#### 110TH CONGRESS 1ST SESSION

# H. R. 3551

To reauthorize the Merit Systems Protection Board and the Office of Special Counsel, to modify the procedures of the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes.

## IN THE HOUSE OF REPRESENTATIVES

September 17, 2007

Mr. Davis of Illinois introduced the following bill; which was referred to the Committee on Oversight and Government Reform

# A BILL

- To reauthorize the Merit Systems Protection Board and the Office of Special Counsel, to modify the procedures of the Merit Systems Protection Board and 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; TABLE OF CONTENTS.
  - 4 (a) Short Title.—This Act may be cited as the
  - 5 "Federal Merit System Reauthorization Act of 2007".
  - 6 (b) Table of Contents.—The table of contents is
  - 7 as follows:
    - Sec. 1. Short title; table of contents.
    - Sec. 2. Authorization of appropriations.

- Sec. 3. Allegations of wrongdoing against Special Counsel or Deputy Special Counsel.
- Sec. 4. Discrimination on the basis of sexual orientation prohibited.
- Sec. 5. Procedures of the Merit Systems Protection Board.
- Sec. 6. Procedures of the Office of Special Counsel.
- Sec. 7. Reporting requirements.

#### 1 SEC. 2. AUTHORIZATION OF APPROPRIATIONS.

- 2 (a) Merit Systems Protection Board.—Section
- 3 8(a)(1) of the Whistleblower Protection Act of 1989 (5
- 4 U.S.C. 5509 note) is amended by striking "2003, 2004,
- 5 2005, 2006, and 2007" and inserting "2008, 2009, and
- 6 2010".
- 7 (b) Office of Special Counsel.—Section 8(a)(2)
- 8 of the Whistleblower Protection Act of 1989 (5 U.S.C.
- 9 5509 note) is amended by striking "2003, 2004, 2005,
- 10 2006, and 2007" and inserting "2008, 2009, and 2010".
- 11 (c) Effective Date.—This section shall take effect
- 12 as of October 1, 2007.
- 13 SEC. 3. ALLEGATIONS OF WRONGDOING AGAINST SPECIAL
- 14 COUNSEL OR DEPUTY SPECIAL COUNSEL.
- 15 (a) Definitions.—In this section—
- 16 (1) the term "Special Counsel" refers to the
- 17 Special Counsel appointed under section 1211(b) of
- title 5, United States Code;
- 19 (2) the term "Integrity Committee" refers to
- the Integrity Committee described in Executive
- Order 12993 (relating to administrative allegations

- against inspectors general) or its successor in function (as identified by the President); and
- 3 (3) the terms "wrongdoing" and "Inspector 4 General" have the same respective meanings as 5 under the Executive order cited in paragraph (2).

# (b) AUTHORITY OF INTEGRITY COMMITTEE.—

- (1) In General.—An allegation of wrongdoing against the Special Counsel (or the Deputy Special Counsel) may be received, reviewed, and referred for investigation by the Integrity Committee to the same extent and in the same manner as in the case of an allegation against an Inspector General (or a member of the staff of an Office of Inspector General), subject to the requirement that the Special Counsel recuse himself or herself from the consideration of any allegation brought under this subsection.
- (2) COORDINATION WITH EXISTING PROVISIONS OF LAW.—This section does not eliminate access to the Merit Systems Protection Board for review under section 7701 of title 5, United States Code. To the extent that an allegation brought under this subsection involves section 2302(b)(8) of such title, a failure to obtain corrective action within 120 days after the date on which that allegation is received by the Integrity Committee shall, for purposes of sec-

- 1 tion 1221 of such title, be considered to satisfy sec-
- 2 tion 1214(a)(3)(B) of such title.
- 3 (c) Regulations.—The Integrity Committee may
- 4 prescribe any rules or regulations necessary to carry out
- 5 this section, subject to such consultation or other require-
- 6 ments as might otherwise apply.

