

110TH CONGRESS  
1ST SESSION

# S. 2057

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

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## IN THE SENATE OF THE UNITED STATES

SEPTEMBER 17, 2007

Mr. AKAKA introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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## A BILL

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

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

3       **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4       (a) **SHORT TITLE.**—This Act may be cited as the  
5       “Federal Merit System Reauthorization Act of 2007”.

6       (b) **TABLE OF CONTENTS.**—The table of contents is  
7       as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Authorization of appropriations.

Sec. 3. Allegations of wrongdoing against Special Counsel or Deputy Special Counsel.

Sec. 4. Discrimination on the basis of sexual orientation prohibited.

Sec. 5. Procedures of the Merit Systems Protection Board.

Sec. 6. Procedures of the Office of Special Counsel.

Sec. 7. Reporting requirements.

**1 SEC. 2. AUTHORIZATION OF APPROPRIATIONS.**

2 (a) MERIT SYSTEMS PROTECTION BOARD.—Section  
3 8(a)(1) of the Whistleblower Protection Act of 1989 (5  
4 U.S.C. 5509 note) is amended by striking “2003, 2004,  
5 2005, 2006, and 2007” and inserting “2008, 2009, and  
6 2010”.

7 (b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2)  
8 of the Whistleblower Protection Act of 1989 (5 U.S.C.  
9 5509 note) is amended by striking “2003, 2004, 2005,  
10 2006, and 2007” and inserting “2008, 2009, and 2010”.

11 (c) EFFECTIVE DATE.—This section shall take effect  
12 as of October 1, 2007.

**13 SEC. 3. ALLEGATIONS OF WRONGDOING AGAINST SPECIAL  
14 COUNSEL OR DEPUTY SPECIAL COUNSEL.**

15 (a) DEFINITIONS.—In this section—

16 (1) the term “Special Counsel” refers to the  
17 Special Counsel appointed under section 1211(b) of  
18 title 5, United States Code;

19 (2) the term “Integrity Committee” refers to  
20 the Integrity Committee described in Executive  
21 Order 12993 (relating to administrative allegations

1 against inspectors general) or its successor in func-  
2 tion (as identified by the President); and

3 (3) the terms “wrongdoing” and “Inspector  
4 General” have the same respective meanings as  
5 under the Executive order cited in paragraph (2).

6 (b) AUTHORITY OF INTEGRITY COMMITTEE.—

7 (1) IN GENERAL.—An allegation of wrongdoing  
8 against the Special Counsel (or the Deputy Special  
9 Counsel) may be received, reviewed, and referred for  
10 investigation by the Integrity Committee to the same  
11 extent and in the same manner as in the case of an  
12 allegation against an Inspector General (or a mem-  
13 ber of the staff of an Office of Inspector General),  
14 subject to the requirement that the Special Counsel  
15 recuse himself or herself from the consideration of  
16 any allegation brought under this subsection.

17 (2) COORDINATION WITH EXISTING PROVISIONS  
18 OF LAW.—This section does not eliminate access to  
19 the Merit Systems Protection Board for review  
20 under section 7701 of title 5, United States Code.  
21 To the extent that an allegation brought under this  
22 subsection involves section 2302(b)(8) of such title,  
23 a failure to obtain corrective action within 120 days  
24 after the date on which that allegation is received by  
25 the Integrity Committee shall, for purposes of sec-

1       tion 1221 of such title, be considered to satisfy sec-  
 2       tion 1214(a)(3)(B) of such title.

3       (c) REGULATIONS.—The Integrity Committee may  
 4       prescribe any rules or regulations necessary to carry out  
 5       this section, subject to such consultation or other require-  
 6       ments as might otherwise apply.

7       **SEC. 4. DISCRIMINATION ON THE BASIS OF SEXUAL ORI-**  
 8                                   **ENTATION PROHIBITED.**

9       (a) REPUDIATION.—In order to dispel any public con-  
 10       fusion, Congress repudiates any assertion that Federal  
 11       employees are not protected from discrimination on the  
 12       basis of sexual orientation.

13       (b) AFFIRMATION.—It is the sense of Congress that,  
 14       in the absence of the amendment made by subsection (c),  
 15       discrimination against Federal employees and applicants  
 16       for Federal employment on the basis of sexual orientation  
 17       is prohibited by section 2302(b)(10) of title 5, United  
 18       States Code.

