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GOVERNMENT ACCOUNTABILITY OFFICE IMPROVEMENT ACT OF 2008

JULY 24, 2008.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. WAXMAN, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 6388]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 6388) to provide additional authorities to the Comptroller General of the United States, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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69–006

The amendment is as follows:

In section 721 of title 31, United States Code, as proposed to be added by section 4, add at the end the following new subsection (and make appropriate conforming changes):

> "(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.".

PURPOSE AND SUMMARY

H.R. 6388, the Government Accountability Office Improvement Act of 2008, was introduced by Chairman Henry A. Waxman on June 26, 2008, with 18 other committee chairs as original cosponsors. H.R. 6388 enhances and clarifies the investigative authorities of the Government Accountability Office (GAO) in a number of important ways.

BACKGROUND AND NEED FOR LEGISLATION

GAO assists Congress in identifying waste, fraud, and abuse in federal programs and recommending ways to make government work better. Because of its vital role, GAO needs unfettered access to federal agencies. Efforts by executive branch officials to withhold information from GAO impede Congress' ability to legislate effectively, conduct meaningful oversight, and audit the use of appropriated funds.

The bill improves the investigative authorities of GAO in a number of ways. The bill makes clear that GAO is authorized to pursue civil actions if federal agencies improperly withhold federal records from it. H.R. 6388 also gives GAO the express authority to interview federal employees when conducting evaluations and investigations and gives GAO the authority to administer oaths. In addition, the bill confirms GAO's existing right to important records to which it has been denied access, including records at the Food and Drug Administration, the Centers for Medicare and Medicaid Services, and the Federal Trade Commission. Finally, the bill requires GAO to report to Congress if federal agencies do not cooperate with it.

LEGISLATIVE HISTORY

The Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia held a hearing on March 13, 2008, on legislation to improve the oversight, administration, and investigative authorities of GAO. The witnesses were the Honorable Gene Dodaro, Acting Comptroller General, GAO; Paul Coran, Chairman, Personnel Appeals Board, GAO; Anne Wagner, General Counsel,

Personnel Appeals Board, GAO; Curtis Copeland, Specialist in American National Government, Congressional Research Service; Shirley Jones, Representative, GAO's Employee Advisory Committee; Janet C. Smith, President, Ivy Planning Group, LLC; and Jacqueline Harpp, International Federation of Professional & Technical Engineers, AFL-CIO.

Chairman Waxman introduced H.R. 6388, the Government Accountability Office Improvement Act of 2008, on June 26, 2008.

SECTION-BY-SECTION

Section 1: Short title

The short title of the bill is the "Government Accountability Office Improvement Act of 2008."

Section 2: Authority to obtain records

This section makes clear that Congress authorizes GAO to pursue civil actions if federal agencies or the White House improperly withhold federal records. In litigation arising from GAO's efforts to obtain information about the operations of Vice President Cheney's energy task force, a federal district court held that the Comptroller General lacked standing to enforce GAO's right to information (*Walker* v. *Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002)). This case was wrongly decided and misconstrued congressional intent regarding the role of the Comptroller General. The decision was also an improper invasion into Congress' constitutional prerogatives to determine how best to carry out its investigative responsibilities. While another court considering this issue would almost certainly reach a different decision, passing new legislation is the most expedient way to confirm the authority of the Comptroller General. For this reason, this section contains express authorization from Congress to the Comptroller General to pursue litigation if documents are improperly withheld from GAO, without the need for additional approval as the *Walker* v. *Cheney* court incorrectly suggested. In effect, this provision represents a legislative repudiation of the court's decision in *Walker* v. *Cheney*.

While GAO has had a longstanding right of access to agency records, its audit, evaluation, and investigation efforts have occasionally been frustrated by a lack of willingness on the part of agency officials and employees to discuss the information contained in those records, as well as background information relevant to programs under review. In addition, many agency activities are not documented for subsequent audit, and cooperation from these individuals provides the only viable means for GAO to obtain critical information about these activities. Accordingly, this section also enhances GAO's existing access authority by providing an express right to interview agency officers and employees under section 716(a) of Title 31.

Section 3: Administering oaths

This section amends 31 U.S.C. § 711 to allow the Comptroller General greater authority, subject to appropriate safeguards, to administer oaths to witnesses. Presently, section 711 authorizes the Comptroller General to administer oaths when auditing and settling accounts. When GAO was established in 1921, auditing and

settling accounts were its principal focus, but that is no longer the case. The Comptroller General has been called upon to perform many other audit, investigative, and adjudicative roles for the Congress. These roles periodically raise situations involving potential criminal or ethical violations or conflicting testimony or assertions concerning material and sensitive subjects. In such situations, the ability to administer oaths can be an important tool for the Comptroller General to accomplish the Comptroller General's work for the Congress.

Section 4: Access to certain information

Section 4 adds a new section 721 to title 31 to ensure that provisions contained in the Social Security Act, the Federal Food, Drug, and Cosmetic Act, and the Hart-Scott-Rodino Act are not construed to limit GAO's rights of access to agency information.

