

–CITE–

5 USC CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD,  
OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE  
RIGHT OF ACTION 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES  
PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES  
CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL  
COUNSEL, AND EMPLOYEE RIGHT OF ACTION

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–HEAD–

CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL  
COUNSEL, AND EMPLOYEE RIGHT OF ACTION

–MISC1–

SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

Sec.

1201. Appointment of members of the Merit Systems Protection Board.

1202. Term of office; filling vacancies; removal.

1203. Chairman; Vice Chairman.

1204. Powers and functions of the Merit Systems Protection Board.

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SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

1211. Establishment.

1212. Powers and functions of the Office of Special Counsel.

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### SUBCHAPTER III – INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

1221. Individual right of action in certain reprisal cases.

1222. Availability of other remedies.

### AMENDMENTS

1989 – Pub. L. 101–12, Sec. 3(b)(2), (3), Apr. 10, 1989, 103

Stat. 31, substituted ", OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION" for "AND SPECIAL COUNSEL" in chapter heading, and amended chapter analysis generally, inserting subchapter I heading, and in item 1204 substituting "Powers and functions of the Merit Systems Protection Board" for "Special Counsel; appointment and removal", in item 1205 substituting "Transmittal of information to Congress" for "Powers and functions of the Merit Systems Protection Board and Special Counsel", in item 1206

substituting "Annual report" for "Authority and responsibilities of the Special Counsel", omitting items 1207 "Hearings and decisions on complaints filed by the Special Counsel", 1208 "Stays of certain personnel actions", and 1209 "Information", and inserting subchapters II and III headings and items 1211 to 1219, 1221, and 1222.

–SECREf–

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 2302, 3352 of this title; title 3 section 401; title 6 section 344; title 22 section 4139; title 49 section 40122.

–CITE–

5 USC SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

#### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

#### SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

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–HEAD–

#### SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

–MISC1–

#### AMENDMENTS

1989 – Pub. L. 101–12, Sec. 3(b)(4), Apr. 10, 1989, 103 Stat. 31, inserted subchapter heading.

–CITE–

5 USC Sec. 1201 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL  
COUNSEL, AND EMPLOYEE RIGHT OF ACTION

SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

–HEAD–

Sec. 1201. Appointment of members of the Merit Systems Protection  
Board

–STATUTE–

The Merit Systems Protection Board is composed of 3 members  
appointed by the President, by and with the advice and consent of  
the Senate, not more than 2 of whom may be adherents of the same  
political party. The members of the Board shall be individuals  
who, by demonstrated ability, background, training, or experience  
are especially qualified to carry out the functions of the Board.

No member of the Board may hold another office or position in the  
Government of the United States, except as otherwise provided by  
law or at the direction of the President. The Board shall have an  
official seal which shall be judicially noticed. The Board shall  
have its principal office in the District of Columbia and may have  
field offices in other appropriate locations.

–SOURCE–

(Added Pub. L. 95–454, title II, Sec. 202(a), Oct. 13, 1978, 92

Stat. 1121; amended Pub. L. 101–12, Sec. 3(a)(1), Apr. 10, 1989,  
103 Stat. 16.)

–MISC1–

## AMENDMENTS

1989 – Pub. L. 101–12 substituted "The members" for "The  
Chairman and members" in second sentence.

## EFFECTIVE DATE OF 1989 AMENDMENT

Section 11 of Pub. L. 101–12 provided that: "This Act and the  
amendments made by this Act (see Short Title of 1989 Amendment note  
below) shall take effect 90 days following the date of enactment of  
this Act (Apr. 10, 1989)."

## EFFECTIVE DATE

Subchapter effective 90 days after Oct. 13, 1978, see section 907  
of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment  
note under section 1101 of this title.

## SHORT TITLE OF 1989 AMENDMENT

Section 1 of Pub. L. 101–12 provided that: "This Act (enacting  
subchapters II and III of this chapter and section 3352 of this  
title, amending this section and sections 1202 to 1206, 1209, 1211,  
2302, 2303, 3393, 7502, 7512, 7521, 7542, 7701, and 7703 of this  
title and section 4139 of Title 22, Foreign Relations and  
Intercourse, repealing sections 1207 and 1208 of this title, and  
enacting provisions set out as notes under this section and  
sections 1211 and 5509 of this title) may be cited as the  
'Whistleblower Protection Act of 1989'."

## SAVINGS PROVISION

Section 7 of Pub. L. 101–12 provided that:

"(a) Orders, Rules, and Regulations. – All orders, rules, and regulations issued by the Merit Systems Protection Board or the Special Counsel before the effective date of this Act (see Effective Date of 1989 Amendment note above) shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed.

"(b) Administrative Proceedings. – No provision of this Act (see Short Title of 1989 Amendment note above) shall affect any administrative proceeding pending at the time such provisions take effect. Orders shall be issued in such proceedings, and appeals shall be taken therefrom, as if this Act had not been enacted.

"(c) Suits and Other Proceedings. – No suit, action, or other proceeding lawfully commenced by or against the members of the Merit Systems Protection Board, the Special Counsel, or officers or employees thereof, in their official capacity or in relation to the discharge of their official duties, as in effect immediately before the effective date of this Act (see Effective Date of 1989 Amendment note above), shall abate by reason of the enactment of this Act. Determinations with respect to any such suit, action, or other proceeding shall be made as if this Act had not been enacted."

## WHISTLEBLOWER PROTECTION; CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE

Section 2 of Pub. L. 101–12 provided that:

"(a) Findings. – The Congress finds that –

"(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;

"(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

"(3) in passing the Civil Service Reform Act of 1978 (Pub. L. 95–454, see Tables for classification), Congress established the Office of Special Counsel to protect whistleblowers (those individuals who make disclosures described in such section 2302(b)(8)) from reprisal.