19       (c) DISCRIMINATION BASED ON SEXUAL ORIENTA-  
 20       TION PROHIBITED.—Section 2302(b)(1) of title 5, United  
 21       States Code, is amended—

22               (1) in subparagraph (D), by striking “or” at  
 23       the end;

24               (2) in subparagraph (E), by inserting “or” at  
 25       the end; and

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

2 “(F) on the basis of sexual orientation;”.

3 **SEC. 5. PROCEDURES OF THE MERIT SYSTEMS PROTEC-**  
4 **TION BOARD.**

5 (a) **PROOF OF EXHAUSTION FOR INDIVIDUAL RIGHT**  
6 **OF ACTION.**—Section 1221(a) of title 5, United States  
7 Code, is amended—

8 (1) by striking “(a)” and inserting “(a)(1)”;  
9 and

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

11 “(2) For purposes of paragraph (1), an employee,  
12 former employee, or applicant for employment may dem-  
13 onstrate compliance with section 1214(a)(3)(B) by—

14 “(A) submitting a copy of the complaint or  
15 other pleading pursuant to which such employee,  
16 former employee, or applicant sought corrective ac-  
17 tion from the Special Counsel with respect to the  
18 personnel action involved; and

19 “(B) certifying that the Special Counsel did not  
20 provide notice of intent to seek such corrective ac-  
21 tion to such employee, former employee, or applicant  
22 within the 120-day period described in such section  
23 1214(a)(3)(B).”.

1 (b) INDIVIDUAL REQUESTS FOR STAYS.—Section  
 2 1221(c) of title 5, United States Code, is amended by  
 3 striking paragraph (2) and inserting the following:

4 “(2) Any stay requested under paragraph (1) shall  
 5 be granted within 10 calendar days (excluding Saturdays,  
 6 Sundays, and legal holidays) after the date the request  
 7 is made, if the Board determines that the employee,  
 8 former employee, or applicant has demonstrated that pro-  
 9 tected activity described under section 2302(b)(8) was a  
 10 contributing factor to the personnel action involved. If the  
 11 stay request is denied, the employee, former employee, or  
 12 applicant may submit an interlocutory appeal for expe-  
 13 dited review by the Board.”.

14 (c) JOINING SUBSEQUENT AND RELATED CLAIMS  
 15 WITH PENDING LITIGATION.—

16 (1) IN GENERAL.—Section 1221 of title 5,  
 17 United States Code, is amended—

18 (A) by redesignating subsections (h), (i),  
 19 and (j) as subsections (i), (j), and (k), respec-  
 20 tively; and

21 (B) inserting after subsection (g) the fol-  
 22 lowing:

23 “(h) During a pending proceeding, subsequent per-  
 24 sonnel actions may be joined if the employee, former em-  
 25 ployee, or applicant for employment demonstrates that re-

1 taliation for protected activity at issue in the pending pro-  
2 ceeding was a contributing factor to subsequent alleged  
3 prohibited personnel practices.”.

4 (2) CONFORMING AMENDMENT.—Section 1222  
5 of title 5, United States Code, is amended by strik-  
6 ing “section 1221(i)” and inserting “section  
7 1221(j)”.

8 (d) PROCEDURAL DUE PROCESS.—Section  
9 1204(b)(1) of title 5, United States Code, is amended by  
10 inserting “in accordance with regulations consistent with  
11 the Federal Rules of Civil Procedure, so far as prac-  
12 ticable” before the period.

13 (e) ATTORNEY FEES.—Section 7701(g)(1) of title 5,  
14 United States Code, is amended by striking “if the em-  
15 ployee or applicant is the prevailing party and” and insert-  
16 ing “if the claim or claims raised by the employee or appli-  
17 cant were not frivolous, unreasonable, or groundless; the  
18 case was a substantial or significant factor in the agency’s  
19 action providing some relief or benefit to the employee or  
20 applicant; and”.

21 **SEC. 6. PROCEDURES OF THE OFFICE OF SPECIAL COUN-**  
22 **SEL.**

23 (a) INVESTIGATIONS OF ALLEGED PROHIBITED PER-  
24 SONNEL PRACTICES.—Section 1212(e) of title 5, United  
25 States Code, is amended by striking “may prescribe such

1 regulations as may be necessary to perform the functions”  
2 and inserting “shall prescribe such regulations as may be  
3 necessary to carry out subsection (a)(2) and may prescribe  
4 any regulations necessary to carry out any of the other  
5 functions”.