#### 7 SEC. 4. DISCRIMINATION ON THE BASIS OF SEXUAL ORI-

- 8 ENTATION PROHIBITED.
- 9 (a) Repudiation.—In order to dispel any public con-
- 10 fusion, Congress repudiates any assertion that Federal
- 11 employees are not protected from discrimination on the
- 12 basis of sexual orientation.
- 13 (b) Affirmation.—It is the sense of Congress that,
- 14 in the absence of the amendment made by subsection (c),
- 15 discrimination against Federal employees and applicants
- 16 for Federal employment on the basis of sexual orientation
- 17 is prohibited by section 2302(b)(10) of title 5, United
- 18 States Code.
- 19 (c) DISCRIMINATION BASED ON SEXUAL ORIENTA-
- 20 TION PROHIBITED.—Section 2302(b)(1) of title 5, United
- 21 States Code, is amended—
- 22 (1) in subparagraph (D), by striking "or" at
- 23 the end;
- 24 (2) in subparagraph (E), by inserting "or" at
- 25 the end; and

1	(3) by adding at the end the following:
2	"(F) on the basis of sexual orientation;".
3	SEC. 5. PROCEDURES OF THE MERIT SYSTEMS PROTEC-
4	TION BOARD.
5	(a) Proof of Exhaustion for Individual Right
6	OF ACTION.—Section 1221(a) of title 5, United States
7	Code, is amended—
8	(1) by striking "(a)" and inserting "(a)(1)";
9	and
10	(2) by adding at the end the following:
11	"(2) For purposes of paragraph (1), an employee,
12	former employee, or applicant for employment may dem-
13	onstrate compliance with section 1214(a)(3)(B) by—
14	"(A) submitting a copy of the complaint or
15	other pleading pursuant to which such employee,
16	former employee, or applicant sought corrective ac-
17	tion from the Special Counsel with respect to the
18	personnel action involved; and
19	"(B) certifying that the Special Counsel did not
20	provide notice of intent to seek such corrective ac-
21	tion to such employee, former employee, or applicant
22	within the 120-day period described in such section
23	1214(a)(3)(B).".

1 (b) Individual Requests for Stays.—Section 2 1221(c) of title 5, United States Code, is amended by 3 striking paragraph (2) and inserting the following: 4 "(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request 6 is made, if the Board determines that the employee, 8 former employee, or applicant has demonstrated that protected activity described under section 2302(b)(8) was a 10 contributing factor to the personnel action involved. If the stay request is denied, the employee, former employee, or 11 12 applicant may submit an interlocutory appeal for expe-13 dited review by the Board.". 14 (c) Joining Subsequent and Related Claims 15 WITH PENDING LITIGATION.— 16 (1) In General.—Section 1221 of title 5, 17 United States Code, is amended— 18 (A) by redesignating subsections (h), (i), 19 and (j) as subsections (i), (j), and (k), respec-20 tively; and 21 (B) inserting after subsection (g) the fol-22 lowing: 23 "(h) During a pending proceeding, subsequent personnel actions may be joined if the employee, former employee, or applicant for employment demonstrates that re-

- 1 taliation for protected activity at issue in the pending pro-
- 2 ceeding was a contributing factor to subsequent alleged
- 3 prohibited personnel practices.".
- 4 (2) Conforming amendment.—Section 1222
- 5 of title 5, United States Code, is amended by strik-
- 6 ing "section 1221(i)" and inserting "section
- 7 1221(j)".
- 8 (d) Procedural Due Process.—Section
- 9 1204(b)(1) of title 5, United States Code, is amended by
- 10 inserting "in accordance with regulations consistent with
- 11 the Federal Rules of Civil Procedure, so far as prac-
- 12 ticable" before the period.
- 13 (e) Attorney Fees.—Section 7701(g)(1) of title 5,
- 14 United States Code, is amended by striking "if the em-
- 15 ployee or applicant is the prevailing party and" and insert-
- 16 ing "if the claim or claims raised by the employee or appli-
- 17 cant were not frivolous, unreasonable, or groundless; the
- 18 case was a substantial or significant factor in the agency's
- 19 action providing some relief or benefit to the employee or
- 20 applicant; and".
- 21 SEC. 6. PROCEDURES OF THE OFFICE OF SPECIAL COUN-
- 22 **SEL.**
- (a) Investigations of Alleged Prohibited Per-
- 24 SONNEL PRACTICES.—Section 1212(e) of title 5, United
- 25 States Code, is amended by striking "may prescribe such