"(b) Purpose. – The purpose of this Act (see Short Title of 1989 Amendment note above) is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by –

"(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

"(2) establishing –

"(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

"(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

"(C) that while disciplining those who commit prohibited

personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration."

#### TERMS OF OFFICE OF MEMBERS

Section 202(b) of Pub. L. 95-454 provided that: "Any term of office of any member of the Merit Systems Protection Board serving on the effective date of this Act (see Effective Date of 1978 Amendment note set out under section 1101 of this title) shall continue in effect until the term would expire under section 1102 of title 5, United States Code, as in effect immediately before the effective date of this Act, and upon expiration of the term, appointments to such office shall be made under sections 1201 and 1202 of title 5, United States Code (as added by this section)."

–SECREf–

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1202 of this title.

–CITE–

5 USC Sec. 1202 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

#### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

#### SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

–HEAD–

Sec. 1202. Term of office; filling vacancies; removal

–STATUTE–

(a) The term of office of each member of the Merit Systems

Protection Board is 7 years.

(b) A member appointed to fill a vacancy occurring before the end

of a term of office of the member's predecessor serves for the

remainder of that term. Any appointment to fill a vacancy is

subject to the requirements of section 1201. Any new member serving

only a portion of a seven-year term in office may continue to serve

until a successor is appointed and has qualified, except that such

member may not continue to serve for more than one year after the

date on which the term of the member would otherwise expire, unless

reappointed.

(c) Any member appointed for a 7-year term may not be reappointed

to any following term but may continue to serve beyond the

expiration of the term until a successor is appointed and has

qualified, except that such member may not continue to serve for

more than one year after the date on which the term of the member

would otherwise expire under this section.

(d) Any member may be removed by the President only for

inefficiency, neglect of duty, or malfeasance in office.

–SOURCE–

(Added Pub. L. 95-454, title II, Sec. 202(a), Oct. 13, 1978, 92

Stat. 1122; amended Pub. L. 100-202, Sec. 101(m) (title VI, Sec.

620), Dec. 22, 1987, 101 Stat. 1329-390, 1329-427; Pub. L. 101-12,

Sec. 3(a)(2), (3), Apr. 10, 1989, 103 Stat. 17.)

–MISC1–

## AMENDMENTS

1989 – Pub. L. 101–12, Sec. 3(a)(2), substituted a semicolon for the comma after "office" in section catchline.

Subsec. (b). Pub. L. 101–12, Sec. 3(a)(3), substituted "the member's" for "his" in first sentence and struck out "of this title" after "section 1201" in second sentence.

1987 – Subsec. (b). Pub. L. 100–202 inserted provision permitting any new member serving portion of seven–year term to continue serving until successor is appointed and has qualified, with exception limiting duration of such service.

## EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

–CITE–

5 USC Sec. 1203 01/06/03

–EXPCITE–

## TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

#### SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

–HEAD–

Sec. 1203. Chairman; Vice Chairman

–STATUTE–

(a) The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.

(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.

(c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.

–SOURCE–

(Added Pub. L. 95–454, title II, Sec. 202(a), Oct. 13, 1978, 92 Stat. 1122; amended Pub. L. 101–12, Sec. 3(a)(4), (5), Apr. 10, 1989, 103 Stat. 17.)

–MISC1–

#### AMENDMENTS

1989 – Subsec. (a). Pub. L. 101–12, Sec. 3(a)(4), struck out the comma after "time" in first sentence.

Subsec. (c). Pub. L. 101–12, Sec. 3(a)(5), substituted "the Chairman and the Vice Chairman" for "the Chairman and Vice Chairman" after "both".

#### EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101-12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101-12, set out as a note under section 1201 of this title.

–CITE–

5 USC Sec. 1204 01/06/03

–EXPCITE–

## TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

##### SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

–HEAD–

#### Sec. 1204. Powers and functions of the Merit Systems Protection Board

–STATUTE–

(a) The Merit Systems Protection Board shall –

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

(3) conduct, from time to time, special studies relating to the

civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

(b)(1) Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual –

(A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United

States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

(B) order the taking of depositions from, and responses to written interrogatories by, any such individual.

(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A) or section 1214(b), upon application by

the Board, the United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

(e)(1)(A) In any proceeding under subsection (a)(1), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

(B)(i) The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from

harassment, except that an agency (other than the Office of Special Counsel) may not request any such order with regard to an investigation by the Office of Special Counsel from the Board during such investigation.

(ii) An order issued under this subparagraph may be enforced in the same manner as provided for under paragraph (2) with respect to any order under subsection (a)(2).

(2)(A) In enforcing compliance with any order under subsection (a)(2), the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.

(B) The Board shall prescribe regulations under which any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board to exercise its authority under subparagraph (A).

(3) In carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed.

(f)(1) At any time after the effective date of any rule or regulation issued by the Director of the Office of Personnel Management in carrying out functions under section 1103, the Board shall review any provision of such rule or regulation –

(A) on its own motion;

(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

(C) on the filing of a written complaint by the Special Counsel requesting such review.

(2) In reviewing any provision of any rule or regulation pursuant to this subsection, the Board shall declare such provision –

(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b); or

(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b).

(3) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.

(4) The Board shall require any agency –

(A) to cease compliance with any provisions of any rule or regulation which the Board declares under this subsection to be invalid on its face; and

(B) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

(g) The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board.

(h) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

(i) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.

(j) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or

the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(k) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31.

(l) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.

