITED STATES

DECEMBER 10, 2015

Mr. GRASSLEY (for himself, Mr. LEAHY, Mrs. MCCASKILL, Mr. WYDEN, Mr. JOHNSON, Mr. TILLIS, Mr. KIRK, Mr. HATCH, Mr. MARKEY, Ms. BALDWIN, and Mr. LEE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

APRIL 14, 2016

Reported by Mr. GRASSLEY, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To provide adequate protections for whistleblowers at the Federal Bureau of Investigation.

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 "Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2015".~~

SEC. 2. FBI WHISTLEBLOWER PROTECTIONS.

(a) IN GENERAL.—Section 2303 of title 5, United States Code, is amended to read as follows:

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

"(a) DEFINITIONS.—In this section—

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

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

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

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

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

"(A) made—

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

~~"(ii) to the Inspector General;~~

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

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

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

~~"(vi) to a Member of Congress;~~

~~"(vii) to the Office of Special Counsel;~~ ~~or~~

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

~~"(B) which the employee or applicant reasonably believes evidences—~~

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

~~"(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or~~

a substantial and specific danger to public health or safety.

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

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

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

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

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

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

''(B) testifying for or otherwise lawfully assisting any individual in the exercise of any

right referred to in clause (i) or (ii) of subparagraph (A);

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

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

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

"(c) PROCEDURES.—

"(1) FILING OF A COMPLAINT.—An employee in, or applicant for, a position in the Federal Bureau of Investigation may seek review of a personnel action alleged to be in violation of subsection (b) by filing a complaint with the Office of the Inspector General.

"(2) INVESTIGATION.—

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

"(B) DETERMINATION.—The Inspector General—

"(i) shall issue a decision containing the findings of the Inspector General supporting the determination of the Inspector General; and

"(ii) if the Inspector General determines that reasonable grounds exist to believe that a personnel action occurred, exists, or is to be taken, in violation of subsection (b), the Inspector General shall request from an administrative law judge, and the administrative law judge, without further proceedings, shall issue, a preliminary order staying the personnel action.

"(3) FILING OF OBJECTIONS.—

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

"(B) NO EFFECT ON STAY.—The filing of objections under subparagraph (A) shall not affect the stay of a personnel action under a pre-

liminary order issued under paragraph (2)(B)(ii).

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

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

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

"(I) an administrative law judge, without further proceedings, shall issue an order permanently staying the personnel action; and

"(II) upon motion by the employee, and after an opportunity for a hearing, an administrative law judge may issue an order that provides for corrective action as described under section 1221(g).

"(4) REVIEW BY ADMINISTRATIVE LAW JUDGE.—

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

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

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

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

"(5) REVIEW BY ATTORNEY GENERAL.—

"(A) TIMEFRAME.—

"(i) IN GENERAL.—Upon an appeal to, or review on motion of, the Attorney

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

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

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

~~"(6) PUBLICATION OF DETERMINATIONS.—~~

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

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

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

"(d) REGULATIONS.—The Attorney General shall prescribe regulations to carry out subsection (c) that—

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

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

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

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

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

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

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

‘‘(5) the number of instances during the previous year in which the Inspector General found a

reasonable basis that a prohibited personnel practice had occurred that were appealed by the Federal Bureau of Investigation; and

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

''(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to limit the jurisdiction of any office under any other provision of law to conduct an investigation to determine whether a prohibited personnel practice has been or will be taken.''.

(b) GAO REPORT.—

(1) DEFINITION.—In this subsection, the term ''prohibited personnel practice'' means a prohibited personnel practice described in section 2303(b) of title 5, United States Code, as added by subsection (a).

(2) REPORT.—Not later than 4 years after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report on the effects of the amendment made by subsection (a), which shall include—

~~(A) an evaluation of the timeliness of resolution of allegations of a prohibited personnel practice;~~

~~(B) an analysis of the corrective action provided in instances of a prohibited personnel practice;~~

~~(C) the number and type of disciplinary actions taken in instances of a prohibited personnel practice;~~

~~(D) an evaluation of the communication by the Inspector General of the Department of Justice with an individual alleging a prohibited personnel practice regarding the investigation and resolution of the allegation;~~

~~(E) an assessment of the mediation process of the Department of Justice; and~~

~~(F) a discussion of how the use of administrative law judges and review under chapters 5 and 7 of title 5, United States Code, affected the process of investigating and resolving allegations of a prohibited personnel practice.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016".

SEC. 2. FBI WHISTLEBLOWER PROTECTIONS.

(a) IN GENERAL.—Section 2303 of title 5, United States Code, is amended to read as follows:

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

"(a) DEFINITIONS.—In this section—

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

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

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

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

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

"(A) made—

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

"(ii) to the Inspector General;

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

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

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

"(vi) as described in section 7211;

"(vii) to the Office of Special Counsel; or

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

"(B) which the employee or applicant reasonably believes evidences—

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

"(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a

substantial and specific danger to public health or safety.

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

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

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

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

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

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

"(B) testifying for or otherwise lawfully assisting any individual in the exercise of any

right referred to in clause (i) or (ii) of subparagraph (A);

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

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

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

"(c) PROCEDURES.—

"(1) FILING OF A COMPLAINT.—An employee in, or applicant for, a position in the Federal Bureau of Investigation may seek review of a personnel action alleged to be in violation of subsection (b) by filing a complaint with the Office of the Inspector General.

