

109TH CONGRESS
2^D SESSION

S. 2361

To improve Federal contracting and procurement by eliminating fraud and abuse and improving competition in contracting and procurement and by enhancing administration of Federal contracting personnel, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 2, 2006

Mr. DORGAN (for himself, Mr. BINGAMAN, Mrs. BOXER, Mr. CARPER, Mrs. CLINTON, Mr. DAYTON, Mr. DURBIN, Mr. FEINGOLD, Mrs. FEINSTEIN, Mr. HARKIN, Mr. JOHNSON, Mr. KENNEDY, Mr. KERRY, Ms. LANDRIEU, Mr. LAUTENBERG, Mr. LEAHY, Mr. MENENDEZ, Ms. MIKULSKI, Mr. OBAMA, Mr. PRYOR, Mr. REID, Mr. ROCKEFELLER, Mr. SALAZAR, Ms. STABENOW, Mr. WYDEN, Mr. KOHL, Mr. SCHUMER, and Mr. NELSON of Florida) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To improve Federal contracting and procurement by eliminating fraud and abuse and improving competition in contracting and procurement and by enhancing administration of Federal contracting personnel, and for other purposes.

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

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Honest Leadership and
3 Accountability in Contracting Act of 2006”.

4 **TITLE I—ELIMINATION OF**
5 **FRAUD AND ABUSE**

6 **SEC. 101. PROHIBITION OF WAR PROFITEERING AND**
7 **FRAUD.**

8 (a) PROHIBITION.—

9 (1) IN GENERAL.—Chapter 47 of title 18,
10 United States Code, is amended by adding at the
11 end the following:

12 **“§ 1039. War profiteering and fraud**

13 **“(a) PROHIBITION.—**

14 **“(1) IN GENERAL.—**Whoever, in any matter in-
15 volving a contract or the provision of goods or serv-
16 ices, directly or indirectly, in connection with a war
17 or military action knowingly and willfully—

18 **“(A)** executes or attempts to execute a
19 scheme or artifice to defraud the United States
20 or the entity having jurisdiction over the area
21 in which such activities occur;

22 **“(B)** falsifies, conceals, or covers up by
23 any trick, scheme, or device a material fact;

24 **“(C)** makes any materially false, fictitious,
25 or fraudulent statements or representations, or
26 makes or uses any materially false writing or

1 document knowing the same to contain any ma-
2 terially false, fictitious, or fraudulent statement
3 or entry; or

4 “(D) materially overvalues any good or
5 service with the specific intent to excessively
6 profit from the war or military action;

7 shall be fined under paragraph (2), imprisoned not
8 more than 20 years, or both.

9 “(2) FINE.—A person convicted of an offense
10 under paragraph (1) may be fined the greater of—

11 “(A) \$1,000,000; or

12 “(B) if such person derives profits or other
13 proceeds from the offense, not more than twice
14 the gross profits or other proceeds.

15 “(b) EXTRATERRITORIAL JURISDICTION.—There is
16 extraterritorial Federal jurisdiction over an offense under
17 this section.

18 “(c) VENUE.—A prosecution for an offense under
19 this section may be brought—

20 “(1) as authorized by chapter 211 of this title;

21 “(2) in any district where any act in further-
22 ance of the offense took place; or

23 “(3) in any district where any party to the con-
24 tract or provider of goods or services is located.”.

1 (2) has exhibited a pattern of failing to comply
2 with the law, including tax, labor and employment,
3 environmental, antitrust, and consumer protection
4 laws.

5 (b) EFFECTIVE DATE.—The revised regulation re-
6 quired by this section shall apply with respect to all con-
7 tracts for which solicitations are issued after the date that
8 is 90 days after the date of the enactment of this Act.

9 **SEC. 103. DISCLOSURE OF AUDIT REPORTS.**

10 (a) DISCLOSURE OF INFORMATION TO CONGRESS.—

11 (1) IN GENERAL.—The head of each executive
12 agency shall maintain a list of audit reports issued
13 by the agency during the current and previous cal-
14 endar years that—

15 (A) describe significant contractor costs
16 that have been identified as unjustified, unsup-
17 ported, questioned, or unreasonable under any
18 contract, task or delivery order, or subcontract;
19 or

20 (B) identify significant or substantial defi-
21 ciencies in any business system of any con-
22 tractor under any contract, task or delivery
23 order, or subcontract.

24 (2) SUBMISSION OF INDIVIDUAL AUDITS.—The
25 head of each executive agency shall provide, within

1 14 days of a request in writing by the chairman or
2 ranking member of a committee of jurisdiction, a
3 full and unredacted copy of—

4 (A) the current version of the list main-
5 tained pursuant to paragraph (1); or

6 (B) any audit or other report identified on
7 such list.

8 (b) PUBLICATION OF INFORMATION ON FEDERAL
9 CONTRACTOR PENALTIES AND VIOLATIONS.—

10 (1) IN GENERAL.—Not later than 180 days
11 after the date of the enactment of this Act, the Fed-
12 eral Procurement Data System shall be modified to
13 include—

14 (A) information on instances in which any
15 major contractor has been fined, paid penalties
16 or restitution, settled, plead guilty to, or had
17 judgments entered against it in connection with
18 allegations of improper conduct; and

19 (B) information on all sole source contract
20 awards in excess of \$2,000,000 entered into by
21 an executive agency.

22 (2) PUBLICLY AVAILABLE WEBSITE.—The in-
23 formation required by paragraph (1) shall be made
24 available through the publicly available website of
25 the Federal Procurement Data System.