(m)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section

2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

–SOURCE–

(Added Pub. L. 95-454, title II, Sec. 202(a), Oct. 13, 1978, 92 Stat. 1122, Sec. 1205; amended Pub. L. 97-258, Sec. 3(a)(2), Sept. 13, 1982, 96 Stat. 1063; renumbered Sec. 1204 and amended Pub. L. 101-12, Sec. 3(a)(7), Apr. 10, 1989, 103 Stat. 17; Pub. L. 102-568, title V, Sec. 506(c)(4), Oct. 29, 1992, 106 Stat. 4341; Pub. L. 103-353, Sec. 2(b)(2)(A), Oct. 13, 1994, 108 Stat. 3169; Pub. L. 103-424, Sec. 2, Oct. 29, 1994, 108 Stat. 4361; Pub. L. 103-446, title XII, Sec. 1203(c)(1), Nov. 2, 1994, 108 Stat. 4690.)

–REFTEXT–

#### REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (d), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

–MISC2–

#### PRIOR PROVISIONS

A prior section 1204 was renumbered section 1211(b) of this title by Pub. L. 101-12, Sec. 3(a)(6). Pub. L. 102-378, Sec. 2(3), Oct. 2, 1992, 106 Stat. 1346, struck out section catchline of prior section 1204.

#### AMENDMENTS

1994 – Subsec. (a)(1). Pub. L. 103-446, which directed the amendment of par. (1) by substituting "section 4303" for

"section 4323" could not be executed because the phrase "section 4323" does not appear in text subsequent to the intervening amendment by Pub. L. 103–353 substituting "chapter 43" for "section 4323". See below.

Pub. L. 103–353 substituted "chapter 43" for "section 4323".

Subsec. (m). Pub. L. 103–424 added subsec. (m).

1992 – Subsec. (a)(1). Pub. L. 102–568 substituted "4323" for "2023".

1989 – Pub. L. 101–12, Sec. 3(a)(7), renumbered section 1205 of this title as this section.

Pub. L. 101–12, Sec. 3(a)(7)(A), struck out "and Special Counsel" after "Board" in section catchline.

Subsec. (a)(4). Pub. L. 101–12, Sec. 3(a)(7)(A), (C), substituted "subsection (f)" for "subsection (e) of this section".

Subsec. (b)(1). Pub. L. 101–12, Sec. 3(a)(7)(A), struck out "the Special Counsel," after "Board,".

Subsec. (b)(2). Pub. L. 101–12, Sec. 3(a)(7)(D), amended par. (2) generally. Prior to amendment, par. (2) read as follows: "Any member of the Board, the Special Counsel, and any administrative law judge appointed by the Board under section 3105 of this title may –

"(A) issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States or any territory or possession thereof, the Commonwealth of Puerto Rico, or the District of Columbia; and

"(B) order the taking of depositions and order responses to written interrogatories."

Subsec. (b)(3). Pub. L. 101–12, Sec. 3(a)(7)(B), substituted "subpoena" for "subpena" and "subpoenaed" for "subpenaed".

Subsec. (c). Pub. L. 101–12, Sec. 3(a)(7)(B), (E), substituted "subpoena" for "subpena" in two places, "(b)(2)(A) or section 1214(b), upon application by the Board" for "(b)(2) of this section", and "for the district" for "for the judicial district".

Subsec. (d). Pub. L. 101–12, Sec. 3(a)(7)(F), added subsec. (d).

Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101–12, Sec. 3(a)(7)(F), redesignated former subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(1). Pub. L. 101–12, Sec. 3(a)(7)(A), (G)(i), designated existing provisions as subpar. (A), struck out "of this section" after "subsection (a)(1)", and added subpar. (B).

Subsec. (e)(2). Pub. L. 101–12, Sec. 3(a)(7)(G)(ii), designated existing provisions as subpar. (A), struck out "of this section" after "subsection (a)(2)", and added subpar. (B).

Subsec. (e)(3). Pub. L. 101–12, Sec. 3(a)(7)(A), (G)(iii), struck out "of this section" after "subsection (a)(3)" and inserted "of Personnel Management" after "Office".

Subsec. (f). Pub. L. 101–12, Sec. 3(a)(7)(F), redesignated former subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (f)(1). Pub. L. 101–12, Sec. 3(a)(7)(H)(i), inserted "of the Office of Personnel Management" after "Director" and struck

out "of this title" after "section 1103".

Subsec. (f)(2). Pub. L. 101–12, Sec. 3(a)(7)(H)(ii), inserted comma after "subsection" and in subpars. (A) and (B) struck out "of this title" after "section 2302(b)".

Subsec. (f)(3), (4). Pub. L. 101–12, Sec. 3(a)(7)(H)(iii), struck out "(A)" before "The Director", struck out subpar. (B) which provided that any review conducted by the Board be limited to determining the validity on its face of the provision under review and whether the provision under review has been validly implemented, and redesignated former subpar. (C) and cls. (i) and (ii) of former subpar. (C) as par. (4) and subpars. (A) and (B), respectively, of par. (4).

Subsecs. (g) to (i). Pub. L. 101–12, Sec. 3(a)(7)(F), redesignated former subsecs. (f) to (h) as (g) to (i), respectively. Former subsec. (i) redesignated (j).

Subsec. (j). Pub. L. 101–12, Sec. 3(a)(7)(F), (I), redesignated former subsec. (i) as (j) and substituted "chapter 33" for "chapter 33 of this title". Former subsec. (j) redesignated (k).

Subsecs. (k), (l). Pub. L. 101–12, Sec. 3(a)(7)(F), redesignated former subsecs. (j) and (k) as (k) and (l), respectively.

1982 – Subsec. (j). Pub. L. 97–258 substituted "section 1105 of title 31" for "section 201 of the Budget and Accounting Act, 1921 (31 U.S.C. 11)".

