

1 **Purpose: In the nature of a substitute.**

2
3
4 **S. 2390**

5
6 **To provide adequate protections for whistleblowers at the**
7 **Federal Bureau of Investigation.**

8
9 **Referred to the Committee on _____ and ordered to be**
10 **printed**

11 **Ordered to lie on the table and to be printed**

12 **AMENDMENT IN THE NATURE OF A SUBSTITUTE INTENDED TO**
13 **BE PROPOSED BY MR. GRASSLEY (for himself and Mr.**
14 **LEAHY)**

15 **Viz:**

16 **Strike all after the enacting clause and insert the following:**

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

19 **SECTION 1. SHORT TITLE.**

20 This Act may be cited as the “Federal Bureau of Investigation Whistleblower Protection
21 Enhancement Act of 2015” 2016”.

22 **SEC. 2. FBI WHISTLEBLOWER PROTECTIONS.**

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

24 **“2303. Prohibited personnel practices in the Federal Bureau of**
25 **Investigation**

26 **“(a) Definitions.—In this section—**

27 **“(1) the term ‘administrative law judge’ means an administrative law judge appointed by**
28 **the Attorney General under section 3105 or used by the Attorney General under section**
29 **3344;**

30 **“(2) the term ‘Inspector General’ means the Inspector General of the Department of**
31 **Justice;**

32 **“(3) the term ‘personnel action’ means any action described in section 2302(a)(2)(A) with**

1 respect to an employee in, or applicant for, a position in the Federal Bureau of Investigation
2 (other than a position of a confidential, policy-determining, policymaking, or policy-
3 advocating character);

4 “(4) the term ‘prohibited personnel practice’ means a prohibited personnel practice
5 described in subsection (b); and

6 “(5) the term ‘protected disclosure’ means any disclosure of information by an employee
7 in, or applicant for, a position in the Federal Bureau of Investigation—

8 “(A) made—

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

11 “(ii) to the Inspector General;

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

13 “(iv) to the Office of Professional Responsibility of the Federal Bureau of
14 Investigation;

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

16 “(vi) ~~to a Member of Congress~~ **as described in section 7211**;

17 “(vii) to the Office of Special Counsel; or

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

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

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

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

25 “(b) Prohibited Practices.—Any employee of the Federal Bureau of Investigation or another
26 component of the Department of Justice who has authority to take, direct others to take,
27 recommend, or approve any personnel action, shall not, with respect to such authority—

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

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

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

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

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

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

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

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

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

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

7 “(c) Procedures.—

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

11 “(2) INVESTIGATION.—

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

15 “(B) DETERMINATION.—The Inspector ~~General~~ **General**—

16 “~~(i)~~ shall issue a decision containing the findings of the Inspector General supporting
17 the determination of the Inspector General; ~~and~~.

18 “~~(ii)~~ **“(C) PRELIMINARY RELIEF.—**

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

22 “**(I) the Inspector General shall request from an administrative law judge,—**
23 **~~and~~ a preliminary order providing relief from the personnel action; and**

24 “**(II) except as provided in clause (ii), the administrative law judge,**
25 **without further proceedings, shall issue, ~~a preliminary order staying such an~~**
26 **order.**

27 “**(ii) GOOD CAUSE.—Upon motion by the Government, after notice and an**
28 **opportunity to be heard, and if the administrative law judge determines that**
29 **there is a particularized showing of good cause that an order should not be**
30 **issued returning an employee to the position the employee would have held**
31 **had the personnel action not been taken, the administrative law judge shall**
32 **issue an order directing that the employee be returned, as nearly as**
33 **practicable and reasonable, to such position.**

34 “(3) FILING OF OBJECTIONS.—

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

38 “(B) NO EFFECT ON STAY.—~~THE PRELIMINARY RELIEF.—The~~ filing of objections
39 under subparagraph (A) shall not affect ~~the stay of a personnel action under a~~

1 ~~preliminary~~ **an** order issued under **clause (i) or (ii) of** paragraph ~~(2)(B)(i)~~**(2)(C)**.