1 **TITLE II—CONTRACT MATTERS**
2 **Subtitle A—Competition in**
3 **Contracting**

4 **SEC. 201. PROHIBITION ON AWARD OF MONOPOLY CON-**
5 **TRACTS.**

6 (a) CIVILIAN AGENCY CONTRACTS.—Section
7 303H(d) of the Federal Property and Administrative
8 Services Act of 1949 (41 U.S.C. 253h(d)) is amended by
9 adding at the end the following new paragraph:

10 “(4)(A) No task or delivery order contract in an
11 amount estimated to exceed \$100,000,000 (including all
12 options) may be awarded to a single contractor unless the
13 head of the agency determines in writing that—

14 “(i) because of the size, scope, or method of
15 performance of the requirement, it would not be
16 practical to award multiple task or delivery order
17 contracts;

18 “(ii) the task orders expected under the con-
19 tract are so integrally related that only a single con-
20 tractor can reasonably perform the work; or

21 “(iii) for any other reason, it is necessary in the
22 public interest to award the contract to a single con-
23 tractor.

1 “(B) The head of the agency shall notify Congress
2 within 30 days of any determination under subparagraph
3 (A)(iii).”.

4 (b) DEFENSE CONTRACTS.—Section 2304a(d) of title
5 10, United States Code, is amended by adding at the end
6 the following new paragraph:

7 “(4)(A) No task or delivery order contract in an
8 amount estimated to exceed \$100,000,000 (including all
9 options) may be awarded to a single contractor unless the
10 head of the agency determines in writing that—

11 “(i) because of the size, scope, or method of
12 performance of the requirement, it would not be
13 practical to award multiple task or delivery order
14 contracts;

15 “(ii) the task orders expected under the con-
16 tract are so integrally related that only a single con-
17 tractor can reasonably perform the work; or

18 “(iii) for any other reason, it is necessary in the
19 public interest to award the contract to a single con-
20 tractor.

21 “(B) The head of the agency shall notify Congress
22 within 30 days of any determination under subparagraph
23 (A)(iii).”.

1 **SEC. 202. COMPETITION IN MULTIPLE AWARD CONTRACTS.**

2 (a) REGULATIONS REQUIRED.—Not later than 180
3 days after the date of the enactment of this section, the
4 Federal Acquisition Regulation shall be revised to require
5 competition in the purchase of goods and services by each
6 executive agency pursuant to multiple award contracts.

7 (b) CONTENT OF REGULATIONS.—(1) The regula-
8 tions required by subsection (a) shall provide, at a min-
9 imum, that each individual purchase of goods or services
10 in excess of \$1,000,000 that is made under a multiple
11 award contract shall be made on a competitive basis unless
12 a contracting officer of the executive agency—

13 (A) waives the requirement on the basis of a
14 determination that—

15 (i) one of the circumstances described in
16 paragraphs (1) through (4) of section 303J(b)
17 of the Federal Property and Administrative
18 Services Act of 1949 (41 U.S.C. 253j(b)) ap-
19 plies to such individual purchase; or

20 (ii) a statute expressly authorizes or re-
21 quires that the purchase be made from a speci-
22 fied source; and

23 (B) justifies the determination in writing.

24 (2) For purposes of this subsection, an individual
25 purchase of goods or services is made on a competitive
26 basis only if it is made pursuant to procedures that—

1 (A) require fair notice of the intent to make
2 that purchase (including a description of the work to
3 be performed and the basis on which the selection
4 will be made) to be provided to all contractors offer-
5 ing such goods or services under the multiple award
6 contract; and

7 (B) afford all contractors responding to the no-
8 tice a fair opportunity to make an offer and have
9 that offer fairly considered by the official making
10 the purchase.

11 (3) Notwithstanding paragraph (2), notice may be
12 provided to fewer than all contractors offering such goods
13 or services under a multiple award contract described in
14 subsection (c)(2)(A) if notice is provided to as many con-
15 tractors as practicable.

16 (4) A purchase may not be made pursuant to a notice
17 that is provided to fewer than all contractors under para-
18 graph (3) unless—

19 (A) offers were received from at least three
20 qualified contractors; or

21 (B) a contracting officer of the executive agency
22 determines in writing that no additional qualified
23 contractors were able to be identified despite reason-
24 able efforts to do so.

25 (c) DEFINITIONS.—In this section:

1 (1) The term “individual purchase” means a
2 task order, delivery order, or other purchase.

3 (2) The term “multiple award contract”
4 means—

5 (A) a contract that is entered into by the
6 Administrator of General Services under the
7 multiple award schedule program referred to in
8 section 309(b)(3) of the Federal Property and
9 Administrative Services Act of 1949 (41 U.S.C.
10 259(b)(3));

11 (B) a multiple award task order contract
12 that is entered into under the authority of sec-
13 tions 2304a through 2304d of title 10, United
14 States Code, or sections 303H through 303K of
15 the Federal Property and Administrative Serv-
16 ices Act of 1949 (41 U.S.C. 253h through
17 253k); and

18 (C) any other indefinite delivery, indefinite
19 quantity contract that is entered into by the
20 head of an executive agency with two or more
21 sources pursuant to the same solicitation.

22 (d) **APPLICABILITY.**—The revisions to the Federal
23 Acquisition Regulation pursuant to subsection (a) shall
24 take effect not later than 180 days after the date of the
25 enactment of this Act, and shall apply to all individual

1 purchases of goods or services that are made under mul-
2 tiple award contracts on or after the effective date, with-
3 out regard to whether the multiple award contracts were
4 entered into before, on, or after such effective date.