#### EFFECTIVE DATE OF 1994 AMENDMENTS

Section 14 of Pub. L. 103–424 provided that: "The provisions of this Act (amending this section and sections 1211, 1212, 1214,

1218, 1221, 2105, 2302, 4313, 7121, and 8348 of this title, enacting provisions set out as notes under sections 1212 and 1214 of this title and section 1441a of Title 12, Banks and Banking, and amending provisions set out as a note under section 5509 of this title) and the amendments made by this Act shall be effective on and after the date of the enactment of this Act (Oct. 29, 1994)."

Amendment by Pub. L. 103–353 effective with respect to reemployments initiated on or after the first day after the 60–day period beginning Oct. 13, 1994, with transition rules, see section 8 of Pub. L. 103–353, set out as an Effective Date note under section 4301 of Title 38, Veterans' Benefits.

#### EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

–SECREf–

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1212, 1221 of this title; title 49 section 40122.

–CITE–

5 USC Sec. 1205 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

#### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

## SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

### –HEAD–

Sec. 1205. Transmittal of information to Congress

### –STATUTE–

Notwithstanding any other provision of law or any rule, regulation or policy directive, any member of the Board, or any employee of the Board designated by the Board, may transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Board, without review, clearance, or approval by any other administrative authority.

### –SOURCE–

(Added Pub. L. 95–454, title II, Sec. 202(a), Oct. 13, 1978, 92 Stat. 1131, Sec. 1209(a); renumbered Sec. 1205 and amended Pub. L. 101–12, Sec. 3(a)(9), Apr. 10, 1989, 103 Stat. 18.)

### –MISC1–

#### PRIOR PROVISIONS

A prior section 1205 was renumbered section 1204 of this title.

#### AMENDMENTS

1989 – Pub. L. 101–12 renumbered section 1209(a) of this title as this section and inserted section catchline.

#### EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

–CITE–

5 USC Sec. 1206 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

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COUNSEL, AND EMPLOYEE RIGHT OF ACTION

SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

–HEAD–

Sec. 1206. Annual report

–STATUTE–

The Board shall submit an annual report to the President and the Congress on its activities, which shall include a description of significant actions taken by the Board to carry out its functions under this title. The report shall also review the significant actions of the Office of Personnel Management, including an analysis of whether the actions of the Office of Personnel Management are in accord with merit system principles and free from prohibited personnel practices.

–SOURCE–

(Added Pub. L. 95–454, title II, Sec. 202(a), Oct. 13, 1978, 92 Stat. 1131, Sec. 1209(b); renumbered Sec. 1206 and amended Pub. L. 101–12, Sec. 3(a)(10), Apr. 10, 1989, 103 Stat. 18.)

–MISC1–

PRIOR PROVISIONS

A prior section 1206, added Pub. L. 95–454, title II, Sec.

202(a), Oct. 13, 1978, 92 Stat. 1125, which related to authority and responsibilities of Special Counsel, was repealed by Pub. L. 101–12, Sec. 3(a)(8), 11, Apr. 10, 1989, 103 Stat. 18, effective 90 days following Apr. 10, 1989. See section 1212 of this title.

#### AMENDMENTS

1989 – Pub. L. 101–12 renumbered section 1209(b) of this title as this section and inserted section catchline.

#### EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

#### TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in first sentence of this section relating to annual reports to Congress (formerly 5 U.S.C. 1209(b)), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 176 of House Document No. 103–7.

–CITE–

5 USC Sec. 1207, 1208 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

#### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

#### SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

–HEAD–

(Sec. 1207, 1208. Repealed. Pub. L. 101-12, Sec. 3(a)(8), Apr. 10, 1989, 103 Stat. 18)

–MISC1–

Section 1207, added Pub. L. 95-454, title II, Sec. 202(a), Oct. 13, 1978, 92 Stat. 1130, provided for hearings and decisions on complaints filed by Special Counsel. See section 1215(a)(2) to (5) of this title.

Section 1208, added Pub. L. 95-454, title II, Sec. 202(a), Oct. 13, 1978, 92 Stat. 1130, related to stays of certain personnel actions. See section 1214(b) of this title.

#### EFFECTIVE DATE OF REPEAL

Repeal of sections effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101-12, set out as an Effective Date of 1989 Amendment note under section 1201 of this title.

–CITE–

5 USC Sec. 1209 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

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#### SUBCHAPTER I – MERIT SYSTEMS PROTECTION BOARD

–HEAD–

(Sec. 1209. Renumbered Sec. 1205 and 1206)

–COD–

#### CODIFICATION

Subsecs. (a) and (b) of this section were renumbered as sections 1205 and 1206, respectively, of this title by Pub. L. 101-12, Sec. 3(a)(9), (10). Pub. L. 102-378, Sec. 2(2), Oct. 2, 1992, 106 Stat. 1346, struck out section catchline of prior section 1209.

–CITE–

5 USC SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

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SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

.

–HEAD–

SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–SECREf–

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 1221, 4505a, 5754, 5755, 7121 of this title.

–CITE–

5 USC Sec. 1211 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

## SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

### Sec. 1211. Establishment

–STATUTE–

(a) There is established the Office of Special Counsel, which shall be headed by the Special Counsel. The Office shall have an official seal which shall be judicially noticed. The Office shall have its principal office in the District of Columbia and shall have field offices in other appropriate locations.

(b) The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that the Special Counsel may not continue to serve for more than one year after the date on which the term of the Special Counsel would otherwise expire under this subsection.

