

Calendar No. 646

114TH CONGRESS
2D SESSION**S. 2968****[Report No. 114–360]**

To reauthorize the Office of Special Counsel, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 23, 2016

Mr. JOHNSON (for himself, Mr. GRASSLEY, and Mrs. MCCASKILL) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

SEPTEMBER 27, 2016

Reported by Mr. JOHNSON, with amendments

[Omit the part struck through and insert the part printed in *italic*]**A BILL**

To reauthorize the Office of Special Counsel, 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,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Office of Special Coun-
5 sel Reauthorization Act of 2016”.

1 **SEC. 2. ADEQUATE ACCESS OF SPECIAL COUNSEL TO IN-**
2 **FORMATION.**

3 Section 1212(b) of title 5, United States Code, is
4 amended by adding at the end the following:

5 “(5)(A) The Special Counsel, in carrying out this
6 subchapter—

7 “(i) shall have timely access to all records, data,
8 reports, audits, reviews, documents, papers, rec-
9 ommendations, or other material available to the ap-
10 plicable agency which relate to a matter within the
11 jurisdiction or authority of the Special Counsel;

12 “(ii) may request from any agency the informa-
13 tion or assistance that may be necessary for the Spe-
14 cial Counsel to carry out the duties and responsibil-
15 ities of the Special Counsel under this subchapter;
16 and

17 “(iii) may require, during an investigation, re-
18 view, or inquiry of an agency, any employee of the
19 agency to provide to the Special Counsel any record
20 or other information that relates to a matter within
21 the jurisdiction or authority of the Special Counsel.

22 “(B)(i) A claim of common law privilege by an agen-
23 cy, or an officer or employee of an agency, shall not pre-
24 vent the Special Counsel from obtaining any material de-
25 scribed in subparagraph (A)(i) with respect to the agency.

1 “(ii) The submission of material described in sub-
 2 paragraph (A)(i) by an agency to the Special Counsel may
 3 not be deemed to waive any assertion of privilege by the
 4 agency against a non-Federal entity or against an indi-
 5 vidual in any other proceeding.

6 “(iii) With respect to any record or other information
 7 made available to the Special Counsel by an agency under
 8 subparagraph (A), the Special Counsel may only disclose
 9 the record or information for a purpose that is in further-
 10 ance of any authority provided to the Special Counsel in
 11 this subchapter.

12 “(6) The Special Counsel shall submit to the Com-
 13 mittee on Homeland Security and Governmental Affairs
 14 of the Senate, the Committee on Oversight and Govern-
 15 ment Reform of the House of Representatives, and each
 16 committee of Congress with jurisdiction over the applica-
 17 ble agency a report regarding any case of contumacy or
 18 failure to comply with a request submitted by the Special
 19 Counsel under paragraph (5)(A).”.

20 **SEC. 3. PROHIBITED PERSONNEL PRACTICES; INFORMA-**
 21 **TION ON WHISTLEBLOWER PROTECTIONS.**

22 Section 2302 of title 5, United States Code, is
 23 amended—

24 (1) in subsection (a)(2)(A)—

1 (A) in clause (xi), by striking “and” at the
2 end;

3 (B) by redesignating clause (xii) as clause
4 (xiii); and

5 (C) by inserting after clause (xi) the fol-
6 lowing:

7 “(xii) for the purposes of paragraph (8) or
8 (9) of subsection (b), the accessing of a medical
9 record of the employee or applicant for employ-
10 ment; and”;

11 (2) in subsection (b)(9)(D), by inserting “, rule,
12 or regulation” after ~~“order”~~ “law”; and

13 (3) by striking subsection (c) and inserting the
14 following:

15 “(c)(1) In this subsection—

16 “(A) the term ‘new employee’ means an indi-
17 vidual—

18 “(i) appointed to a position as an employee
19 on or after the date of enactment of the Office
20 of Special Counsel Reauthorization Act of 2016;
21 and

22 “(ii) who has not previously served as an
23 employee; and

24 “(B) the term ‘whistleblower protections’ means
25 the protections against and remedies for a prohibited

1 personnel practice described in paragraph (8) or
2 subparagraph (A)(i), (B), (C), or (D) of paragraph
3 (9) of subsection (b).