5 (e) CONFORMING AMENDMENTS TO DEFENSE CON-
6 TRACT PROVISION.—Section 803 of the National Defense
7 Authorization Act for Fiscal Year 2002 (Public Law 107–
8 107; 10 U.S.C. 2304 note) is amended as follows:

9 (1) GOODS COVERED.—(A) The section heading
10 is amended by inserting “**GOODS OR**” before
11 “**SERVICES**”.

12 (B) Subsection (a) is amended by inserting
13 “goods and” before “services”.

14 (C) The following provisions are amended by in-
15 serting “goods or” before “services” each place it
16 appears:

17 (i) Paragraphs (1), (2), and (3) of sub-
18 section (b).

19 (ii) Subsection (d).

20 (D) Such section is amended by adding at the
21 end the following new subsection:

22 “(e) APPLICABILITY TO GOODS.—The Secretary shall
23 revise the regulations promulgated pursuant to subsection
24 (a) to cover purchases of goods by the Department of De-
25 fense pursuant to multiple award contracts. The revised

1 regulations shall take effect in final form not later than
 2 180 days after the date of the enactment of this subsection
 3 and shall apply to all individual purchases of goods that
 4 are made under multiple award contracts on or after the
 5 effective date, without regard to whether the multiple
 6 award contracts were entered into before, on, or after such
 7 effective date.”.

8 (f) PROTEST RIGHTS FOR CERTAIN AWARDS.—

9 (1) CIVILIAN AGENCY CONTRACTS.—Section
 10 303J(d) of the Federal Property and Administrative
 11 Services Act (41 U.S.C. 253j(d)) is amended by in-
 12 serting “with a value of less than \$500,000” after
 13 “task or delivery order”.

14 (2) DEFENSE CONTRACTS.—Section 2304c(d)
 15 of title 10, United States Code, is amended by in-
 16 serting “with a value of less than \$500,000” after
 17 “task or delivery order”.

18 **Subtitle B—Contract Personnel** 19 **Matters**

20 **SEC. 211. CONTRACTOR CONFLICTS OF INTEREST.**

21 (a) PROHIBITION ON CONTRACTS RELATING TO IN-
 22 HERENTLY GOVERNMENTAL FUNCTIONS.—The head of
 23 an agency may not enter into a contract for the perform-
 24 ance of any inherently governmental function.

1 (b) PROHIBITION ON CONTRACTS FOR CONTRACT
2 OVERSIGHT.—

3 (1) PROHIBITION.—The head of an agency may
4 not enter into a contract for the performance of ac-
5 quisition functions closely associated with inherently
6 governmental functions with any entity unless the
7 head of the agency determines in writing that—

8 (A) neither that entity nor any related en-
9 tity will be responsible for performing any of
10 the work under a contract which the entity will
11 help plan, evaluate, select a source, manage or
12 oversee; and

13 (B) the agency has taken appropriate steps
14 to prevent or mitigate any organizational con-
15 flict of interest that may arise because the enti-
16 ty—

17 (i) has a separate ongoing business
18 relationship, such as a joint venture or
19 contract, with any of the contractors to be
20 overseen;

21 (ii) would be placed in a position to
22 affect the value or performance of work it
23 or any related entity is doing under any
24 other Government contract;

1 (iii) has a reverse role with the con-
2 tractor to be overseen under one or more
3 separate Government contracts; or

4 (iv) has some other relationship with
5 the contractor to be overseen that could
6 reasonably appear to bias the contractor's
7 judgment.

8 (2) RELATED ENTITY DEFINED.—In this sub-
9 section, the term “related entity”, with respect to a
10 contractor, means any subsidiary, parent, affiliate,
11 joint venture, or other entity related to the con-
12 tractor.

13 (c) DEFINITIONS.—In this section:

14 (1) The term “inherently governmental func-
15 tions” has the meaning given to such term in part
16 7.5 of the Federal Acquisition Regulation.

17 (2) The term “functions closely associated with
18 governmental functions” means the functions de-
19 scribed in section 7.503(d) of the Federal Acquisi-
20 tion Regulation.

21 (3) The term “organizational conflict of inter-
22 est” has the meaning given such term in part 9.5 of
23 the Federal Acquisition Regulation.

1 (d) EFFECTIVE DATE AND APPLICABILITY.—This
 2 section shall take effect on the date of the enactment of
 3 this Act and shall apply to—

4 (1) contracts entered into on or after such date;

5 (2) any task or delivery order issued on or after
 6 such date under a contract entered into before, on,
 7 or after such date; and

8 (3) any decision on or after such date to exer-
 9 cise an option or otherwise extend a contract for the
 10 performance of a function relating to contract over-
 11 sight regardless of whether such contract was en-
 12 tered into before, on, or after such date.

13 **SEC. 212. ELIMINATION OF REVOLVING DOOR BETWEEN**
 14 **FEDERAL PERSONNEL AND CONTRACTORS.**

15 (a) ELIMINATION OF LOOPHOLES ALLOWING
 16 FORMER FEDERAL OFFICIALS TO ACCEPT COMPENSA-
 17 TION FROM CONTRACTORS OR RELATED ENTITIES.—

18 (1) IN GENERAL.—Paragraph (1) of subsection
 19 (d) of section 27 of the Office of Federal Procure-
 20 ment Policy Act (41 U.S.C. 423) is amended—

21 (A) by striking “or consultant” and insert-
 22 ing “consultant, lawyer, or lobbyist”;

23 (B) by striking “one year” and inserting
 24 “two years”; and

1 (C) in subparagraph (C), by striking “per-
2 sonally made for the Federal agency—” and in-
3 serting “participated personally and substan-
4 tially in—”.