6 (b) MANDATORY COMMUNICATIONS WITH COM-  
7 PLAINANTS.—

8 (1) CONTACT INFORMATION.—Section  
9 1214(a)(1)(B) of title 5, United States Code, is  
10 amended by striking clause (ii) and inserting the fol-  
11 lowing:

12 “(ii) shall include the name and contact infor-  
13 mation of a person at the Office of Special Counsel  
14 who—

15 “(I) shall be responsible for interviewing  
16 the complainant and making recommendations  
17 to the Special Counsel regarding the allegations  
18 of the complainant; and

19 “(II) shall be available to respond to rea-  
20 sonable questions from the complainant regard-  
21 ing the investigation or review conducted by the  
22 Special Counsel, the relevant facts ascertained  
23 by the Special Counsel, and the law applicable  
24 to the allegations of the complainant.”.



1           (2) STATEMENT AFTER TERMINATION OF IN-  
2           VESTIGATION.—Section 1214(a)(2)(A)(iv) of title 5,  
3           United States Code, is amended by striking “a re-  
4           sponse” and inserting “specific responses”.

5           (c) QUALIFICATIONS OF SPECIAL COUNSEL.—The  
6           third sentence of section 1211(b) of title 5, United States  
7           Code, is amended by striking “position.” and inserting  
8           “position and has professional experience that dem-  
9           onstrates an understanding of and a commitment to pro-  
10          tecting the merit based civil service.”.

11          (d) ALTERNATIVE DISPUTE RESOLUTION PROGRAM  
12          OF THE OFFICE OF SPECIAL COUNSEL.—Section 1212 of  
13          title 5, United States Code, is amended by adding at the  
14          end the following:

15          “(h) The Office of Special Counsel shall by regulation  
16          provide for one or more alternative methods for settling  
17          matters subject to the jurisdiction of the Office which shall  
18          be applicable at the election of an employee, former em-  
19          ployee, or applicant for employment or at the direction of  
20          the Special Counsel with the consent of the employee,  
21          former employee, or applicant concerned. In order to carry  
22          out this subsection, the Special Counsel shall provide for  
23          appropriate offices in the District of Columbia and other  
24          appropriate locations.”.

1 (e) SUBSTANTIAL LIKELIHOOD DETERMINATIONS.—  
2 Section 1213 of title 5, United States Code, is amended—

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

5 (2) in subsection (c)(1), by inserting “, after  
6 consulting with the person who made the disclosure  
7 on how to characterize the issues,” after “appro-  
8 priate agency head”.

9 (f) DETERMINATION OF STATUTORY REQUIREMENTS  
10 MET.—Section 1213(e) of title 5, United States Code, is  
11 amended—

12 (1) in paragraph (3), by striking “subsection  
13 (e)(1)” and inserting “paragraph (1)”;

14 (2) by redesignating paragraphs (3) and (4) as  
15 paragraphs (4) and (5), respectively; and

16 (3) by inserting after paragraph (2) the fol-  
17 lowing:

18 “(3) Upon receipt of any report of the head of an  
19 agency required under subsection (c), if the Special Coun-  
20 sel is unable to make a determination under paragraph  
21 (2)(A) or (B), the Special Counsel shall require the agency  
22 head to submit any additional information necessary for  
23 the Special Counsel to make such determinations before  
24 any information is transmitted under paragraph (4).”.

1 (g) PUBLIC AND INTERNET ACCESS FOR AGENCY IN-  
2 VESTIGATIONS.—Section 1219 of title 5, United States  
3 Code, is amended by striking subsections (a) and (b) and  
4 inserting the following:

5 “(a) The Special Counsel shall maintain and make  
6 available to the public (including on the website of the Of-  
7 fice of Special Counsel)—

8 “(1) a list of noncriminal matters referred to  
9 heads of agencies under subsection (c) of section  
10 1213, together with—

11 “(A) reports from heads of agencies under  
12 subsection (c)(1)(B) of such section relating to  
13 such matters;

14 “(B) comments submitted under sub-  
15 section (e)(1) of such section relating to such  
16 matters, if the person making the disclosure  
17 consents; and

18 “(C) comments or recommendations by the  
19 Special Counsel under subsection (e)(4) of such  
20 section relating to such matters;

21 “(2) a list of matters referred to heads of agen-  
22 cies under section 1215(c)(2);

23 “(3) a list of matters referred to heads of agen-  
24 cies under subsection (e) of section 1214, together

1 with certifications from heads of agencies under  
2 such subsection; and

3 “(4) reports from heads of agencies under sec-  
4 tion 1213(g)(1).