4 “(2) The head of each agency shall be responsible
5 for—

6 “(A) preventing prohibited personnel practices;

7 “(B) complying with and enforcing applicable
8 civil service laws, rules, and regulations, and other
9 aspects of personnel management; and

10 “(C) ensuring, in consultation with the Special
11 Counsel and the Inspector General of the agency,
12 that employees of the agency are informed of the
13 rights and remedies available to the employees under
14 this chapter and chapter 12, including—

15 “(i) information with respect to whistle-
16 blower protections available to new employees
17 during a probationary period;

18 “(ii) the role of the Office of Special Coun-
19 sel and the Merit Systems Protection Board
20 with respect to whistleblower protections; and

21 “(iii) the means by which, with respect to
22 information that is otherwise required by law or
23 Executive order to be kept classified in the in-
24 terest of national defense or the conduct of for-

1 eign affairs, an employee may make a lawful
2 disclosure of the information to—

3 “(I) the Special Counsel;

4 “(II) the Inspector General of an
5 agency;

6 “(III) Congress; or

7 “(IV) another employee of the agency
8 who is designated to receive such a disclo-
9 sure.

10 “(3) The head of each agency shall ensure that the
11 information described in paragraph (2) is provided to each
12 new employee of the agency not later than 180 days after
13 the date on which the new employee is appointed.

14 “(4) The head of each agency shall make available
15 information regarding whistleblower protections applicable
16 to employees of the agency on the public website of the
17 agency and on any online portal that is made available
18 only to employees of the agency, if such portal exists.

19 “(5) Any employee to whom the head of an agency
20 delegates authority for any aspect of personnel manage-
21 ment shall, within the limits of the scope of the delegation,
22 be responsible for the activities described in paragraph
23 (2).”.

1 **SEC. 4. ADDITIONAL WHISTLEBLOWER PROVISIONS.**

2 (a) EXPLANATIONS FOR FAILURE TO TAKE AC-
3 TION.—Section 1213 of title 5, United States Code, is
4 amended—

5 (1) in subsection (b), by striking “15 days” and
6 inserting “45 days”;

7 (2) in subsection (e)—

8 (A) in paragraph (1), by striking “Any
9 such report” and inserting “Any report re-
10 quired under subsection (c) or paragraph (5) of
11 this subsection”;

12 (B) by striking paragraph (2) and insert-
13 ing the following:

14 ~~“(2) Upon~~

15 *“(2) Upon* receipt of any report that the head of an
16 agency is required to submit under subsection (c), the Spe-
17 cial Counsel shall review the report and determine wheth-
18 er—

19 ~~“(A) the~~

20 *“(A) the* findings of the head of the agency ap-
21 pear reasonable; and

22 ~~“(B) if~~

23 *“(B) if* the Special Counsel requires the head of
24 the agency to submit a supplemental report under
25 paragraph (5), the reports submitted by the head of

1 the agency collectively contain the information re-
 2 quired under subsection (d).”;

3 (C) in paragraph (3), by striking “agency
 4 report received pursuant to subsection (c) of
 5 this section” and inserting “report submitted to
 6 the Special Counsel by the head of an agency
 7 under subsection (c) or paragraph (5) of this
 8 subsection”; and

9 (D) by adding at the end the following:

10 “(5) If, after conducting a review of a report under
 11 paragraph (2), the Special Counsel concludes that the
 12 Special Counsel requires additional information or docu-
 13 mentation to determine whether the report submitted by
 14 the head of an agency is reasonable and sufficient, the
 15 Special Counsel may request that the head of the agency
 16 submit a supplemental report—

17 “(A) containing the additional information or
 18 documentation identified by the Special Counsel; and

19 “(B) which the head of the agency shall submit
 20 to the Special Counsel within a period of time speci-
 21 fied by the Special Counsel.”; and

22 (3) by striking subsection (h) and inserting the
 23 following:

24 “(h) The Special Counsel may not respond to any in-
 25 quiry or disclose any information about any person who

1 makes a disclosure under this section except in accordance
 2 with section 552a or as required by any other provision
 3 of Federal law.”.