The new section 721(a) is intended in part to correct an erroneous interpretation by the Department of Health and Human Services of provisions of the Social Security Act pertaining to the Medicare prescription drug benefit (Part D). Under its interpretation, the Department has refused to disclose certain information related to Medicare Part D to GAO. The new section 721(a) provision confirms GAO's right to obtain information from the Department and ensures that GAO is able to conduct congressionally requested and statutorily required audits, including audits of Parts C and D of the Medicare program. The Committee is aware that there are efforts by the Ways and Means Committee to pass similar corrective legislation to clarify the rights that other congressional support agencies, like the Congressional Research Service, have to this information. The Committee fully supports these efforts, but could not include those provisions in this bill because it does not have jurisdiction over legislative branch agencies other than GAO.

The Food and Drug Administration, citing a provision of the Federal Food, Drug, and Cosmetic Act, has taken the position that it will only disclose trade secrets information to GAO for studies conducted at the request of a chair of a committee or subcommittee of jurisdiction, and only when the requests for the studies specifically refer to GAO's need for such information. The new section 721(b) is designed to remove any doubt as to GAO's authority to obtain trade secrets information from the Food and Drug Administration, including when GAO is conducting an investigation at the Comptroller General's initiative.

The Federal Trade Commission has cited provisions of the Hart-Scott-Rodino Act to deny GAO access to pre-merger information and will only provide such information to the chairman of a committee or subcommittee of Congress. Hart-Scott-Rodino 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. However, because FOIA does not apply to GAO, access to these pre-merger filings under GAO's basic access authority should continue to apply. The new section 721(c) makes clear GAO's authority to obtain this information from the Federal Trade Commission and the Department of Justice.

Section 5: Comptroller General reports

This section amends 31 U.S.C. § 719 by adding two new reporting requirements. The first is designed to provide critical information to the Congress regarding the overall cooperation of federal agencies in all aspects of the work of GAO. It does so by requiring that for all agencies subject to the Chief Financial Officers Act of 1990 (31 U.S.C. §§ 901–903), and other agencies designated by the Comptroller General, the Comptroller General will report to Congress annually regarding the overall degree of cooperation exhibited by the agencies or their staff in making personnel available for interviews, in providing written answers to questions, in submitting to an oath authorized by the Comptroller General, in granting access to records, in providing timely comments to draft reports, in adopting report recommendations, and in responding to such matters as the Comptroller General deems appropriate. Section 5 also requires that the Comptroller General report to Congress, as soon as practicable, when an agency or other entity does not respond to a request regarding the matters discussed above.

These reporting requirements will enable the Comptroller General to keep Congress apprised of the general state of cooperation between GAO and other agencies and entities concerning the work of the office. While the Comptroller General will advise Congress as soon as practicable when GAO concludes that an agency or entity is not reasonably cooperating in an audit or investigation, it is anticipated that the annual report will provide greater insight into the ongoing relationships between GAO and the agencies it audits and investigates in a balanced and fair manner.

EXPLANATION OF AMENDMENTS

During the business meeting Rep. Waxman, together with Ranking Member Davis, offered an amendment to the bill which passed by voice vote. The amendment to section 4 of the bill adds as new subsection 721(d) to title 31, United States Code, a requirement that GAO prescribe procedures necessary to ensure that the trade secret and other sensitive information protected from public disclosure covered by that section remains confidential. The amendment also provides that nothing in the section shall be construed to amend the prohibitions against the disclosure of such information contained in section 1905 of title 18. The amendment further ensures that section 716(e) of title 31, which requires GAO to treat information it receives in the same manner as the head of the agency from which it is received would treat such information, continues to apply.

COMMITTEE CONSIDERATION

On Wednesday, July 16, 2008, the Committee met in open session and favorably ordered H.R. 6388 to be reported to the House by a voice vote.

ROLLCALL VOTES

No rollcall votes were held.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services and accommodations. H.R. 6388 contains no provisions which relate to the terms and conditions of employment.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report, including the need to clarify and enhance the investigative authorities of GAO.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report, including increasing the efficiency and effectiveness of GAO.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 6388. Article I, section 8, clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., section 5(b).

UNFUNDED MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement on whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 6388 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 6388. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its

report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 6388 from the Director of the Congressional Budget Office:

JULY 17, 2008.

Hon. HENRY A. WAXMAN,
Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 6388, the Government Accountability Office Improvement Act of 2008.

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

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 6388—Government Accountability Office Improvement Act of 2008

H.R. 6388 would provide additional authorities to the Government Accountability Office (GAO), including the authority to obtain certain records and administer oaths to witnesses. The bill also would require GAO to establish procedures to protect certain proprietary information that it collects when carrying out its responsibilities.

CBO estimates that implementing H.R. 6388 would have no significant effect on the federal budget. The additional authorities provided by the bill would facilitate GAO's audit procedures and other activities. The requirement to protect confidential information would have no effect because the agency already has such procedures in place.

H.R. 6388 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

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

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, 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, UNITED STATES CODE

* * * * * * *

SUBTITLE I—GENERAL

* * * * * * *

CHAPTER 7—GOVERNMENT ACCOUNTABILITY OFFICE

SUBCHAPTER I—DEFINITIONS AND GENERAL ORGANIZATION

Sec.
701. Definitions.