1	regulations as may be necessary to perform the functions"
2	and inserting "shall prescribe such regulations as may be
3	necessary to carry out subsection (a)(2) and may prescribe
4	any regulations necessary to carry out any of the other
5	functions".
6	(b) Mandatory Communications With Com-
7	PLAINANTS.—
8	(1) CONTACT INFORMATION.—Section
9	1214(a)(1)(B) of title 5, United States Code, is
10	amended by striking clause (ii) and inserting the fol-
11	lowing:
12	"(ii) shall include the name and contact infor-
13	mation of a person at the Office of Special Counsel
14	who—
15	"(I) shall be responsible for interviewing
16	the complainant and making recommendations
17	to the Special Counsel regarding the allegations
18	of the complainant; and
19	"(II) shall be available to respond to rea-
20	sonable questions from the complainant regard-
21	ing the investigation or review conducted by the
22	Special Counsel, the relevant facts ascertained
23	by the Special Counsel, and the law applicable
24	to the allegations of the complainant.".

- 1 (2) STATEMENT AFTER TERMINATION OF IN-
- 2 VESTIGATION.—Section 1214(a)(2)(A)(iv) of title 5,
- 3 United States Code, is amended by striking "a re-
- 4 sponse" and inserting "specific responses".
- 5 (c) QUALIFICATIONS OF SPECIAL COUNSEL.—The
- 6 third sentence of section 1211(b) of title 5, United States
- 7 Code, is amended by striking "position." and inserting
- 8 "position and has professional experience that dem-
- 9 onstrates an understanding of and a commitment to pro-
- 10 tecting the merit based civil service.".
- 11 (d) Alternative Dispute Resolution Program
- 12 OF THE OFFICE OF SPECIAL COUNSEL.—Section 1212 of
- 13 title 5, United States Code, is amended by adding at the
- 14 end the following:
- 15 "(h) The Office of Special Counsel shall by regulation
- 16 provide for one or more alternative methods for settling
- 17 matters subject to the jurisdiction of the Office which shall
- 18 be applicable at the election of an employee, former em-
- 19 ployee, or applicant for employment or at the direction of
- 20 the Special Counsel with the consent of the employee,
- 21 former employee, or applicant concerned. In order to carry
- 22 out this subsection, the Special Counsel shall provide for
- 23 appropriate offices in the District of Columbia and other
- 24 appropriate locations.".

1	(e) Substantial Likelihood Determinations.—
2	Section 1213 of title 5, United States Code, is amended—
3	(1) in subsection (b), by striking "15 days" and
4	inserting "45 days"; and
5	(2) in subsection (c)(1), by inserting ", after
6	consulting with the person who made the disclosure
7	on how to characterize the issues," after "appro-
8	priate agency head".
9	(f) Determination of Statutory Requirements
10	Met.—Section 1213(e) of title 5, United States Code, is
11	amended—
12	(1) in paragraph (3), by striking "subsection
13	(e)(1)" and inserting "paragraph (1)";
14	(2) by redesignating paragraphs (3) and (4) as
15	paragraphs (4) and (5), respectively; and
16	(3) by inserting after paragraph (2) the fol-
17	lowing:
18	"(3) Upon receipt of any report of the head of an
19	agency required under subsection (c), if the Special Coun-
20	sel is unable to make a determination under paragraph
21	(2)(A) or (B), the Special Counsel shall require the agency
22	head to submit any additional information necessary for
23	the Special Counsel to make such determinations before
24	any information is transmitted under paragraph (4).".

1	(g) Public and Internet Access for Agency In-
2	VESTIGATIONS.—Section 1219 of title 5, United States
3	Code, is amended by striking subsections (a) and (b) and
4	inserting the following:
5	"(a) The Special Counsel shall maintain and make
6	available to the public (including on the website of the Of-
7	fice of Special Counsel)—
8	"(1) a list of noncriminal matters referred to
9	heads of agencies under subsection (c) of section
10	1213, together with—
11	"(A) reports from heads of agencies under
12	subsection (c)(1)(B) of such section relating to
13	such matters;
14	"(B) comments submitted under sub-
15	section (e)(1) of such section relating to such
16	matters, if the person making the disclosure
17	consents; and
18	"(C) comments or recommendations by the
19	Special Counsel under subsection (e)(4) of such
20	section relating to such matters;
21	"(2) a list of matters referred to heads of agen-
22	cies under section $1215(c)(2)$ ;
23	"(3) a list of matters referred to heads of agen-
24	gies under subsection (e) of section 1214 together