4 (b) RETALIATORY INVESTIGATIONS.—Section 1214
 5 of title 5, United States Code, is amended by adding at
 6 the end the following:

7 “(i) The Special Counsel may petition the Board to
 8 order corrective action, including fees, costs, or damages
 9 reasonably incurred by an employee due to an investiga-
 10 tion of the employee by an agency, if the investigation by
 11 an agency was commenced, expanded, or extended in retal-
 12 iation for a disclosure or protected activity described
 13 under section 2302(b)(8) or section 2302(b)(9) (A)(i),
 14 (B), (C), or (D), even if no personnel action, as defined
 15 under section 2302(a), is taken or not taken.”.

16 (c) SENSITIVE POSITIONS.—Section 7701 of title 5,
 17 United States Code, is amended—

18 (1) by redesignating subsection (k) as sub-
 19 section (l); and

20 (2) by inserting after subsection (j) the fol-
 21 lowing:

22 “(k)(1) The Board has authority to review on the
 23 merits an appeal by an employee or applicant for employ-
 24 ment of an action arising from a determination that the

1 employee or applicant for employment is ineligible for a
 2 sensitive position if—

3 “(A) the sensitive position does not require a
 4 security clearance or access to classified information;
 5 and

6 “(B) such action is otherwise appealable.

7 “(2) In this subsection, the term ‘sensitive position’
 8 means a position designated as a sensitive position under
 9 Executive Order 10450 (5 U.S.C. 7311 note), or any suc-
 10 cessor thereto.”.

11 (d) PROTECTION OF WHISTLEBLOWERS AS CRITERIA
 12 IN PERFORMANCE APPRAISALS.—

13 (1) ESTABLISHMENT OF SYSTEMS.—Section
 14 4302 of title 5, United States Code, is amended—

15 (A) by redesignating subsections (b) and
 16 (c) as subsections (c) and (d), respectively; and

17 (B) by inserting after subsection (a) the
 18 following:

19 “(b)(1) The head of each agency, in consultation with
 20 the Director of the Office of Personnel Management and
 21 the Special Counsel, shall develop criteria that—

22 “(A) the head of the agency shall use as a crit-
 23 ical element for establishing the job requirements of
 24 a supervisory employee; and

25 “(B) promote the protection of whistleblowers.

1 “(2) The criteria required under paragraph (1) shall
2 include principles for the protection of whistleblowers,
3 such as the degree to which supervisory employees—

4 “(A) respond constructively when employees of
5 the agency make disclosures described in subpara-
6 graph (A) or (B) of section 2302(b)(8);

7 “(B) take responsible actions to resolve such
8 disclosures; and

9 “(C) foster an environment in which employees
10 of the agency feel comfortable making such disclo-
11 sures to supervisory employees or other appropriate
12 authorities.

13 “(3) In this subsection—

14 “(A) the term ‘agency’ means any entity the
15 employees of which are covered by paragraphs (8)
16 and (9) of section 2302(b), without regard to wheth-
17 er any other provision of this section is applicable to
18 the entity;

19 “(B) the term ‘supervisory employee’ means an
20 employee who would be a supervisor, as defined in
21 section 7103(a), if the agency employing the em-
22 ployee was an agency for purposes of chapter 71;
23 and

1 “(C) the term ‘whistleblower’ means an em-
 2 ployee who makes a disclosure described in section
 3 2302(b)(8).”.

4 (2) CRITERIA FOR PERFORMANCE APPRAIS-
 5 ALS.—Section 4313 of title 5, United States Code,
 6 is amended—

7 (A) in paragraph (4), by striking “and” at
 8 the end;

9 (B) in paragraph (5), by striking the pe-
 10 riod at the end and inserting “; and”; and

11 (C) by adding at the end the following:

12 “(6) protecting whistleblowers, as described in
 13 section 4302(b)(2).”.

14 (e) ANNUAL REPORT TO CONGRESS ON UNACCEPT-
 15 ABLE PERFORMANCE IN WHISTLEBLOWER PROTEC-
 16 TION.—

17 (1) DEFINITIONS.—In this subsection, the
 18 terms “agency” and “whistleblower” have the mean-
 19 ings given the terms in section 4302(b)(3) of title 5,
 20 United States Code, as amended by subsection (d).