The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of the Special Counsel's predecessor serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The Special Counsel may not hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(11), Apr. 10, 1989, 103 Stat. 19, Sec. 1211(a), and Pub. L. 95–454, title II, Sec. 202(a), Oct. 13, 1978, 92 Stat. 1122, Sec. 1204; renumbered Sec. 1211(b) and amended Pub. L. 101–12, Sec. 3(a)(6), (12), Apr. 10, 1989, 103 Stat. 17, 19; Pub. L. 103–424, Sec. 3(a), Oct. 29, 1994, 108 Stat. 4361.)

–MISC1–

#### AMENDMENTS

1994 – Subsec. (b). Pub. L. 101–424 inserted after first sentence "The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that the Special Counsel may not continue to serve for more than one year after the date on which the term of the Special Counsel would otherwise expire under this subsection."

1989 – Subsec. (b). Pub. L. 101–12, Sec. 3(a)(6), (12), renumbered section 1204 of this title as subsec. (b) of this section, substituted "Special Counsel shall be appointed by the President" for "Special Counsel of the Merit Systems Protection Board shall be appointed by the President from attorneys", substituted "The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of the Special Counsel's predecessor serves for the remainder of the term." for "A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of

his predecessor serves for the remainder of the term.", and  
inserted at end "The Special Counsel may not hold another office  
or position in the Government of the United States, except as  
otherwise provided by law or at the direction of the President."

#### EFFECTIVE DATE

Subchapter effective 90 days following Apr. 10, 1989, see section  
11 of Pub. L. 101-12, set out as a note under section 1201 of this  
title.

#### TRANSFER OF FUNDS

Section 8(c) of Pub. L. 101-12 provided that: "The personnel,  
assets, liabilities, contracts, property, records, and unexpended  
balances of appropriations, authorizations, allocations, and other  
funds employed, held, used, arising from, available or to be made  
available to the Special Counsel of the Merit Systems Protection  
Board are, subject to section 1531 of title 31, United States Code,  
transferred to the Special Counsel referred to in section 1211 of  
title 5, United States Code (as added by section 3(a) of this Act),  
for appropriate allocation."

–SECRET–

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 38 section 4324; title 49  
section 40122.

–CITE–

5 USC Sec. 1212 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

## PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

#### SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

Sec. 1212. Powers and functions of the Office of Special Counsel

–STATUTE–

(a) The Office of Special Counsel shall –

(1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;

(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate –

(A) bring petitions for stays, and petitions for corrective action, under section 1214; and

(B) file a complaint or make recommendations for disciplinary action under section 1215;

(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions under

section 1103 and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board; and

(5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216).

(b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) The Special Counsel may –

(A) issue subpoenas; and

(B) order the taking of depositions and order responses to written interrogatories;

in the same manner as provided under section 1204.

(3)(A) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A), the Special Counsel may apply to the Merit Systems Protection Board to enforce the subpoena in court pursuant to section 1204(c).

(B) A subpoena under paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in the manner referred to in subsection (d) of section 1204, and the United States District Court for the District of Columbia may, with respect to any such individual, compel compliance in accordance with such subsection.

(4) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c)(1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.

(2) The Special Counsel may not intervene in an action brought by an individual under section 1221, or in an appeal brought by an individual under section 7701, without the consent of such individual.

(d)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(e) The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel. Such regulations shall be published in the Federal Register.

(f) The Special Counsel may not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).

(g)(1) The Special Counsel may not respond to any inquiry or disclose any information from or about any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any person described in paragraph (1) –

(A) unless the consent of the individual as to whom the information pertains is obtained in advance; or

(B) except upon request of an agency which requires such information in order to make a determination concerning an individual's having access to the information unauthorized disclosure of which could be expected to cause exceptionally grave damage to the national security.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 19; amended Pub. L. 103–424, Sec. 3(b), Oct. 29, 1994, 108 Stat. 4362.)

–MISC1–

#### AMENDMENTS

1994 – Subsec. (g)(1). Pub. L. 103–424, Sec. 3(b)(1) substituted "disclose any information from or about" for "provide information concerning".

Subsec. (g)(2). Pub. L. 103–424, Sec. 3(b)(2), substituted "an

evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any" for "a matter described in subparagraph (A) or (B) of section 2302(b)(2) in connection with a".

#### POLICY STATEMENT REGARDING IMPLEMENTATION OF WHISTLEBLOWER PROTECTION ACT

Section 12(a) of Pub. L. 103-424 provided that: "No later than 6 months after the date of enactment of this Act (Oct. 29, 1994), the Special Counsel shall issue a policy statement regarding the implementation of the Whistleblower Protection Act of 1989 (see Short Title of 1989 Amendment note set out under section 1201 of this title). Such policy statement shall be made available to each person alleging a prohibited personnel practice described under section 2302(b)(8) of title 5, United States Code, and shall include detailed guidelines identifying specific categories of information that may (or may not) be communicated to agency officials for an investigative purpose, or for the purpose of obtaining corrective action under section 1214 of title 5, United States Code, or disciplinary action under section 1215 of such title, the circumstances under which such information is likely to be disclosed, and whether or not the consent of any person is required in advance of any such communication."

#### ANNUAL SURVEY OF INDIVIDUALS SEEKING ASSISTANCE

Section 13 of Pub. L. 103-424 provided that:

"(a) In General. – The Office of Special Counsel shall, after consulting with the Office of Policy and Evaluation of the Merit

Systems Protection Board, conduct an annual survey of all individuals who contact the Office of Special Counsel for assistance. The survey shall –

"(1) determine if the individual seeking assistance was fully apprised of their rights;

"(2) determine whether the individual was successful either at the Office of Special Counsel or the Merit Systems Protection Board; and

"(3) determine if the individual, whether successful or not, was satisfied with the treatment received from the Office of Special Counsel.