5 “(b) The Special Counsel shall take steps to ensure  
6 that any list or report made available to the public or  
7 placed on the website of the Office of Special Counsel  
8 under this section does not contain any information the  
9 disclosure of which is prohibited by law or by Executive  
10 order requiring that information be kept secret in the in-  
11 terest of national defense or the conduct of foreign af-  
12 fairs.”.

13 **SEC. 7. REPORTING REQUIREMENTS.**

14 (a) MERIT SYSTEMS PROTECTION BOARD.—Each  
15 annual report submitted by the Merit Systems Protection  
16 Board under section 1206 of title 5, United States Code,  
17 shall, with respect to the period covered by such report,  
18 include—

19 (1) the number of cases and alleged violations  
20 of section 2302 of such title 5 filed with the Board  
21 for each agency, itemized for each prohibited per-  
22 sonnel practice;

23 (2) the number of cases and alleged violations  
24 of section 2302 of such title 5 that the Board deter-  
25 mines for each agency, itemized for each prohibited

1 personnel practice and compared to the total number  
2 of cases and allegations filed with the Board for  
3 each, both with respect to the initial decisions by ad-  
4 ministrative judges and final Board decisions;

5 (3) the number of cases and allegations in  
6 which corrective action was provided, compared to  
7 the total number of cases and allegations filed with  
8 the Board for each, itemized separately for settle-  
9 ments and final Board decisions; and

10 (4) with respect to paragraphs (8) and (9) of  
11 section 2302 (b) of such title 5, the number of cases  
12 in which the Board has ruled in favor of the em-  
13 ployee on the merits of the claim compared to the  
14 total number of cases and allegations filed with the  
15 Board for each, where findings of fact and conclu-  
16 sions of law were issued on whether those provisions  
17 were violated, independent from cases disposed by  
18 procedural determinations, including a separate  
19 itemization of both initial decisions by administrative  
20 judges and final Board decisions for each category.

21 (b) OFFICE OF SPECIAL COUNSEL.—Each annual re-  
22 port submitted under section 1218 of title 5, United  
23 States Code, by the Special Counsel or an employee des-  
24 ignated by the Special Counsel shall, with respect to the  
25 period covered by such report, include—

1           (1) the number of cases and allegations for  
2 each prohibited personnel practice, delineated by  
3 type of prohibited personnel practice;

4           (2) for each type of prohibited personnel prac-  
5 tice, the number of cases and allegations as to which  
6 the Office of Special Counsel found reasonable  
7 grounds to believe section 2302 of such title 5 had  
8 been violated;

9           (3) for each type of prohibited personnel prac-  
10 tice, the number of cases and allegations as to which  
11 the Office of Special Counsel referred the complaint  
12 for full field investigation;

13           (4) for each prohibited personnel practice, the  
14 number of cases and allegations as to which the Of-  
15 fice of Special Counsel recommended corrective ac-  
16 tion;

17           (5) for each prohibited personnel practice, the  
18 number of cases and allegations as to which the Of-  
19 fice of Special Counsel conducted a mediation or  
20 other form of alternative dispute resolution, with  
21 statistics and illustrative examples describing the re-  
22 sults with particularity;

23           (6) the number of instances in which the Office  
24 of Special Counsel referred disclosures submitted  
25 under section 1213 of such title 5 to an agency

1 head, without any finding under subsection (c) or  
2 (g) of such section;

3 (7) a statistical tabulation of results for each  
4 customer satisfaction survey question, both with re-  
5 spect to allegations of prohibited personnel practice  
6 submitted under section 1214 of such title 5 and  
7 disclosures submitted under section 1213 of such  
8 title; and

9 (8) for each provision under section 1216(a) (1)  
10 through (5) and (c) of such title 5, the number of  
11 cases and allegations, the number of field investiga-  
12 tions opened, the number of instances in which cor-  
13 rective action was sought, and the number of in-  
14 stances in which corrective action was obtained.

15 (c) ANNUAL SURVEY.—Section 13(a) of the Act enti-  
16 tled “An Act to reauthorize the Office of Special Counsel,  
17 and for other purposes”, approved October 29, 1994 (5  
18 U.S.C. 1212 note; Public Law 103–424) is amended in  
19 the first sentence by inserting “, including individuals who  
20 disclose information to the Office of Special Counsel under  
21 section 1213” before the period.

○