"(2) INVESTIGATION.—

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

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

"(C) PRELIMINARY RELIEF.—

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

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

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

"(ii) GOOD CAUSE.—Upon motion by the Government, after notice and an opportunity to be heard, and if the administrative law judge determines that there is a particularized showing of good cause that an order should not be issued returning an employee to the position the employee would

have held had the personnel action not been taken, the administrative law judge shall issue an order directing that the employee be returned, as nearly as practicable and reasonable, to such position.

"(3) FILING OF OBJECTIONS.—

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

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

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

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

"(ii) if the Inspector General had determined that reasonable grounds exist to believe that a personnel action occurred, ex-

ists, or is to be taken, in violation of subsection (b)—

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

"(II) upon motion by the employee or applicant, and after an opportunity for a hearing, an administrative law judge may issue an order that provides for corrective action as described under section 1221(g), which shall be accompanied by a written decision explaining the grounds for the order.

"(4) REVIEW BY ADMINISTRATIVE LAW JUDGE.—

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

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

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

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

"(5) REVIEW BY ATTORNEY GENERAL.—

"(A) TIMEFRAME.—

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

fairness and other priorities of the Attorney General.

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

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

"(6) PUBLICATION OF DETERMINATIONS.—

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

"(i) to the maximum extent practicable, consistent with the manner in which

the Merit Systems Protection Board makes decisions of the Board available to the public; and

"(ii) in accordance with section 552.

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

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

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

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

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

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

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

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

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

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

"(3) the number of unresolved allegations of a prohibited personnel practice pending as of the end of

the previous year and, for each such unresolved allegation, how long the allegation had been pending as of the end of the previous year;

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

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

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

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

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

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

(b) GAO REPORT.—

(1) DEFINITION.—In this subsection, the term "prohibited personnel practice" means a prohibited personnel practice described in section 2303(b) of title 5, United States Code, as amended by subsection (a).

(2) REPORT.—Not later than 4 years after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report on the protections for whistleblowers at the Federal Bureau of Investigation and the process of investigating and adjudicating complaints of reprisal by whistleblowers under the amendments made by this Act, which shall include—

(A) the number and nature of complaints—

(i) that were filed;

(ii) that were investigated;

(iii) that were adjudicated; and

(iv) that were appealed to a court of appeals of the United States;

(B) the number of decisions made publicly available under 2303(c)(6) of title 5, United States Code, as amended by this Act, and the nature of any limitations on public disclosure of the decisions;

(C) the nature of corrective action provided in instances of a prohibited personnel practice;

(D) the number and type of disciplinary actions taken in instances of a prohibited personnel practice;

(E) an evaluation of the timeliness of resolution of allegations of a prohibited personnel practice;

(F) an assessment of the mediation process of the Department of Justice;

(G) a discussion of how the use of administrative law judges and review under chapters 5 and 7 of title 5, United States Code, affected the process of investigating and resolving allegations of a prohibited personnel practice; and

(H) a discussion of the perspectives of key stakeholders on the effects of the amendments made by this Act on the Federal Bureau of Investigation.

(c) EFFECTIVE DATE; IMPLEMENTATION.—

(1) IN GENERAL.—Except as provided in paragraph (2), this Act and the amendments made by this Act shall—

(A) take effect on the date of enactment of this Act; and

(B) apply to any matter pending on, or commenced on or after, the date of enactment of this Act.

(2) IMPLEMENTATION OF INVESTIGATION AND REVIEW PROCEDURES FOR PENDING COMPLAINTS AND COMPLAINTS MADE DURING TRANSITION PERIOD.—

(A) DEFINITION.—In this paragraph, the term "covered complaint" means a complaint alleging a personnel action in violation of section 2303 of title 5, United States Code—

(i) made—

(I) before, on, or after the date of enactment of this Act; and

(II) before the effective date of the regulations prescribed by the Attorney General under section 2303(d) of title 5, United States Code, as amended by this Act; and

(ii) for which an investigation or review is pending on or after the date of enactment of this Act.

(B) APPLICATION OF EXISTING PROCEDURES UNTIL RULES ISSUED.—Subject to subparagraph (C), for any covered complaint—

(i) the procedures under section 2303(c) of title 5, United States Code, as amended by this Act, shall not apply; and

(ii) the covered complaint shall be investigated and reviewed in accordance with the regulations and procedures prescribed under section 2303 of title 5, United States Code, as in effect on the day before the date of enactment of this Act.

(C) APPLICATION OF NEW REVIEW PROCEDURES TO PENDING INVESTIGATIONS.—For any covered complaint for which the investigation is pending on the effective date of the regulations prescribed by the Attorney General under section 2303(d) of title 5, United States Code, as amended by this Act—

(i) the procedures under paragraphs (1), (2), and (3) of section 2303(c) of title 5, United States Code, as amended by this Act, shall not apply; and

(ii) if either party files objections and requests a hearing on the record not later than 60 days after the date on which the investigation is completed, the covered complaint shall be subject to review in accord-

ance with paragraphs (4), (5), (6), and (7) of section 2303(c) of title 5, United States Code, as amended by this Act.

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A BILL

To provide adequate protections for whistleblowers at the Federal Bureau of Investigation.

APRIL 14, 2016

Reported with an amendment