5 (2) DEFINITION.—Paragraph (2) of such sub-
6 section is amended to read as follows:

7 “(2) For purposes of paragraph (1), the term ‘con-
8 tractor’ includes any division, affiliate, subsidiary, parent,
9 joint venture, or other related entity of a contractor.”.

10 (b) PROHIBITION ON AWARD OF GOVERNMENT CON-
11 TRACTS TO FORMER EMPLOYERS.—Such section is fur-
12 ther amended by adding at the end the following new sub-
13 section:

14 “(i) PROHIBITION ON INVOLVEMENT BY CERTAIN
15 FORMER CONTRACTOR EMPLOYEES IN PROCURE-
16 MENTS.—A former employee of a contractor who becomes
17 an employee of the Federal Government shall not be per-
18 sonally and substantially involved with any Federal agency
19 procurement involving the employee’s former employer, in-
20 cluding any division, affiliate, subsidiary, parent, joint
21 venture, or other related entity of the former employer,
22 for a period of two years beginning on the date on which
23 the employee leaves the employment of the contractor un-
24 less the designated agency ethics officer for the agency
25 determines in writing that the government’s interest in the

1 former employee’s participation in a particular procure-
2 ment outweighs any appearance of impropriety.”.

3 (c) REQUIREMENT FOR FEDERAL PROCUREMENT
4 OFFICERS TO DISCLOSE JOB OFFERS MADE TO REL-
5 ATIVES.—Subsection (c)(1) of such section is amended by
6 inserting after “that official” the following: “, or for a rel-
7 ative of that official (as defined in section 3110 of title
8 5, United States Code),”.

9 (d) ADDITIONAL CRIMINAL PENALTIES.—Paragraph
10 (1) of subsection (e) of such section is amended to read
11 as follows:

12 “(1) CRIMINAL PENALTIES.—Whoever engages
13 in conduct constituting a violation of—

14 “(A) subsection (a) or (b) for the purpose
15 of either—

16 “(i) exchanging the information cov-
17 ered by such subsection for anything of
18 value, or

19 “(ii) obtaining or giving anyone a
20 competitive advantage in the award of a
21 Federal agency procurement contract; or

22 “(B) subsection (c) or (d);

23 shall be imprisoned for not more than 5 years, fined
24 as provided under title 18, Untied States Code, or
25 both.”.

1 (e) REGULATIONS.—Such section is further amended
2 by adding at the end the following new subsection:

3 “(j) REGULATIONS.—The Director of the Office of
4 Government Ethics, in consultation with the Adminis-
5 trator, shall—

6 “(1) promulgate regulations to carry out and
7 ensure the enforcement of this section; and

8 “(2) monitor and investigate individual and
9 agency compliance with this section.”.

10 **TITLE III—OTHER PERSONNEL** 11 **MATTERS**

12 **SEC. 301. MINIMUM REQUIREMENTS FOR POLITICAL AP-** 13 **POINTEES HOLDING PUBLIC CONTRACTING** 14 **AND SAFETY POSITIONS.**

15 (a) IN GENERAL.—A position specified in subsection
16 (b) may not be held by any political appointee who does
17 not meet the requirements of subsection (c).

18 (b) SPECIFIED POSITIONS.—A position specified in
19 this subsection is any position as follows:

20 (1) A public contracting position.

21 (2) A public safety position.

22 (c) MINIMUM REQUIREMENTS.—An individual shall
23 not, with respect to any position, be considered to meet
24 the requirements of this subsection unless such indi-
25 vidual—

1 (1) has academic, management, and leadership
2 credentials in one or more areas relevant to such po-
3 sition;

4 (2) has a superior record of achievement in one
5 or more areas relevant to such position;

6 (3) has training and expertise in one or more
7 areas relevant to such position; and

8 (4) has not, within the 2-year period ending on
9 the date of such individual's nomination for or ap-
10 pointment to such position, been a lobbyist for any
11 entity or other client that is subject to the authority
12 of the agency within which, if appointed, such indi-
13 vidual would serve.

14 (d) **POLITICAL APPOINTEE.**—For purposes of this
15 section, the term “political appointee” means any indi-
16 vidual who—

17 (1) is employed in a position listed in sections
18 5312 through 5316 of title 5, United States Code
19 (relating to the Executive Schedule);

20 (2) is a limited term appointee, limited emer-
21 gency appointee, or noncareer appointee in the Sen-
22 ior Executive Service; or

23 (3) is employed in the executive branch of the
24 Government in a position which has been excepted
25 from the competitive service by reason of its policy-

1 determining, policy-making, or policy-advocating
2 character.

3 (e) PUBLIC CONTRACTING POSITION.—For purposes
4 of this section, the term “public contracting position”
5 means the following:

6 (1) The Administrator for Federal Procurement
7 Policy.

8 (2) The Administrator of the General Services
9 Administration.

10 (3) The Chief Acquisition Officer of any execu-
11 tive agency, as appointed or designated pursuant to
12 section 16 of the Office of Federal Procurement Pol-
13 icy Act (41 U.S.C. 414).

14 (4) The Under Secretary of Defense for Acqui-
15 sition, Technology, and Logistics.

16 (5) Any position (not otherwise identified under
17 any of the preceding provisions of this subsection) a
18 primary function of which involves government pro-
19 curement and procurement policy, as identified by
20 the head of each employing agency in consultation
21 with the Office of Personnel Management.

22 (f) PUBLIC SAFETY POSITION.—For purposes of this
23 section, the term “public safety position” means the fol-
24 lowing:

1 (1) The Under Secretary for Emergency Pre-
2 paredness and Response, Department of Homeland
3 Security.