- with certifications from heads of agencies under
  such subsection; and
- 3 "(4) reports from heads of agencies under sec-4 tion 1213(g)(1).
- 5 "(b) The Special Counsel shall take steps to ensure
- 6 that any list or report made available to the public or
- 7 placed on the website of the Office of Special Counsel
- 8 under this section does not contain any information the
- 9 disclosure of which is prohibited by law or by Executive
- 10 order requiring that information be kept secret in the in-
- 11 terest of national defense or the conduct of foreign af-
- 12 fairs.".

## 13 SEC. 7. REPORTING REQUIREMENTS.

- 14 (a) Merit Systems Protection Board.—Each
- 15 annual report submitted by the Merit Systems Protection
- 16 Board under section 1206 of title 5, United States Code,
- 17 shall, with respect to the period covered by such report,
- 18 include—
- 19 (1) the number of cases and alleged violations
- of section 2302 of such title 5 filed with the Board
- 21 for each agency, itemized for each prohibited per-
- sonnel practice;
- 23 (2) the number of cases and alleged violations
- of section 2302 of such title 5 that the Board deter-
- 25 mines for each agency, itemized for each prohibited

- personnel practice and compared to the total number of cases and allegations filed with the Board for each, both with respect to the initial decisions by administrative judges and final Board decisions;
  - (3) the number of cases and allegations in which corrective action was provided, compared to the total number of cases and allegations filed with the Board for each, itemized separately for settlements and final Board decisions; and
  - (4) with respect to paragraphs (8) and (9) of section 2302 (b) of such title 5, the number of cases in which the Board has ruled in favor of the employee on the merits of the claim compared to the total number of cases and allegations filed with the Board for each, where findings of fact and conclusions of law were issued on whether those provisions were violated, independent from cases disposed by procedural determinations, including a separate itemization of both initial decisions by administrative judges and final Board decisions for each category.
- 21 (b) Office of Special Counsel.—Each annual re-
- 22 port submitted under section 1218 of title 5, United
- 23 States Code, by the Special Counsel or an employee des-
- 24 ignated by the Special Counsel shall, with respect to the
- 25 period covered by such report, include—

- 1 (1) the number of cases and allegations for 2 each prohibited personnel practice, delineated by 3 type of prohibited personnel practice;
  - (2) for each type of prohibited personnel practice, the number of cases and allegations as to which the Office of Special Counsel found reasonable grounds to believe section 2302 of such title 5 had been violated;
  - (3) for each type of prohibited personnel practice, the number of cases and allegations as to which the Office of Special Counsel referred the complaint for full field investigation;
  - (4) for each prohibited personnel practice, the number of cases and allegations as to which the Office of Special Counsel recommended corrective action;
  - (5) for each prohibited personnel practice, the number of cases and allegations as to which the Office of Special Counsel conducted a mediation or other form of alternative dispute resolution, with statistics and illustrative examples describing the results with particularity;
  - (6) the number of instances in which the Office of Special Counsel referred disclosures submitted under section 1213 of such title 5 to an agency

- head, without any finding under subsection (c) or (g) of such section;
- (7) a statistical tabulation of results for each customer satisfaction survey question, both with respect to allegations of prohibited personnel practice submitted under section 1214 of such title 5 and disclosures submitted under section 1213 of such title; and
- 9 (8) for each provision under section 1216(a) (1)
  10 through (5) and (c) of such title 5, the number of
  11 cases and allegations, the number of field investiga12 tions opened, the number of instances in which cor13 rective action was sought, and the number of in14 stances in which corrective action was obtained.
- stances in which corrective action was obtained.

  (c) Annual Survey.—Section 13(a) of the Act entitled "An Act to reauthorize the Office of Special Counsel,
  and for other purposes", approved October 29, 1994 (5
  U.S.C. 1212 note; Public Law 103–424) is amended in
  the first sentence by inserting ", including individuals who
  disclose information to the Office of Special Counsel under
  section 1213" before the period.

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