"(b) Report. – The results of the survey conducted under subsection (a) shall be published in the annual report of the Office of Special Counsel."

–SECREf–

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2105 of this title; title 49 section 40122.

–CITE–

5 USC Sec. 1213 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

#### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

#### SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

Sec. 1213. Provisions relating to disclosures of violations of law,  
gross mismanagement, and certain other matters

–STATUTE–

(a) This section applies with respect to –

(1) any disclosure of information by an employee, former  
employee, or applicant for employment which the employee, former  
employee, or applicant reasonably believes evidences –

(A) a violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of  
authority, or a substantial and specific danger to public  
health or safety;

if such disclosure is not specifically prohibited by law and if  
such information is not specifically required by Executive order  
to be kept secret in the interest of national defense or the  
conduct of foreign affairs; and

(2) any disclosure by an employee, former employee, or  
applicant for employment to the Special Counsel or to the  
Inspector General of an agency or another employee designated by  
the head of the agency to receive such disclosures of information  
which the employee, former employee, or applicant reasonably  
believes evidences –

(A) a violation of any law, rule, or regulation; or

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

(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 15 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

(c)(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head –

(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and

(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.

(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by –

(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or

(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include –

(1) a summary of the information with respect to which the investigation was initiated;

(2) a description of the conduct of the investigation;

(3) a summary of any evidence obtained from the investigation;

(4) a listing of any violation or apparent violation of any law, rule, or regulation; and

(5) a description of any action taken or planned as a result of the investigation, such as –

(A) changes in agency rules, regulations, or practices;

(B) the restoration of any aggrieved employee;

(C) disciplinary action against any employee; and

(D) referral to the Attorney General of any evidence of a criminal violation.

(e)(1) Any such report shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.

(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether –

(A) the findings of the head of the agency appear reasonable;

and

(B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

(3) The Special Counsel shall transmit any agency report received pursuant to subsection (c) of this section, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President and the congressional committees with jurisdiction over the agency which the disclosure involves.

(4) Whenever the Special Counsel does not receive the report of the agency within the time prescribed in subsection (c)(2) of this section, the Special Counsel shall transmit a copy of the information which was transmitted to the agency head to the President and the congressional committees with jurisdiction over the agency which the disclosure involves together with a statement noting the failure of the head of the agency to file the required report.

(f) In any case in which evidence of a criminal violation obtained by an agency in an investigation under subsection (c) of this section is referred to the Attorney General –

(1) the report shall not be transmitted to the complainant; and

(2) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

(g)(1) If the Special Counsel receives information of a type

described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head.

(2) If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.

(3) If the Special Counsel does not transmit the information to the head of the agency under paragraph (2), the Special Counsel shall inform the individual of –

(A) the reasons why the disclosure may not be further acted on under this chapter; and

(B) other offices available for receiving disclosures, should the individual wish to pursue the matter further.

(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

(i) Except as specifically authorized under this section, the provisions of this section shall not be considered to authorize disclosure of any information by any agency or any person which is –

(1) specifically prohibited from disclosure by any other provision of law; or

(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(j) With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate.

–SOURCE–

(Added Pub. L. 101-12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 21;  
amended Pub. L. 104-316, title I, Sec. 103(a), Oct. 19, 1996, 110  
Stat. 3828; Pub. L. 107-304, Sec. 3, Nov. 27, 2002, 116 Stat.  
2364.)

-MISC1-

## AMENDMENTS

2002 – Subsec. (g)(1). Pub. L. 107-304, Sec. 3(1), struck out at  
end "If the Special Counsel does not transmit the information to  
the head of the agency, the Special Counsel shall return any  
documents and other matter provided by the individual who made the  
disclosure."

Subsec. (g)(3). Pub. L. 107-304, Sec. 3(2), added par. (3) and  
struck out former par. (3) which read as follows: "If the Special  
Counsel does not transmit the information to the head of the agency  
under paragraph (2), the Special Counsel shall –

"(A) return any documents and other matter provided by the  
individual who made the disclosure; and

"(B) inform the individual of –

"(i) the reasons why the disclosure may not be further acted  
on under this chapter; and

"(ii) other offices available for receiving disclosures,  
should the individual wish to pursue the matter further."

1996 – Subsec. (e)(3). Pub. L. 104-316, Sec. 103(a)(1),  
substituted "President and" for "President," and struck out ",  
and the Comptroller General" before period at end.

Subsec. (e)(4). Pub. L. 104-316, Sec. 103(a)(2), substituted

"President and" for "President," and struck out ", and the  
Comptroller General" before "together with a".

–SECREf–

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1212, 1219, 2105 of this  
title; title 49 section 40122.

–CITE–

5 USC Sec. 1214 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

#### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

#### SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

Sec. 1214. Investigation of prohibited personnel practices;  
corrective action

–STATUTE–

(a)(1)(A) The Special Counsel shall receive any allegation of a  
prohibited personnel practice and shall investigate the allegation  
to the extent necessary to determine whether there are reasonable  
grounds to believe that a prohibited personnel practice has  
occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a  
prohibited personnel practice under paragraph (1), the Special  
Counsel shall provide written notice to the person who made the

allegation that –

(i) the allegation has been received by the Special Counsel;

and

(ii) shall include the name of a person at the Office of

Special Counsel who shall serve as a contact with the person

making the allegation.

(C) Unless an investigation is terminated under paragraph (2),

the Special Counsel shall –

(i) within 90 days after notice is provided under subparagraph

(B), notify the person who made the allegation of the status of

the investigation and any action taken by the Office of the

Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and

any action taken by the Office of the Special Counsel since the

last notice, at least every 60 days after notice is given under

clause (i); and

(iii) notify such person of the status of the investigation and

any action taken by the Special Counsel at such time as

determined appropriate by the Special Counsel.