21 (2) REPORT.—Each agency shall annually sub-
 22 mit to the Committee on Homeland Security and
 23 Governmental Affairs of the Senate, the Committee
 24 on Oversight and Government Reform of the House
 25 of Representatives, and each committee of Congress

1 with jurisdiction over the agency a report that de-
 2 tails—

3 (A) the number of performance appraisals,
 4 for the year covered by the report, that deter-
 5 mined that an employee of the agency failed to
 6 meet the standards for protecting whistle-
 7 blowers that were established under section
 8 4302(b) of title 5, United States Code, as
 9 amended by subsection (d);

10 (B) the reasons for the determinations de-
 11 scribed in subparagraph (A); and

12 (C) each disciplinary or corrective action
 13 taken by the agency in response to a determina-
 14 tion under subparagraph (A).

15 (f) TECHNICAL AND CONFORMING AMENDMENT.—
 16 Section 4301 of title 5, United States Code, is amended,
 17 in the matter preceding paragraph (1), by striking “For
 18 the purpose of” and inserting “Except as otherwise ex-
 19 pressly provided, for the purpose of”.

20 **SEC. 5. TERMINATION OF CERTAIN INVESTIGATIONS BY**
 21 **THE OFFICE OF SPECIAL COUNSEL.**

22 Section 1214(a) of title 5, United States Code, is
 23 amended—

24 (1) in paragraph (1)(D), in the first sentence,
 25 by inserting “other than a termination of an inves-

1 tigation described in paragraph (6)(A)” after “investigation of a prohibited personnel practice”; and

2 (2) by adding at the end the following:

3 “(6)(A) Not later than 30 days after receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel may terminate an investigation of the allegation without further inquiry or an opportunity for the individual who submitted the allegation to respond if the Special Counsel determines that—

4 “(i) the same allegation, based on the same set of facts and circumstances had previously been—

5 “(I)(aa) made by the individual; and

6 “(bb) investigated by the Special Counsel;

7 or

8 “(II) filed by the individual with the Merit Systems Protection Board;

9 “(ii) the Special Counsel does not have jurisdiction to investigate the allegation; or

10 “(iii) the individual knew or should have known of the alleged prohibited personnel practice on or before the date that is 3 years before the date on which the Special Counsel received the allegation.

11 “(B) Not later than 30 days after the date on which the Special Counsel terminates an investigation under subparagraph (A), the Special Counsel shall provide a written

1 notification to the individual who submitted the allegation
2 of a prohibited personnel practice that states the basis of
3 the Special Counsel for terminating the investigation.”.

4 **SEC. 6. ALLEGATIONS OF WRONGDOING WITHIN THE OF-**
5 **FICE OF SPECIAL COUNSEL.**

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

8 “(i) The Special Counsel shall enter into at least 1
9 agreement with the Inspector General of an agency under
10 which—

11 “(1) the Inspector General shall—

12 “(A) receive, review, and investigate allega-
13 tions of prohibited personnel practices or
14 wrongdoing filed by employees of the Office of
15 Special Counsel; and

16 “(B) develop a method for an employee of
17 the Office of Special Counsel to directly com-
18 municate with the Inspector General; and

19 “(2) the Special Counsel—

20 “(A) may not require an employee of the
21 Office of Special Counsel to seek authorization
22 or approval before directly contacting the In-
23 spector General in accordance with the agree-
24 ment; and

1 “(B) may reimburse the Inspector General
2 for services provided under the agreement.”.

3 **SEC. 7. REPORTING REQUIREMENTS.**

4 (a) ANNUAL REPORT.—Section 1218 of title 5,
5 United States Code, is amended to read as follows:

6 **“§ 1218. Annual report**

7 “The Special Counsel shall submit to Congress, on
8 an annual basis, a report on the activities of the Special
9 Counsel, which shall include, for the year preceding the
10 submission of the report—

11 “(1) the number, types, and disposition of alle-
12 gations of prohibited personnel practices filed with
13 the Special Counsel and the costs of resolving such
14 allegations;

15 “(2) the number of investigations conducted by
16 the Special Counsel;

17 “(3) the number of stays or disciplinary actions
18 negotiated with agencies by the Special Counsel;

19 “(4) the number of subpoenas issued by the
20 Special Counsel;

21 “(5) the number of instances in which the Spe-
22 cial Counsel reopened an investigation after the Spe-
23 cial Counsel had made an initial determination with
24 respect to the investigation;

1 “(6) the actions that resulted from reopening
2 investigations as described in paragraph (5);

