



## S. 1094 – Department of Veterans Affairs and Whistleblower Protection Act of 2017 (Rubio, R-FL)

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### FLOOR SCHEDULE:

Expected to be considered on Tuesday, June 13.

### TOPLINE SUMMARY:

[S. 1094](#) would codify the Office of Accountability and Whistleblower Protection within the Department of Veterans Affairs (VA) and grant the secretary additional authority to remove employees due to poor performance or misconduct, recoup bonuses and awards, and improve whistleblower protection.

### COST:

The [Congressional Budget Office \(CBO\)](#) estimates that implementing this bill would cost \$3 million over the 2018-2022 period, subject to the availability of appropriated funds. CBO estimates that enacting the bill would affect direct spending over the 2017-2022 period, but not significantly. It would not affect revenues.

### CONSERVATIVE CONCERNS:

- **Expand the Size and Scope of the Federal Government?** Yes, the bill codifies the Office of Accountability and Whistleblower Protection.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

### DETAILED SUMMARY AND ANALYSIS:

Similar to the [VA Accountability First and Appeals Modernization Act](#), which passed the House by a vote of [310-116](#) in September 2016, S. 1094 would authorize the secretary to remove, demote, or suspend VA employees for poor performance or misconduct, including Senior Executive Service (SES) employees. Such employees would receive advance written notice of the decision with an opportunity to respond, and the secretary would be required to make a final decision in writing, including specific reasons supporting the decision, within 15 business days. If an employee chooses to appeal the decision, they may not be placed on administrative leave and may only receive compensation if they are working or approved to use accrued, unused leave. Employees appealing a decision can receive an expedited review by an administrative judge at the Merit Systems Protection Board (MSPB), appeal the administrative judge's decision to the full MSPB, and may grieve a disciplinary action through a collective bargaining agreement subject to the same procedures, timelines, and standards required of the MSPB. Employees that prevail on appeals would be entitled to back pay. Moreover, employees seeking corrective action from the Office of Special Counsel, a permanent federal agency focused, in part, on protecting federal employees from

whistleblower reprisal, could not be removed, demoted, or suspended unless the secretary obtained approval from the Special Counsel.

If an employee is removed due to committing a felony that influenced their job performance, the bill authorizes the secretary to reduce their pension. The individual convicted of the felony would have the opportunity to appeal that order before the Office of Personnel Management, and the final decision must be made 30 days after receiving the appeal. The secretary would also have the authority to recoup bonuses or awards if employees are determined to have engaged in misconduct or poor performance that, had it been known, would have prevented the award or bonus. Employees may appeal that order to the Office of Personnel Management (OPM) within seven business days, and appeals must be decided within 30 business days. The secretary would also be permitted to recoup relocation expenses paid following an act of fraud or malfeasance, with employees permitted to appeal the order to OPM within seven business days and appeals decided within 30 business days.

Additionally, the bill would give the secretary direct hiring authority to hire Directors of Medical Centers and Veterans Integrated Service Networks (VISNs) with demonstrated ability in the medical profession, health care administration, or health care fiscal management.

S. 1094 would also codify the [Office of Accountability and Whistleblower Protection \(OAWP\)](#), which President Trump established via Executive Order to advise and assist the secretary in protecting whistleblowers and disciplining or terminating employees due to poor performance or misconduct. Under the bill, OAWP would track and review investigations and audits performed by the VA Inspector General, VA Medical Inspector, Special Counsel, and Comptroller General of the United States, and be responsible for implementing their recommendations, gathering and analyzing data, and reporting on wrongdoing at the VA. To lead OAWP, the bill would also create a new Assistant Secretary for Accountability and Whistleblower Protection (Assistant Secretary), a presidential appointment subject to Senate confirmation.

The bill would also require the VA to establish and include criteria promoting whistleblower protection as a “critical element” in performance evaluations for supervisory employees. The criteria must include principles for whistleblower protection, like how constructively supervisory employees: (1) respond to reported concerns; (2) take action to resolve reported concerns; and, (3) foster an environment in which employees feel comfortable reporting concerns. The VA must update its website to include the rights of an employee to make a whistleblower disclosure.

Finally, the bill requires the VA to complete certain reports. OAWP would be required to submit to the VA and Congress a report on methods used to investigate VA employees and whether these methods are used to retaliate against whistleblowers within 540 days after enactment. Further, the secretary would be required to report to Congress on the effect of the bill on morale, engagement, hiring, promotion, retention, discipline, and productivity of SES employees within two years of enactment. The secretary would also be required to report to Congress on the outcomes of VA disciplinary actions, including analysis and suggestions for improvement, by December 31, 2017.

### **COMMITTEE ACTION:**

This bill was introduced by Senator Rubio (R-FL) on May 11, 2017 and referred to the Senate Committee on Veterans Affairs. The Committee reported the bill with an amendment in the nature of a substitute on May 24, and was agreed to in the Senate by voice vote on June 6.

### **ADMINISTRATION POSITION:**

No Statement of Administration Policy is available at this time.

### **CONSTITUTIONAL AUTHORITY:**

Constitutional authority statements are not required for Senate bills.