

Calendar No. 646

111TH CONGRESS }
2d Session }

SENATE

{ REPORT
111-350

GOVERNMENT ACCOUNTABILITY OFFICE
IMPROVEMENT ACT OF 2010

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 2991

TO AMEND TITLE 31, UNITED STATES CODE, TO ENHANCE THE
OVERSIGHT AUTHORITIES OF THE COMPTROLLER GENERAL,
AND FOR OTHER PURPOSES



NOVEMBER 18, 2010.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

99-010

WASHINGTON : 2010

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GOVERNMENT ACCOUNTABILITY OFFICE IMPROVEMENT ACT OF 2010

NOVEMBER 18, 2010.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 2991]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2991) to amend title 31, United States Code, to enhance the oversight authorities of the Comptroller General, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

I. PURPOSE AND SUMMARY

S. 2991, the Government Accountability Office Improvement Act of 2010, responds to several efforts in recent years to curtail the authority of the Government Accountability Office (GAO), a legislative branch agency that serves as Congress' investigative arm. The bill both confirms and enhances GAO's investigative powers by making clear that: the Comptroller General (the head of GAO) has standing to pursue litigation to compel access to federal agency information; GAO has the right to make and retain copies of agency records; GAO can administer oaths to witnesses when conducting certain types of investigations; and GAO has the authority to access specific categories of records that have been denied to GAO by the Department of Health and Human Services, the Food and Drug Administration, the Federal Trade Commission, and the Department of Justice. S. 2991 also confirms GAO's responsibility to protect sensitive information and requires GAO to prescribe the policies necessary to protect proprietary or trade secret information from public disclosure.

II. BACKGROUND AND NEED FOR THE LEGISLATION

Congress relies on GAO in carrying out the investigative and oversight functions vested in the legislative branch. The GAO helps inform the Congress, executive agencies, and the public about areas and programs within the federal government that are performing well, and those that need to be improved or are vulnerable to waste, fraud, abuse, and mismanagement. GAO's audits provide reliable assessments as to whether the taxpayers are receiving full value from important government programs.

To carry out this role, GAO has had a long-standing statutory right of access to information and records in the possession of federal agencies. Although many access disputes are long-standing, several recent efforts by the executive branch to withhold information from GAO highlight how Congress' ability to legislate effectively, conduct meaningful oversight, and audit the use of appropriated funds can be impeded when GAO is denied information. S. 2991 is intended to increase the effectiveness of GAO by ensuring that GAO is not unreasonably restricted in its efforts to secure necessary information in the course of performing its auditing and investigative functions for the Congress.

S. 2991 also responds to a judicial decision that questioned GAO's authority to compel production of material from the executive branch.¹ In 1980, Congress passed legislation authorizing the Comptroller General to "bring a civil action in the district court of the United States for the District of Columbia to require the head of the agency to produce a record[.]"² In litigation arising from GAO's efforts to obtain information about the operations of former Vice President Cheney's energy task force, the U.S. District Court for the District of Columbia held that the Comptroller General lacked standing to enforce GAO's right to information.³ S. 2991 makes clear that, contrary to the Court's decision, the Comptroller General has standing to pursue such cases. Specifically, S. 2991 makes clear that the Comptroller General is authorized to obtain agency records necessary to discharge his audit, evaluation, and investigative duties on behalf of Congress. Both GAO and Congress face cognizable injury when the Comptroller General is denied access to agency records sought to fulfill his statutory mission to inform Congress. This "informational" injury is sufficient to satisfy the constitutional requirement of a justiciable "case or controversy" to enable the Comptroller General to pursue a civil action to enforce GAO's statutory right to access agency records to fulfill its reporting responsibilities to Congress. Thus, the bill definitively reaffirms the Comptroller General's authority to bring civil actions, as necessary, to obtain agency records required to discharge his duties.

The decision in *Walker v. Cheney* is inconsistent with the Comptroller General's role and responsibility set forth in GAO's statute and congressional intent. The decision undermines GAO's ability to successfully carry out the investigative responsibilities delegated to it by Congress as well as Congress' constitutional prerogatives to determine how best to carry out its oversight responsibilities. For

¹ *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

² Pub. L. No. 96-226, codified at 31 U.S.C. § 716(b)(2).

³ *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

these reasons, S. 2991 reaffirms and makes explicit the authorization that Congress gave to the Comptroller General to redress the injury-in-fact sustained when agencies improperly withhold material from GAO, by initiating a lawsuit, without the need for additional approval. It is this Committee's expectation that before pursuing such litigation the Comptroller General will, as he did prior to filing *Walker v. Cheney*, first exhaust other avenues that are available to obtain the necessary information. Should such attempts fail, however, it is the intention of Congress to allow the Comptroller General to seek a judicial remedy to enforce GAO's right to information under the law.