4 (2) The Director of the Federal Emergency
5 Management Agency, Department of Homeland Se-
6 curity.

7 (3) Each regional director of the Federal Emer-
8 gency Management Agency, Department of Home-
9 land Security.

10 (4) The Recovery Division Director of the Fed-
11 eral Emergency Management Agency, Department
12 of Homeland Security.

13 (5) The Assistant Secretary for Immigration
14 and Customs Enforcement, Department of Home-
15 land Security.

16 (6) The Assistant Secretary for Public Health
17 Emergency Preparedness, Department of Health
18 and Human Services.

19 (7) The Assistant Administrator for Solid
20 Waste and Emergency Response, Environmental
21 Protection Agency.

22 (8) Any position (not otherwise identified under
23 any of the preceding provisions of this subsection) a
24 primary function of which involves responding to a
25 direct threat to life or property or a hazard to

1 health, as identified by the head of each employing
2 agency in consultation with the Office of Personnel
3 Management.

4 (g) PUBLICATION OF POSITIONS.—Beginning not
5 later than 30 days after the date of the enactment of this
6 Act, the head of each agency shall maintain on such agen-
7 cy’s public website a current list of all public contracting
8 positions and public safety positions within such agency.

9 (h) COORDINATION WITH OTHER REQUIREMENTS.—
10 The requirements set forth in subsection (c) shall be in
11 addition to, and not in lieu of, any requirements that
12 might otherwise apply with respect to any particular posi-
13 tion.

14 (i) DEFINITIONS.—In this section:

15 (1) The term “agency” means an Executive
16 agency (as defined by section 105 of title 5, United
17 States Code).

18 (2) The terms “limited term appointee”, “lim-
19 ited emergency appointee”, and “noncareer ap-
20 pointee” have the meanings given such terms in sec-
21 tion 3132 of title 5, United States Code.

22 (3) The term “Senior Executive Service” has
23 the meaning given such term by section 2101a of
24 title 5, United States Code.

1 (4) The term “competitive service” has the
2 meaning given such term by section 2102 of title 5,
3 United States Code.

4 (5) The terms “lobbyist” and “client” have the
5 respective meanings given them by section 3 of the
6 Lobbying Disclosure Act of 1995 (2 U.S.C. 1602).

7 (j) CONFORMING AMENDMENT.—Section 16(a) of the
8 Office of Federal Procurement Policy Act (41 U.S.C.
9 414(a)) is amended by striking “non-career employee as”.

10 **SEC. 302. PROTECTION OF CERTAIN DISCLOSURES OF IN-**
11 **FORMATION BY FEDERAL EMPLOYEES.**

12 (a) CLARIFICATION OF DISCLOSURES COVERED.—
13 Section 2302(b)(8) of title 5, United States Code, is
14 amended—

15 (1) in subparagraph (A)—

16 (A) by striking “which the employee or ap-
17 plicant reasonably believes evidences” and in-
18 serting “, without restriction to time, place,
19 form, motive, context, or prior disclosure made
20 to any person by an employee or applicant, in-
21 cluding a disclosure made in the ordinary
22 course of an employee’s duties, that the em-
23 ployee or applicant reasonably believes is evi-
24 dence of”; and

1 (B) in clause (i), by striking “a violation”
2 and inserting “any violation”;

3 (2) in subparagraph (B)—

4 (A) by striking “which the employee or ap-
5 plicant reasonably believes evidences” and in-
6 serting “, without restriction to time, place,
7 form, motive, context, or prior disclosure made
8 to any person by an employee or applicant, in-
9 cluding a disclosure made in the ordinary
10 course of an employee’s duties, of information
11 that the employee or applicant reasonably be-
12 lieves is evidence of”; and

13 (B) in clause (i), by striking “a violation”
14 and inserting “any violation (other than a viola-
15 tion of this section)”; and

16 (3) by adding at the end the following:

17 “(C) any disclosure that—

18 “(i) is made by an employee or appli-
19 cant of information required by law or Ex-
20 ecutive order to be kept secret in the inter-
21 est of national defense or the conduct of
22 foreign affairs that the employee or appli-
23 cant reasonably believes is direct and spe-
24 cific evidence of—

1 “(I) any violation of any law,
2 rule, or regulation;

3 “(II) gross mismanagement, a
4 gross waste of funds, an abuse of au-
5 thority, or a substantial and specific
6 danger to public health or safety; or

7 “(III) a false statement to Con-
8 gress on an issue of material fact; and
9 “(ii) is made to—

10 “(I) a member of a committee of
11 Congress;

12 “(II) any other Member of Con-
13 gress; or

14 “(III) an employee of Congress
15 who has the appropriate security
16 clearance and is authorized to receive
17 information of the type disclosed.”.

18 (b) COVERED DISCLOSURES.—Section 2302(a)(2) of
19 title 5, United States Code, is amended—

20 (1) in subparagraph (B)(ii), by striking “and”
21 at the end;

22 (2) in subparagraph (C)(iii), by striking the pe-
23 riod at the end and inserting “; and”; and

24 (3) by adding at the end the following:

1 “(D) ‘disclosure’ means a formal or informal
2 communication or transmission, but does not include
3 a communication concerning policy decisions that
4 lawfully exercise discretionary authority unless the
5 employee providing the disclosure reasonably believes
6 that the disclosure evidences—

7 “(i) any violation of any law, rule, or regu-
8 lation; or

9 “(ii) gross management, a gross waste of
10 funds, an abuse of authority, or a substantial
11 and specific danger to public health or safety.”.