3 “(7) the number of instances in which the Spe-
4 cial Counsel did not make a determination before
5 the end of the 240-day period described in section
6 1214(b)(2)(A)(i) regarding whether there were rea-
7 sonable grounds to believe that a prohibited per-
8 sonnel practice had occurred, existed, or was to be
9 taken;

10 “(8) a description of the recommendations and
11 reports made by the Special Counsel to other agen-
12 cies under this subchapter and the actions taken by
13 the agencies as a result of the recommendations or
14 reports;

15 “(9) the number of—

16 “(A) actions initiated before the Merit Sys-
17 tems Protection Board, including the number of
18 corrective action petitions and disciplinary ac-
19 tion complaints initiated; *and*

20 “(B) stays and extensions of stays ob-
21 tained from the Merit Systems Protection
22 Board; ~~and~~

23 ~~“(C) requests for enforcement of sub-~~
24 ~~poenas or requests for enforcement by the Merit~~

1 ~~Systems Protection Board described in section~~
 2 ~~1212(b)(6);~~

3 “(10) the number of prohibited personnel prac-
 4 tice complaints that resulted in—

5 “(A) a favorable action for the complain-
 6 ant, organized by actions in—

7 “(i) complaints dealing with reprisals
 8 against whistleblowers; and

9 “(ii) all other complaints; and

10 “(B) a favorable outcome for the complain-
 11 ant, organized by outcomes in—

12 “(i) complaints dealing with reprisals
 13 against whistleblowers; and

14 “(ii) all other complaints;

15 “(11) the number of corrective actions that the
 16 Special Counsel required an agency to take after a
 17 finding by the Special Counsel of a prohibited per-
 18 sonnel practice, as defined in section 2302(b); and

19 “(12) the results for the Office of Special Coun-
 20 sel of any employee viewpoint survey conducted by
 21 the Office of Personnel Management or any other
 22 agency.”.

23 (b) PUBLIC INFORMATION.—Section 1219(a)(1) of
 24 title 5, United States Code, is amended to read as follows:

1 “(1) a list of any noncriminal matters referred
2 to the head of an agency under section 1213(c), to-
3 gether with—

4 “(A) a copy of the information transmitted
5 to the head of the agency under section
6 1213(c)(1);

7 “(B) any report from the agency under
8 section 1213(c)(1)(B) relating to the matter;

9 “(C) if appropriate, not otherwise prohib-
10 ited by law, and consented to by the complain-
11 ant, any comments from the complainant under
12 section 1213(e)(1) relating to the matter; and

13 “(D) the comments or recommendations of
14 the Special Counsel under paragraph (3) or (4)
15 of section 1213(e);”.

16 **SEC. 8. ESTABLISHMENT OF SURVEY PILOT PROGRAM.**

17 (a) IN GENERAL.—The Office of Special Counsel
18 shall design and establish a pilot program under which
19 the Office shall conduct, during the period beginning on
20 October 1, 2017 and ending on September 30, 2018, a
21 survey of individuals who have filed a complaint or dislo-
22 sure with the Office.

23 (b) PURPOSE.—The survey under subsection (a) shall
24 be designed for the purpose of collecting information and

1 improving service at various stages of a review or inves-
2 tigation by the Office of Special Counsel.

3 (c) RESULTS.—The results of the survey under sub-
4 section (a) shall be published in the annual report of the
5 Office of Special Counsel.

6 (d) SUSPENSION OF OTHER SURVEYS.—During the
7 period beginning on October 1, 2017 and ending on Sep-
8 tember 30, 2018, section 13 of the Act entitled “An Act
9 to reauthorize the Office of Special Counsel, and for other
10 purposes”, approved October 29, 1994 (5 U.S.C. 1212
11 note), shall have no force or effect.

12 **SEC. 9. AUTHORIZATION OF APPROPRIATIONS.**

13 (a) IN GENERAL.—Section 8(a)(2) of the Whistle-
14 blower Protection Act of 1989 (5 U.S.C. 5509 note) is
15 amended by striking “2003, 2004, 2005, 2006, and 2007”
16 and inserting “2016 through 2021”.

17 (b) EFFECTIVE DATE.—The amendment made by
18 subsection (a) shall take effect as though enacted on Sep-
19 tember 30, 2015.

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114TH CONGRESS
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[Report No. 114-360]

A BILL

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for other purposes.

SEPTEMBER 27, 2016

Reported with amendments