(D) No later than 10 days before the Special Counsel terminates

any investigation of a prohibited personnel practice, the Special

Counsel shall provide a written status report to the person who

made the allegation of the proposed findings of fact and legal

conclusions. The person may submit written comments about the

report to the Special Counsel. The Special Counsel shall not be

required to provide a subsequent written status report under this

subparagraph after the submission of such written comments.

(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of –

- (i) the termination of the investigation;
- (ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;
- (iii) the reasons for terminating the investigation; and
- (iv) a response to any comments submitted under paragraph (1)(D).

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) from the Special Counsel and –

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are

reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board –

(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or

(ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

(2)(A)(i) Except as provided under clause (ii), no later than 240

days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(D) If the Special Counsel finds, in consultation with the

individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for –

(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8), has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which

was taken or is to be taken against the individual.

(ii) Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless –

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which

case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states –

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g) If the Board orders corrective action under this section, such corrective action may include –

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 23; amended Pub. L. 103–424, Sec. 3(c), (d), 8(a), Oct. 29, 1994, 108 Stat. 4362, 4364.)

–MISC1–

#### AMENDMENTS

1994 – Subsec. (a)(1)(D). Pub. L. 103–424, Sec. 3(c)(1), added subpar. (D).

Subsec. (a)(2)(A)(iv). Pub. L. 103–424, Sec. 3(c)(2), added cl. (iv).

Subsec. (b)(2). Pub. L. 103–424, Sec. 3(d), added subpars. (A) and (E) and redesignated former subpars. (A) to (C) as (B) to (D), respectively.

Subsec. (g). Pub. L. 103–424, Sec. 8(a), added subsec. (g).

#### TERMINATION STATEMENT

Section 12(b) of Pub. L. 103–424 provided that: "The Special Counsel shall include in any letter terminating an investigation under section 1214(a)(2) of title 5, United States Code, the name and telephone number of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the person's allegations."

–SECREf–

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1204, 1212, 1216, 1218,

1219, 1221, 2105, 2303, 7121 of this title; title 22 section 4139;

title 49 section 40122.

–CITE–

5 USC Sec. 1215 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL  
COUNSEL, AND EMPLOYEE RIGHT OF ACTION

SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

Sec. 1215. Disciplinary action

–STATUTE–

(a)(1) Except as provided in subsection (b), if the Special  
Counsel determines that disciplinary action should be taken against  
any employee for having –

(A) committed a prohibited personnel practice,

(B) violated the provisions of any law, rule, or regulation, or  
engaged in any other conduct within the jurisdiction of the  
Special Counsel as described in section 1216, or

(C) knowingly and willfully refused or failed to comply with an  
order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the  
employee containing the Special Counsel's determination, together  
with a statement of supporting facts, and present the complaint and  
statement to the employee and the Board, in accordance with this

subsection.

(2) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under paragraph (1) is entitled to –

(A) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;

(B) be represented by an attorney or other representative;

(C) a hearing before the Board or an administrative law judge appointed under section 3105 and designated by the Board;

(D) have a transcript kept of any hearing under subparagraph (C); and

(E) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.

(4) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefor with such court, and within such time, as provided for under section 7703(b).

(5) In the case of any State or local officer or employee under

chapter 15, the Board shall consider the case in accordance with the provisions of such chapter.

(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).

(c)(1) In the case of members of the uniformed services and individuals employed by any person under contract with an agency to provide goods or services, the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the agency concerned.

(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (1), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on each recommendation and the action taken, or proposed to be taken, with respect to each such recommendation.

—SOURCE—

(Added Pub. L. 101-12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 27.)

—SECREf—

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1204, 1212, 1216, 1219,  
1221, 2105, 2302, 3393, 7121, 7502, 7512, 7521, 7542 of this title;  
title 49 section 40122.

–CITE–

5 USC Sec. 1216 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL  
COUNSEL, AND EMPLOYEE RIGHT OF ACTION

SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

Sec. 1216. Other matters within the jurisdiction of the Office of  
Special Counsel

–STATUTE–

(a) In addition to the authority otherwise provided in this  
chapter, the Special Counsel shall, except as provided in  
subsection (b), conduct an investigation of any allegation  
concerning –

(1) political activity prohibited under subchapter III of  
chapter 73, relating to political activities by Federal  
employees;

(2) political activity prohibited under chapter 15, relating to  
political activities by certain State and local officers and  
employees;

(3) arbitrary or capricious withholding of information

prohibited under section 552, except that the Special Counsel shall make no investigation of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

(4) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

(5) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

(b) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in subsection (a)(5), if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

(c) If the Special Counsel receives an allegation concerning any matter under paragraph (1), (3), (4), or (5) of subsection (a), the Special Counsel may investigate and seek corrective action under section 1214 and disciplinary action under section 1215 in the same way as if a prohibited personnel practice were involved.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 28; amended Pub. L. 103–94, Sec. 3, Oct. 6, 1993, 107 Stat. 1004.)

–MISC1–

#### AMENDMENTS

1993 – Subsec. (c). Pub. L. 103–94 amended subsec. (c)

generally. Prior to amendment, subsec. (c) read as follows:

"(1) If an investigation by the Special Counsel under subsection (a)(1) substantiates an allegation relating to any activity prohibited under section 7324, the Special Counsel may petition the Merit Systems Protection Board for any penalties provided for under section 7325.

"(2) If the Special Counsel receives an allegation concerning any matter under paragraph (3), (4), or (5) of subsection (a), the Special Counsel may investigate and seek corrective action under section 1214 in the same way as if a prohibited personnel practice were involved."