12 (c) REBUTTABLE PRESUMPTION.—Section 2302(b)
13 of title 5, United States Code, is amended by amending
14 the matter following paragraph (12) to read as follows:
15 “‘This subsection shall not be construed to authorize the
16 withholding of information from Congress or the taking
17 of any personnel action against an employee who discloses
18 information to Congress. For purposes of paragraph (8),
19 any presumption relating to the performance of a duty by
20 an employee who has authority to take, direct others to
21 take, recommend, or approve any personnel action may be
22 rebutted by substantial evidence. For purposes of para-
23 graph (8), a determination as to whether an employee or
24 applicant reasonably believes that they have disclosed in-
25 formation that evidences any violation of law, rule, regula-

1 tion, gross mismanagement, a gross waste of funds, an
 2 abuse of authority, or a substantial and specific danger
 3 to public health or safety shall be made by determining
 4 whether a disinterested observer with knowledge of the es-
 5 sential facts known to and readily ascertainable by the em-
 6 ployee would reasonably conclude that the actions of the
 7 Government evidence such violations, mismanagement,
 8 waste, abuse, or danger.”.

9 (d) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
 10 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-
 11 VESTIGATIONS.—

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

15 (A) in clause (x), by striking “and” after
 16 the semicolon; and

17 (B) by redesignating clause (xi) as clause
 18 (xiv) and inserting after clause (x) the fol-
 19 lowing:

20 “(xi) the implementation or enforce-
 21 ment of any nondisclosure policy, form, or
 22 agreement;

23 “(xii) a suspension, revocation, or
 24 other determination relating to a security

1 clearance or any other access determina-
2 tion by a covered agency;

3 “(xiii) an investigation, other than
4 any ministerial or nondiscretionary fact
5 finding activities necessary for the agency
6 to perform its mission, of an employee or
7 applicant for employment because of any
8 activity protected under this section; and”.

9 (2) PROHIBITED PERSONNEL PRACTICE.—Sec-
10 tion 2302(b) of title 5, United States Code, is
11 amended—

12 (A) in paragraph (11), by striking “or” at
13 the end;

14 (B) in paragraph (12), by striking the pe-
15 riod and inserting a semicolon; and

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

18 “(13) implement or enforce any nondisclosure
19 policy, form, or agreement, if such policy, form, or
20 agreement does not contain the following statement:
21 ‘These provisions are consistent with and do not su-
22 persede, conflict with, or otherwise alter the em-
23 ployee obligations, rights, or liabilities created by
24 Executive Order No. 12958; section 7211 (governing
25 disclosures to Congress); section 1034 of title 10

1 (governing disclosure to Congress by members of the
2 military); section 2302(b)(8) (governing disclosures
3 of illegality, waste, fraud, abuse, or public health or
4 safety threats); the Intelligence Identities Protection
5 Act of 1982 (50 U.S.C. 421 et seq.) (governing dis-
6 closures that could expose confidential Government
7 agents); and the statutes which protect against dis-
8 closures that could compromise national security, in-
9 cluding sections 641, 793, 794, 798, and 952 of title
10 18 and section 4(b) of the Subversive Activities Con-
11 trol Act of 1950 (50 U.S.C. 783(b)). The defini-
12 tions, requirements, obligations, rights, sanctions,
13 and liabilities created by such Executive order and
14 such statutory provisions are incorporated into this
15 agreement and are controlling; or

16 “(14) conduct, or cause to be conducted, an in-
17 vestigation, other than any ministerial or nondis-
18 cretionary fact finding activities necessary for the
19 agency to perform its mission, of an employee or ap-
20 plicant for employment because of any activity pro-
21 tected under this section.”.

22 (3) BOARD AND COURT REVIEW OF ACTIONS
23 RELATING TO SECURITY CLEARANCES.—

1 (A) IN GENERAL.—Chapter 77 of title 5,
2 United States Code, is amended by inserting
3 after section 7702 the following:

4 **“§ 7702a. Actions relating to security clearances**

5 “(a) In any appeal relating to the suspension, revoca-
6 tion, or other determination relating to a security clear-
7 ance or access determination, the Merit Systems Protec-
8 tion Board or any reviewing court—

9 “(1) shall determine whether paragraph (8) or
10 (9) of section 2302(b) was violated;

11 “(2) may not order the President or the des-
12 ignee of the President to restore a security clearance
13 or otherwise reverse a determination of clearance
14 status or reverse an access determination; and

15 “(3) subject to paragraph (2), may issue declar-
16 atory relief and any other appropriate relief.

17 “(b)(1) If, in any final judgment, the Board or court
18 declares that any suspension, revocation, or other deter-
19 mination with regards to a security clearance or access
20 determination was made in violation of paragraph (8) or
21 (9) of section 2302(b), the affected agency shall conduct
22 a review of that suspension, revocation, access determina-
23 tion, or other determination, giving great weight to the
24 Board or court judgment.

1 “(2) Not later than 30 days after any Board or court
2 judgment declaring that a security clearance suspension,
3 revocation, access determination, or other determination
4 was made in violation of paragraph (8) or (9) of section
5 2302(b), the affected agency shall issue an unclassified re-
6 port to the congressional committees of jurisdiction (with
7 a classified annex if necessary), detailing the cir-
8 cumstances of the agency’s security clearance suspension,
9 revocation, other determination, or access determination.
10 A report under this paragraph shall include any proposed
11 agency action with regards to the security clearance or ac-
12 cess determination.

13 “(c) An allegation that a security clearance or access
14 determination was revoked or suspended in retaliation for
15 a protected disclosure shall receive expedited review by the
16 Office of Special Counsel, the Merit Systems Protection
17 Board, and any reviewing court.