S. 2991 also reaffirms that GAO not only has the statutory right to inspect agency records,⁴ but also to make and retain copies of agency records. A number of court precedents have established that the statutory right to inspect a record implies the right to inspect them in an effective manner, which would include the copying of documents.⁵ In order for GAO to effectively carry out its statutory responsibilities, it is necessary for GAO to make and retain copies of such records. At times, however, GAO has found its audit, evaluation, and investigative efforts frustrated and delayed by agencies that insist that GAO review records only on site, without making copies, even in situations that do not involve sensitive information or any other practical justifications for denying GAO the ability to copy necessary records. Accordingly, S. 2991 specifies that GAO has a right to make and retain copies of records.

S. 2991 further strengthens GAO's authorities by expanding the Comptroller General's authority to administer oaths. Presently, the Comptroller General is authorized to administer oaths only "when auditing and settling accounts."⁶ When GAO was established in 1921 as the General Accounting Office, its principal focus was auditing accounts, but that is no longer the case. Congress has since called upon the Comptroller General to perform many other audit, investigative, and evaluative roles. These roles periodically entail situations involving potential fraud or attempts to defraud the United States or irregularities or misconduct of an employee or agent of the United States. In such situations, the ability to administer oaths can be an important tool for the Comptroller General to accomplish GAO's work for the Congress.

S. 2991 also addresses longstanding problems GAO has faced with certain federal agencies that have resisted GAO scrutiny. The bill makes clear GAO's existing right to access information at the Department of Health and Human Services (HHS), the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and the Department of Justice (DOJ). Despite arguments to the contrary, GAO has rightful access to information from these agencies, including in certain contested circumstances. For example, HHS has construed the Social Security Act as precluding GAO access to the National Directory of New Hires, a database of employment information critical to investigations of fraud in certain Social Security Act programs, because GAO is not expressly listed as an authorized recipient of the data. The new 31 U.S.C. § 721(a) would

⁴31 U.S.C. § 716(a).

⁵See *Westside Ford, Inc. v. United States*, 206 F.2d 627, 634 (9th Cir., 1953); *Riley v. McGarry*, 248 F. Supp. 545 (D. Mass, 1966).

⁶31 U.S.C. § 711(4).

prohibit HHS from denying or limiting GAO's access to any material merely because governing statutes do not expressly identify GAO as a recipient of information or provide for its access to information, thereby confirming GAO's existing statutory right of access in these types of cases.

Similarly, the FDA has construed a provision of the Federal Food, Drug, and Cosmetic Act to authorize it to disclose trade secrets information to GAO only for studies requested by a chair of a committee or subcommittee of jurisdiction, and only when the requests specifically refer to GAO's need for trade secrets information. FDA does not separate trade secrets information from other information on regulated entities that is needed for audits and investigations and, thus, according to GAO, FDA's view has adversely affected GAO's access to a wide range of information beyond trade secrets. Gaining access to needed information has involved time-consuming procedural steps, including the redaction of trade secrets information, and substantial delays in GAO's work. The new section 721(b) would remove any doubt as to GAO's authority to obtain trade secrets information from the FDA.

The FTC and the DOJ have denied GAO information based on their reading of the Hart-Scott-Rodino Act, which requires companies to file information with the FTC and DOJ before mergers and other transactions can be consummated. The FTC and DOJ have routinely denied GAO access to pre-merger information and argue that under the Hart-Scott-Rodino Act and related case law they can provide such information only to a Committee or Subcommittee Chair. The Hart-Scott-Rodino Act exempts from public disclosure, under the Freedom of Information Act (FOIA), the pre-merger materials required to be filed with the FTC and the Department of Justice. FOIA does not apply to GAO, however, so GAO has access to these pre-merger filings under GAO's basic access authority. The new section 721(c) makes clear that GAO has the authority to obtain this information from the FTC and the DOJ.

The Committee recognizes GAO's exemplary record of protecting the most sensitive information it routinely obtains from agencies across government—ranging from highly classified national security documents to taxpayer return information—and the Committee is confident that GAO will rigorously maintain the confidentiality of information obtained under these new sections.

Finally, the Committee notes that S. 2991 responds primarily to long-standing problems GAO has faced in its efforts to obtain information and material from executive branch agencies. During the Committee's consideration of the bill, the Judicial Conference of the United States expressed concerns about how these authorities would apply to it. It shared its view that the judicial branch has a unique role, structure, operations, and mission different from that of the executive branch. It believes that questions remain regarding the appropriate process and procedures under which GAO accesses and obtains certain information from the judicial branch. Those questions were outside the immediate scope of this bill. The Committee expects GAO, in consultation with the Administrative Office of the U.S. Courts (AOUSC) and other appropriate entities, to develop GAO protocols outlining the procedures it will follow in future reviews relating to the judicial branch. GAO and the AOUSC should inform this and other relevant Committees when

they have completed this effort and whether they believe additional legislative action is warranted.