#### EFFECTIVE DATE OF 1993 AMENDMENT; SAVINGS PROVISION

Amendment by Pub. L. 103-94 effective 120 days after Oct. 6, 1993, but not to release or extinguish any penalty, forfeiture, or liability incurred under amended provision, which is to be treated as remaining in force for purpose of that penalty, forfeiture, or liability, and no provision of Pub. L. 103-94 to affect any proceedings with respect to which charges were filed on or before 120 days after Oct. 6, 1993, with orders to be issued in such proceedings and appeals taken therefrom as if Pub. L. 103-94 had not been enacted, see section 12 of Pub. L. 103-94, set out as an Effective Date; Savings Provision note under section 7321 of this title.

—SECRET—

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1212, 1215, 2105 of this

title; title 49 section 40122.

–CITE–

5 USC Sec. 1217 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL  
COUNSEL, AND EMPLOYEE RIGHT OF ACTION

SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

Sec. 1217. Transmittal of information to Congress

–STATUTE–

The Special Counsel or any employee of the Special Counsel designated by the Special Counsel, shall transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and the Special Counsel's views on functions, responsibilities, or other matters relating to the Office. Such information shall be transmitted concurrently to the President and any other appropriate agency in the executive branch.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 28.)

–SECREf–

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 49 section 40122.

–CITE–

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

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SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

Sec. 1218. Annual report

–STATUTE–

The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i), and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 29;  
amended Pub. L. 103–424, Sec. 3(e), Oct. 29, 1994, 108 Stat. 4363.)

–MISC1–

## AMENDMENTS

1994 – Pub. L. 103–424 inserted "cases in which it did not make  
a determination whether there are reasonable grounds to believe  
that a prohibited personnel practice has occurred, exists, or is to  
be taken within the 240–day period specified in section  
1214(b)(2)(A)(i)," after "investigations conducted by it,".

## TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of reporting provisions  
in this section, see section 3003 of Pub. L. 104–66, as amended,  
set out as a note under section 1113 of Title 31, Money and  
Finance, and page 188 of House Document No. 103–7.

–SECREf–

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 49 section 40122.

–CITE–

5 USC Sec. 1219 01/06/03

–EXPCITE–

## TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

#### SUBCHAPTER II – OFFICE OF SPECIAL COUNSEL

–HEAD–

Sec. 1219. Public information

–STATUTE–

(a) The Special Counsel shall maintain and make available to the public –

(1) a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with reports from heads of agencies under subsection (c)(1)(B) of such section relating to such matters;

(2) a list of matters referred to heads of agencies under section 1215(c)(2);

(3) a list of matters referred to heads of agencies under subsection (e) of section 1214, together with certifications from heads of agencies under such subsection; and

(4) reports from heads of agencies under section 1213(g)(1).

(b) The Special Counsel shall take steps to ensure that any list or report made available to the public under this section does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 29.)

–CITE–

5 USC SUBCHAPTER III – INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

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CASES

.

–HEAD–

SUBCHAPTER III – INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL  
CASES

–SECREf–

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 7121 of this title;

title 12 sections 1441a, 1831j.

–CITE–

5 USC Sec. 1221 01/06/03

–EXPCITE–

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

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SUBCHAPTER III – INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL  
CASES

–HEAD–

Sec. 1221. Individual right of action in certain reprisal cases

–STATUTE–

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

(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 is made, if the Board determines that such a stay would be appropriate.

(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board

determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that –

(A) the official taking the personnel action knew of the disclosure; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(f)(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include –

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former employee, (FOOTNOTE 1) or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

(FOOTNOTE 1) So in original. Probably should be "employee,".

(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(i) Subsections (a) through (h) shall apply in any proceeding

brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 29; amended Pub. L. 103–424, Sec. 4, 8(b), Oct. 29, 1994, 108 Stat. 4363, 4365.)

–MISC1–

## AMENDMENTS

1994 – Subsec. (d)(1). Pub. L. 103–424, Sec. 4(a), added par. (1) and struck out former par. (1) which read as follows: "At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board may issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that such subpoena is necessary for the development of relevant evidence."

Subsec. (e)(1). Pub. L. 103–424, Sec. 4(b), which directed the amendment of section 1221(e)(1), without specifying the Code title to be amended, by inserting at end "The employee may demonstrate that the disclosure was a contributing factor in the personnel

action through circumstantial evidence, such as evidence that –

"(A) the official taking the personnel action knew of the disclosure; and

"(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.", was executed to subsec. (e)(1) of this section to reflect the probable intent of Congress.

Subsec. (f)(3). Pub. L. 103–424, Sec. 4(c), added par. (3).

Subsec. (g). Pub. L. 103–424, Sec. 8(b), added par. (1) and redesignated former pars. (1) and (2) as (2) and (3), respectively.

#### EFFECTIVE DATE

Subchapter effective 90 days following Apr. 10, 1989, see section

11 of Pub. L. 101–12, set out as an Effective Date of 1989

Amendment note under section 1201 of this title.

–SECREf–

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1212, 1214, 1222, 2105, 2303, 7121 of this title; title 22 section 4139; title 49 section 40122.

–CITE–

5 USC Sec. 1222 01/06/03

–EXPCITE–

#### TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

#### PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

#### CHAPTER 12 – MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL

## COUNSEL, AND EMPLOYEE RIGHT OF ACTION

### SUBCHAPTER III – INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL

#### CASES

–HEAD–

Sec. 1222. Availability of other remedies

–STATUTE–

Except as provided in section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23.

–SOURCE–

(Added Pub. L. 101–12, Sec. 3(a)(13), Apr. 10, 1989, 103 Stat. 31.)

–SECREf–

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2105 of this title.

–CITE–