18 “(d) For purposes of this section, corrective action
19 may not be ordered if the agency demonstrates by a pre-
20 ponderance of the evidence that it would have taken the
21 same personnel action in the absence of such disclosure.”.

22 (B) TECHNICAL AND CONFORMING AMEND-
23 MENT.—The table of sections for chapter 77 of
24 title 5, United States Code, is amended by in-

1 serting after the item relating to section 7702
2 the following:

“7702a. Actions relating to security clearances.”.

3 (e) EXCLUSION OF AGENCIES BY THE PRESIDENT.—
4 Section 2302(a)(2)(C) of title 5, United States Code, is
5 amended by striking clause (ii) and inserting the following:

6 “(ii)(I) the Federal Bureau of Investiga-
7 tion, the Office of the Director of National In-
8 telligence, the Central Intelligence Agency, the
9 Defense Intelligence Agency, the National
10 Geospatial-Intelligence Agency, and the Na-
11 tional Security Agency; and

12 “(II) as determined by the President, any
13 executive agency or unit thereof the principal
14 function of which is the conduct of foreign in-
15 telligence or counterintelligence activities, if the
16 determination (as that determination relates to
17 a personnel action) is made before that per-
18 sonnel action; or”.

19 (f) ATTORNEY FEES.—Section 1204(m)(1) of title 5,
20 United States Code, is amended by striking “agency in-
21 volved” and inserting “agency where the prevailing party
22 is employed or has applied for employment”.

23 (g) DISCIPLINARY ACTION.—Section 1215(a)(3) of
24 title 5, United States Code, is amended to read as follows:

1 “(3)(A) A final order of the Board may im-
2 pose—

3 “(i) disciplinary action consisting of re-
4 moval, reduction in grade, debarment from
5 Federal employment for a period not to exceed
6 5 years, suspension, or reprimand;

7 “(ii) an assessment of a civil penalty not to
8 exceed \$1,000; or

9 “(iii) any combination of disciplinary ac-
10 tions described under clause (i) and an assess-
11 ment described under clause (ii).

12 “(B) In any case in which the Board finds that
13 an employee has committed a prohibited personnel
14 practice under paragraph (8) or (9) of section
15 2302(b), the Board shall impose disciplinary action
16 if the Board finds that the activity protected under
17 paragraph (8) or (9) of section 2302(b) was a sig-
18 nificant motivating factor, even if other factors also
19 motivated the decision, for the employee’s decision to
20 take, fail to take, or threaten to take or fail to take
21 a personnel action, unless that employee dem-
22 onstrates, by preponderance of evidence, that the
23 employee would have taken, failed to take, or threat-
24 ened to take or fail to take the same personnel ac-
25 tion, in the absence of such protected activity.”.

1 (h) SPECIAL COUNSEL AMICUS CURIAE APPEAR-
2 ANCE.—Section 1212 of title 5, United States Code, is
3 amended by adding at the end the following:

4 “(h)(1) The Special Counsel is authorized to appear
5 as amicus curiae in any action brought in a court of the
6 United States related to any civil action brought in con-
7 nection with section 2302(b) (8) or (9), or subchapter III
8 of chapter 73, or as otherwise authorized by law. In any
9 such action, the Special Counsel is authorized to present
10 the views of the Special Counsel with respect to compli-
11 ance with section 2302(b) (8) or (9) or subchapter III of
12 chapter 77 and the impact court decisions would have on
13 the enforcement of such provisions of law.

14 “(2) A court of the United States shall grant the ap-
15 plication of the Special Counsel to appear in any such ac-
16 tion for the purposes described in subsection (a).”.

17 (i) JUDICIAL REVIEW.—

18 (1) IN GENERAL.—Section 7703(b)(1) of title
19 5, United States Code, is amended to read as fol-
20 lows:

21 “(b)(1)(A) Except as provided in subparagraph (B)
22 and paragraph (2), a petition to review a final order or
23 final decision of the Board shall be filed in the United
24 States Court of Appeals for the Federal Circuit. Notwith-
25 standing any other provision of law, any petition for re-

1 view must be filed within 60 days after the date the peti-
2 tioner received notice of the final order or decision of the
3 Board.

4 “(B) During the 5-year period beginning on the effec-
5 tive date of this subsection, a petition to review a final
6 order or final decision of the Board in a case alleging a
7 violation of paragraph (8) or (9) of section 2302(b) shall
8 be filed in the United States Court of Appeals for the Fed-
9 eral Circuit or any court of appeals of competent jurisdic-
10 tion as provided under subsection (b)(2).”.

11 (2) REVIEW OBTAINED BY OFFICE OF PER-
12 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
13 United States Code, is amended to read as follows:

14 “(d)(1) Except as provided under paragraph (2), this
15 paragraph shall apply to any review obtained by the Direc-
16 tor of the Office of Personnel Management. The Director
17 of the Office of Personnel Management may obtain review
18 of any final order or decision of the Board by filing, within
19 60 days after the date the Director received notice of the
20 final order or decision of the Board, a petition for judicial
21 review in the United States Court of Appeals for the Fed-
22 eral Circuit if the Director determines, in his discretion,
23 that the Board erred in interpreting a civil service law,
24 rule, or regulation affecting personnel management and
25 that the Board’s decision will have a substantial impact

1 on a civil service law, rule, regulation, or policy directive.
2 If the Director did not intervene in a matter before the
3 Board, the Director may not petition for review of a Board
4 decision under this section unless the Director first peti-
5 tions the Board for a reconsideration of its decision, and
6 such petition is denied. In addition to the named respond-
7 ent, the Board and all other parties to the proceedings
8 before the Board shall have the right to appear in the pro-
9 ceeding before the Court of Appeals. The granting of the
10 petition for judicial review shall be at the discretion of the
11 Court of Appeals.