* * * * * * *

SUBCHAPTER II—GENERAL DUTIES AND POWERS

* * * * * * *

721. Access to certain information.

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SUBCHAPTER II—GENERAL DUTIES AND POWERS

§ 711. General authority

The Comptroller General may—

(1) * * *

* * * * * * *

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

(4) administer oaths to witnesses, except that, in matters other than auditing and settling accounts, the authority of an officer or employee to administer oaths to witnesses pursuant to a delegation under paragraph (2) shall not be available without the prior express approval of the Comptroller General (or a designee).

* * * * * * *

§ 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 under 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 *and interview agency officers and employees* to get the information. This subsection does not apply to expenditures made under section 3524 or 3526(e) of this title.

* * * * * * *

§ 719. Comptroller General reports

(a) * * *

(b)(1) The Comptroller General shall include in the report to Congress under subsection (a) of this section—

(A) * * *

(B) information on carrying out duties and powers of the Comptroller General under clauses (A) and (C) of this paragraph, subsections (g) and (h) of this section, and sections 717, 731(e)(2), 734, 1112, and 1113 of this title; **[**and**]**

(C) the name of each officer and employee of the Government Accountability Office assigned or detailed to a committee of Congress, the committee to which the officer or employee is assigned or detailed, the length of the period of assignment or detail, a statement on whether the assignment or detail is finished or continuing, and compensation paid out of appropriations available to the Comptroller General for the period of the assignment or detail that has been completed**[**.**]***; and*

(D) for agencies subject to sections 901 to 903 and other agencies designated by the Comptroller General, an assessment of their overall degree of cooperation in making personnel available for interview, providing written answers to questions, submitting to an oath authorized by the Comptroller General under section 711, granting access to records, providing timely comments to draft reports, adopting recommendations in reports and responding to such other matters as the Comptroller General deems appropriate.

* * * * * * *

(c) The Comptroller General shall report to Congress—

(1) * * *

(2) on the adequacy and effectiveness of—

(A) * * *

(B) inspections by an agency of offices and accounts of fiscal officials; **[**and**]**

(3) as frequently as practicable on audits carried out under sections 713 and 714 of this title**[**.**]***; and*

(4) as soon as practicable when an agency does not, within a reasonable time, respond to a request by the Comptroller General regarding any matter described in subsection (b)(1)(D).

* * * * * * *

§ 721. Access to certain information

(a) No provision of the Social Security Act shall be construed to limit, amend, or supersede the authority of the Comptroller General to obtain any information, to inspect any record, or to interview any officer or employee under section 716 of this title, including with respect to any information disclosed to or obtained by the Secretary of Health and Human Services under part C or D of title XVIII of the Social Security Act.

(b) No provision of the Federal Food, Drug, and Cosmetic Act shall be construed to limit, amend, or supersede the authority of the Comptroller General to obtain any information, to inspect any record, or to interview any officer or employee under section 716 of this title, including with respect to any information concerning any method or process which as a trade secret is entitled to protection.

(c) No provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 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, to inspect any record, or to interview any officer or employee 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.

* * * * * * *

ADDITIONAL VIEWS

I had several concerns about H.R. 6388 as originally introduced. The bill would have included new language giving GAO specific access to Medicare Part D data held by the Department of Health and Human Services as well as trade secrets data held by the Food and Drug Administration. Congress has access to that information now and no new language should be necessary. The original bill also included broad language to expand GAO's authority to interview agency employees and administer oaths to witnesses in conjunction with investigations.

Generally, I had concerns that, by so substantially increasing GAO's investigative powers, we might be triggering a chilling effect on GAO's relationship with federal agencies—resulting in agencies being less forthcoming in providing information and diminishing GAO's role in improving government operations and promoting best practices in the federal government.

However, the amendment adopted by the Committee improved the original bill. Specifically, section 4 of the bill now includes language to ensure GAO will protect the most sensitive data it obtains under this section. Now, section 4 would clarify GAO's access to data specific to:

(l) Medicare Part D held by the Department of Health and Human Services;

(2) trade secrets held by the Food and Drug Administration; and

(3) proprietary commercial information held by the Antitrust Division of the Justice Department and the Federal Trade Commission.

While GAO maintains it has access to this information under current law, these provisions are intended to remedy problems GAO has encountered in getting agencies to voluntarily turn over such sensitive data.

The amendment adopted by the Committee attempts to ensure this data—containing valuable trade secrets and other confidential commercial—is not disclosed. Specifically, the new language makes clear that any sensitive data obtained by GAO is to be protected against improper disclosure by application of the criminal prohibitions of the Trade Secrets Act, 18 U.S.C. 1905. And, it emphasizes the current protections contained in 31 U.S.C. 716(e). This section in current law requires GAO to maintain the level of confidentiality required of the agency providing the information and subjects GAO employees to statutory penalties for improper disclosure.

While it still is not clear we need section 4 at all, the amendment adopted by the Committee gives me a sufficient level of comfort that information containing trade secrets and other confidential

commercial data to which GAO has access will be protected against improper disclosure.

TOM DAVIS.

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