III. LEGISLATIVE HISTORY

On February 4, 2010, Senators McCaskill and Collins introduced S. 2991, which was read twice and referred to the Senate Committee on Homeland Security and Governmental Affairs. The Committee considered the bill on July 28, 2010. The Committee adopted, by voice vote, a substitute amendment offered by Senators McCaskill and Collins and then ordered the bill favorably reported, also by voice vote. Members present for the votes on the substitute amendment and on the bill were Senators Lieberman, Levin, Akaka, Carper, Pryor, Landrieu, McCaskill, Tester, Kaufman, Collins, and McCain.

The substitute amendment makes four significant changes to the original bill. First, the substitute clarifies GAO's existing authority to access information by specifically stating that three particular statutes under which agencies have routinely denied GAO access do not limit GAO's authority to obtain records and information. These statutes are: (1) the Social Security Act; (2) the Federal Food, Drug and Cosmetic Act; and (3) the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Second, the substitute amendment adds a requirement that GAO prescribe policies and procedures for the protection from public disclosure of proprietary or trade secret information. Third, the substitute amendment strikes the language in the bill as introduced allowing for interviews of agency employees. Lastly, the substitute substantially narrowed a provision in the bill as introduced regarding GAO's authority to administer oaths to witnesses. Under the new provision, GAO may administer oaths only if the Comptroller General gives prior and express approval and only if the testimony is in the course of specific types of investigations. The new language is modeled on the authority available to executive departments under 5 U.S.C. § 303, which allows lawfully assigned investigators to administer an oath to a witness who is testifying or being deposed in the course of an investigation into fraud or employee misconduct or irregularity.⁷

IV. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1: Short title

The short title of the bill is the "Government Accountability Office Improvement Act of 2010."

Section 2: Authority to obtain records

Section 2(a) amends 31 U.S.C. § 716(a) to explicitly reaffirm that Congress has authorized GAO to pursue civil actions if federal agencies improperly withhold records from GAO.

Section 2(b) also amends 31 U.S.C. § 716(a) to make clear that the Comptroller General has not only the right to inspect agency records, but also to make and retain copies of such records.

⁷ 5 U.S.C. § 303.

Section 3: Administering oaths

Section 3 amends 31 U.S.C. § 711 to modernize the Comptroller General's authority, subject to appropriate safeguards, to administer oaths to witnesses in specific types of GAO investigations. Section 3 amends GAO's existing authority to allow the Comptroller General to administer oaths to witnesses when investigating fraud, attempts to defraud the United States, or irregularities or misconduct by a federal employee or agent.

Section 4: Access to certain information

Section 4(a) adds a new section, 31 U.S.C. § 721, which makes clear that the Social Security Act, the Federal Food, Drug, and Cosmetic Act, and the Hart-Scott-Rodino Act do not limit GAO's right of access to information.

Section 721(a) confirms GAO's existing authority to review information at the Department of Health and Human Services, including the National Directory of New Hires.

Section 721(b) confirms GAO's existing authority to review trade secret information held by the Food and Drug Administration.

Section 721(c) confirms that GAO has the authority to access pre-merger filing information with the Federal Trade Commission and the Department of Justice.

In recognition of the sensitivity of the information that agencies may provide to GAO, new section 721(d) requires GAO to prescribe policies and procedures necessary to protect proprietary or trade secrets information from public disclosure. It also states that it does not modify 18 U.S.C. § 1905, which prohibits the disclosure of trade secrets and other sensitive information, or affect the applicability of 31 U.S.C. § 716(e), which requires GAO to safeguard the confidentiality of information and also protects against unauthorized disclosure.

New section 721(e) makes clear that the references to specific statutory provisions in this section are not intended to affect GAO's access to information under existing statutes that are not specifically identified in the new section 721. The Committee expects that agencies will treat situations covered by the new section 721, and analogous situations not expressly addressed in a similar manner, thus giving full effect to GAO's existing right of access and facilitating rather than impeding congressional oversight.

Section 5: Agency reports

This section amends 31 U.S.C. § 720(b) to allow an agency more flexibility in reporting to Congress on its response to a GAO recommendation. Currently, agencies must report two months after issuance of a GAO report on "action taken." This provision allows the agency to report on actions "planned" or taken in response to a GAO recommendation. In addition, the section expands the list of recipients of an agency report to include GAO and the congressional committees of jurisdiction over the agency program or activity that is the subject of the recommendation.