12 “(2) During the 5-year period beginning on the effec-
13 tive date of this subsection, this paragraph shall apply to
14 any review relating to paragraph (8) or (9) of section
15 2302(b) obtained by the Director of the Office of Per-
16 sonnel Management. The Director of the Office of Per-
17 sonnel Management may obtain review of any final order
18 or decision of the Board by filing, within 60 days after
19 the date the Director received notice of the final order or
20 decision of the Board, a petition for judicial review in the
21 United States Court of Appeals for the Federal Circuit
22 or any court of appeals of competent jurisdiction as pro-
23 vided under subsection (b)(2) if the Director determines,
24 in his discretion, that the Board erred in interpreting
25 paragraph (8) or (9) of section 2302(b). If the Director

1 did not intervene in a matter before the Board, the Direc-
2 tor may not petition for review of a Board decision under
3 this section unless the Director first petitions the Board
4 for a reconsideration of its decision, and such petition is
5 denied. In addition to the named respondent, the Board
6 and all other parties to the proceedings before the Board
7 shall have the right to appear in the proceeding before
8 the court of appeals. The granting of the petition for judi-
9 cial review shall be at the discretion of the Court of Ap-
10 peals.”.

11 (j) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
12 MENTS.—

13 (1) IN GENERAL.—

14 (A) REQUIREMENT.—Each agreement in
15 Standard Forms 312 and 4414 of the Govern-
16 ment and any other nondisclosure policy, form,
17 or agreement of the Government shall contain
18 the following statement: “These restrictions are
19 consistent with and do not supersede, conflict
20 with, or otherwise alter the employee obliga-
21 tions, rights, or liabilities created by Executive
22 Order No. 12958; section 7211 of title 5,
23 United States Code (governing disclosures to
24 Congress); section 1034 of title 10, United
25 States Code (governing disclosure to Congress

1 by members of the military); section 2302(b)(8)
2 of title 5, United States Code (governing disclo-
3 sures of illegality, waste, fraud, abuse or public
4 health or safety threats); the Intelligence Iden-
5 tities Protection Act of 1982 (50 U.S.C. 421 et
6 seq.) (governing disclosures that could expose
7 confidential Government agents); and the stat-
8 utes which protect against disclosure that may
9 compromise the national security, including sec-
10 tions 641, 793, 794, 798, and 952 of title 18,
11 United States Code, and section 4(b) of the
12 Subversive Activities Act of 1950 (50 U.S.C.
13 783(b)). The definitions, requirements, obliga-
14 tions, rights, sanctions, and liabilities created
15 by such Executive order and such statutory
16 provisions are incorporated into this agreement
17 and are controlling.”.

18 (B) ENFORCEABILITY.—Any nondisclosure
19 policy, form, or agreement described under sub-
20 paragraph (A) that does not contain the state-
21 ment required under subparagraph (A) may not
22 be implemented or enforced to the extent such
23 policy, form, or agreement is inconsistent with
24 that statement.

1 (2) PERSONS OTHER THAN GOVERNMENT EM-
2 PLOYEES.—Notwithstanding paragraph (1), a non-
3 disclosure policy, form, or agreement that is to be
4 executed by a person connected with the conduct of
5 an intelligence or intelligence-related activity, other
6 than an employee or officer of the United States
7 Government, may contain provisions appropriate to
8 the particular activity for which such document is to
9 be used. Such form or agreement shall, at a min-
10 imum, require that the person will not disclose any
11 classified information received in the course of such
12 activity unless specifically authorized to do so by the
13 United States Government. Such nondisclosure
14 forms shall also make it clear that such forms do
15 not bar disclosures to Congress or to an authorized
16 official of an executive agency or the Department of
17 Justice that are essential to reporting a substantial
18 violation of law.

19 (k) CLARIFICATION OF WHISTLEBLOWER RIGHTS
20 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
21 214(e) of the Homeland Security Act of 2002 (6 U.S.C.
22 133(e)) is amended by adding at the end the following:
23 “For purposes of this section a permissible use of inde-
24 pendently obtained information includes the disclosure of

1 such information under section 2302(b)(8) of title 5,
2 United States Code.”.

3 (l) ADVISING EMPLOYEES OF RIGHTS.—Section
4 2302(c) of title 5, United States Code, is amended by in-
5 serting “, including how to make a lawful disclosure of
6 information that is specifically required by law or Execu-
7 tive order to be kept secret in the interest of national de-
8 fense or the conduct of foreign affairs to the Special Coun-
9 sel, the Inspector General of an agency, Congress, or other
10 agency employee designated to receive such disclosures”
11 after “chapter 12 of this title”.

12 (m) SCOPE OF DUE PROCESS.—

13 (1) SPECIAL COUNSEL.—Section
14 1214(b)(4)(B)(ii) of title 5, United States Code, is
15 amended by inserting “, after a finding that a pro-
16 tected disclosure was a contributing factor,” after
17 “ordered if”.

18 (2) INDIVIDUAL ACTION.—Section 1221(e)(2)
19 of title 5, United States Code, is amended by insert-
20 ing “, after a finding that a protected disclosure was
21 a contributing factor,” after “ordered if”.

22 (n) EFFECTIVE DATE.—This section and the amend-
23 ment made by this section shall take effect 30 days after
24 the date of the enactment of this Act.

○