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

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

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

8 “(I) an administrative law judge, without further proceedings, shall issue
9 an order ~~permanently staying~~ **providing permanent relief from** the
10 personnel action; and

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

15 “(4) REVIEW BY ADMINISTRATIVE LAW JUDGE.—

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

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

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

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

28 “(5) REVIEW BY ATTORNEY GENERAL.—

29 “(A) TIMEFRAME.—

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

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

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

4 “(6) PUBLICATION OF DETERMINATIONS.—

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

9 **“(i) to the maximum extent practicable, consistent with the manner in**
10 **which the Merit Systems Protection Board makes decisions of the Board**
11 **available to the public; and**

12 **“(ii) in accordance with section 552.-**

13
14 “(B) RULE OF CONSTRUCTION.—Nothing in subparagraph (A) shall be construed to
15 limit the authority of an administrative law judge or the Attorney General to limit the
16 public disclosure of information under law or regulations.

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

21 “(d) ~~Regulations.~~—**The Regulations.—Not later than 18 months after the date of**
22 **enactment of the Federal Bureau of Investigation Whistleblower Protection Enhancement**
23 **Act of 2016, the** Attorney General shall prescribe regulations to carry out subsection (c) that—

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

26
27 “(2) provide for the administration and enforcement of subsection (c) in a manner
28 consistent with applicable provisions of sections 1214 and 1221 and in accordance with the
29 procedures under subchapter II of chapter 5 and chapter 7-

30 ;

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

36 **“(4) provide for the protection of classified information and intelligence sources and**
37 **methods.**

38 “(e) Reporting.—Not later than March 1 of each year, the Attorney General shall make
39 ~~publically~~ **publicly** available a report containing—

40 “(1) the number and nature of allegations of a prohibited personnel practice received

- 1 during the previous year;
- 2 “(2) the disposition of each allegation of a prohibited personnel practice resolved during
3 the previous year;
- 4 “(3) the number of unresolved allegations of a prohibited personnel practice pending as
5 of the end of the previous year and, for each such unresolved allegation, how long the
6 allegation had been pending as of the end of the previous year;
- 7 “(4) the number of disciplinary investigations and actions taken with respect to each
8 allegation of a prohibited personnel practice during the previous year;
- 9 “(5) the number of instances during the previous year in which the Inspector General
10 found a reasonable basis **grounds existed to believe** that a prohibited personnel practice
11 had occurred that were appealed by the Federal Bureau of Investigation; and
- 12 “(6) the number of allegations of a prohibited personnel practice resolved through
13 settlement, including the number that were resolved as a result of mediation.

14 “(f) ~~Rule~~ **Rules** of Construction.—Nothing in this section shall be construed ~~to~~ to—

15 “(1) limit the jurisdiction of any office under any other provision of law to conduct an
16 investigation to determine whether a prohibited personnel practice has been or will be
17 ~~taken~~.” **taken; or**

18 “(2) **alter or amend any law, regulation, or Executive Order regarding the handling**
19 **or disclosure of information, including classified information.”.**

20 (b) GAO Report.—

21 (1) DEFINITION.—In this subsection, the term “prohibited personnel practice” means a
22 prohibited personnel practice described in section 2303(b) of title 5, United States Code, as
23 ~~added~~ **amended** by subsection (a).

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

30 **(A) the number and nature of complaints—**

31 **(i) that were filed;**

32 **(ii) that were investigated;**

33 **(iii) that were adjudicated; and**

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

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

38

1 ~~* 1 (A) an evaluation of the timeliness of resolution of allegations of a prohibited~~
2 ~~personnel practice;~~

3 ~~(B) an analysis of~~(C) the **nature of** corrective action provided in instances of a
4 prohibited personnel practice;

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

7 ** 1 ~~(A)~~(E) an evaluation of the timeliness of resolution of allegations of a
8 prohibited personnel practice;

9 ~~(D) an evaluation of the communication by the Inspector General~~(F) **an assessment**
10 **of the mediation process** of the Department of Justice ~~with an individual alleging a~~
11 ~~prohibited personnel practice regarding the investigation and resolution of the~~
12 ~~allegation;;~~

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

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

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

19 (c) **Effective Date; Implementation.**—

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

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

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

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

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

30 **(i) made—**

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

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

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

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

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

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

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

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

13 **(ii) if either party files objections and requests a hearing on the record not**
14 **later than 60 days after the date on which the investigation is completed, the**
15 **covered complaint shall be subject to review in accordance with paragraphs**
16 **(4), (5), (6), and (7) of section 2303(c) of title 5, United States Code, as**
17 **amended by this Act.-**