V. REGULATORY IMPACT AND EVALUATION

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered

the regulatory impact of this bill. The Congressional Budget Office states that the bill contains no intergovernmental or private sector mandates as defined in the Unfunded Mandate Reform Act and would not affect the budgets of state, local, or tribal governments. The enactment of this legislation will not have significant regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

AUGUST 5, 2010.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2991, the Government Accountability Office Improvement Act of 2010.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 2991—Government Accountability Office Improvement Act of 2010

S. 2991 would provide additional authorities to the Government Accountability Office (GAO), including the ability to obtain certain records and information, and to administer oaths. The legislation also would require GAO to establish procedures to protect certain proprietary information that it collects when carrying out its responsibilities.

CBO estimates that implementing the legislation would have no significant impact on the federal budget. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 2991 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On June 9, 2009, CBO transmitted a cost estimate for H.R. 2646, the Government Accountability Office Improvement Act of 2009, as ordered reported by the House Committee on Oversight and Government Reform on June 4, 2009. The two pieces of legislation and CBO's cost estimates are similar.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the following changes in existing law made by S. 2991, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

TITLE 31—MONEY AND FINANCE

Subtitle I—General

CHAPTER 7—GOVERNMENT ACCOUNTABILITY OFFICE

Subchapter I—Definitions and General Organization

	*	*	*	*	*	*	*
Section							
701. Definitions							
	*	*	*	*	*	*	*
721. <i>Access to certain information.</i>							
	*	*	*	*	*	*	*

SECTION 711. GENERAL AUTHORITY.

The Comptroller General may

(1) * * *

* * * * *

[(4) administer oaths to witnesses when auditing and settling accounts.]

(4) administer oaths to witnesses when auditing and settling accounts and, with the prior express approval of the Comptroller General, when investigating fraud or attempts to defraud the United States, or irregularity or misconduct of an employee or agent of the United States.

* * * * *

TITLE 31—MONEY AND FINANCE

Subtitle I—General

CHAPTER 7—GOVERNMENT ACCOUNTABILITY OFFICE

Subchapter II—General Duties and Powers

* * * * *

SECTION 716. AVAILABILITY OF INFORMATION AND INSPECTION OF RECORDS.

(a)(1) The Comptroller General is authorized to obtain such agency records as the Comptroller General requires to discharge his duties (including audit, evaluation, and investigative duties), including through the bringing of civil actions under this section. In reviewing a civil action in this section, the court shall recognize the continuing force and effect of the authorization in the preceding sentence until such time as the authorization is repealed pursuant to law.

[(a)](2) Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may **[inspect an agency record] *inspect, and make and retain copies of, an agency record to get the information.***

This subsection does not apply to expenditures made under section 3524 or 3526(e) of this title.

* * * * *

SECTION 720. AGENCY REPORTS.

(a) * * *

(b) When the Comptroller General makes a report that includes a recommendation to the head of an agency, the head of the agency shall submit a written statement on action taken or planned on the recommendation by the head of the agency. The statement shall be submitted to—

[(1) the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives before the 61st day after the date of the report; and]

(1) the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, the congressional committees with jurisdiction over the agency program or activity that is the subject of the recommendation, and the Government Accountability Office before the 61st day after the date of the report; and

(2) the Committees on Appropriations of both Houses of Congress in the first request for appropriations submitted more than 60 days after the date of the report.

* * * * *

SECTION 721. ACCESS TO CERTAIN INFORMATION.

(a) *No provision of the Social Security Act, including section 453(1) of that Act (42 U.S.C. 653(1)), shall be construed to limit, amend or supersede the authority of the Comptroller General to obtain any information or to inspect or copy any record under section 716 of this title.*

(b) *No provision of the Federal, Food, Drug and Cosmetic Act, including section 301(j) of that Act (21 U.S.C. 331(j)), shall be construed to limit, amend, or supersede the authority of the Comptroller General to obtain any information or to inspect or copy any record under section 716 of this title.*

(c) *No provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Public Law 94-435) and the amendments made by that Act shall be construed to limit, amend, or supersede the authority of the Comptroller General to obtain any information or to inspect or copy any record under section 716 of this title, including with respect to any information disclosed to the Assistant Attorney General of the Antitrust Division of the Department of Justice or the Federal Trade Commission for purposes of pre-merger review under section 7A of the Clayton Act (15 U.S.C. 18a).*

(d)(1) *The Comptroller General shall prescribe such policies and procedures as are necessary to protect from public disclosure proprietary or trade secret information obtained consistent with this section.*

(2) *Nothing in this section shall be construed—*

(A) to alter or amend the prohibitions against the disclosure of trade secret or other sensitive information prohibited by section 1905 of title 18 and other applicable laws; or

(B) to affect the applicability of section 716(e) of this title, including the protections against unauthorized disclosure contained in that section, to information obtained consistent with this section.

(e) Specific references to statutes in this section shall not be construed to affect access by the Government Accountability Office to information under statutes that are not so referenced.

