[DISCUSSION DRAFT]

116TH CONGRESS 1ST SESSION

H. R. 3625

To establish a whistleblower program at the Public Company Accounting Oversight Board, and for other purposes.

Ms. GARCIA of Texas introduced the following bill; which was referred to the Committee on __________________

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A BILL

To establish a whistleblower program at the Public Company Accounting Oversight Board, 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,
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4 SECTION 1. SHORT TITLE.
5 This Act may be cited as the “PCAOB Whistleblower
6 Protection Act of 2019”.
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8 SEC. 2. WHISTLEBLOWER INCENTIVES AND PROTECTION.
9 The Sarbanes-Oxley Act of 2002 is amended—
(1) in section 105 (15 U.S.C. 7215) by adding
at the end the following:

“(f) WHISTLEBLOWER INCENTIVES AND PROTECTION.—

“(1) DEFINITIONS.—In this subsection the fol-
lowing definitions shall apply:

“(A) COVERED PROCEEDING.—The term
‘covered proceeding’ means any disciplinary
proceeding by the Board initiated after the date
of the enactment of this subsection that results
in monetary sanctions exceeding $2,500.

“(B) ORIGINAL INFORMATION.—The term
‘original information’ means information that—

“(i) is derived from the independent
knowledge or analysis of a whistleblower;

“(ii) is not known to the Board from
any other source, unless the whistleblower
is the original source of the information;
and

“(iii) is not exclusively derived from
an allegation made in a disciplinary pro-
ceeding, in a judicial or administrative
hearing, in a governmental report, hearing,
audit, or investigation, or from the news
media, unless the whistleblower is a source of the information.

“(C) Monetary sanctions.—The term ‘monetary sanctions’ means any civil money penalties imposed by the Board under subsection (c)(4) as modified by the Commission under section 107(c)(3).

“(D) Whistleblower.—The term ‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of this Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports, auditor independence, and the obligations and liabilities of accountants with respect thereto, including the rules of the Board issued pursuant to this Act, or professional standards governing auditors and accountants.

“(2) Awards.—

“(A) In general.—In any covered disciplinary proceeding, the Board shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Board that resulted in the board imposing
monetary sanctions, in an aggregate amount determined in the discretion of the Board but equal to—

“(i) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed; and

“(ii) not more than 50 percent, in total, of what has been collected of the monetary sanctions.

“(B) CRITERIA.— In determining the amount of an award made under subparagraph (A), the Commission shall take into consideration—

“(i) the significance of the information provided by the whistleblower to the success of the disciplinary proceeding;

“(ii) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a disciplinary proceeding; and

“(iii) the programmatic interest of the Board in deterring violations by making awards to whistleblowers who provide information that lead to successful enforcement.
“(C) DENIAL OF AWARD.—No award under subparagraph (A) shall be made—

“(i) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Board, a member, officer, or employee of—

“(I) an appropriate regulatory agency (as such term is defined in section 34 of the Securities Exchange Act of 1934);

“(II) the Department of Justice;

“(III) a self-regulatory organization (as such term is defined in section 34 of the Securities Exchange Act of 1934);

“(IV) the Public Company Accounting Oversight Board; or

“(V) a law enforcement organization;

“(ii) to any whistleblower who is convicted of a criminal violation related to the Board finding for which the whistleblower otherwise could receive an award under this section;
“(iii) to any whistleblower who fails to submit information to the Board in such form as the Board may, by rule, require;

“(iv) to any whistleblower who knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; and

“(v) to any whistleblower who uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

“(D) PAYMENT OF AWARDS.—Any amount paid under subparagraph (A) shall be paid from any funds generated from the collection of monetary sanctions.

“(3) REPRESENTATION.—

“(A) PERMITTED REPRESENTATION.—Any whistleblower who makes a claim for an award under paragraph (2) may be represented by counsel.

“(B) REQUIRED REPRESENTATION.—

“(i) IN GENERAL.—Any whistleblower who anonymously makes a claim for an award under paragraph (2) shall be represented by counsel if the whistleblower
anonymously submits the information upon which the claim is based.

“(ii) Disclosure of identity.—
Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Board may require, directly or through counsel, for the whistleblower.

“(4) No contract necessary.—No contract with the Board is necessary for any whistleblower to receive an award under paragraph (2), unless otherwise required by the Board by rule.

“(5) Appeals.—Any determination made under this subsection, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Board. Any such determination, except the determination of the amount of an award if the award was made in accordance with this paragraph, may be appealed to the Commission not more than 30 days after the determination is issue by the Board. The Commission shall review the determination made by the Board in accordance with section 107(e).

“(6) Protection of whistleblowers.—
“(A) Prohibition against retaliation.—No current or former employer may discharge, demote, suspend, threaten, blacklist, harass, directly or indirectly, actively or passively, or in any other manner discriminate against any whistleblower in the terms and conditions of employment, including compensation, because of any lawful act done by the whistleblower in—

“(i) providing information to the Board in accordance with this subsection; 

“(ii) initiating, testifying in, or assisting in any investigation or administrative action of the Board based upon or related to such information; 

“(iii) making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission; and
“(iv) in providing information regarding any conduct that the whistleblower reasonably believes constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the Board to—

“(I) a person with supervisory authority over the whistleblower at the whistleblower’s employer, where such employer is an entity registered with or required to be registered with the Commission, a self-regulatory organization, or a State securities commission or office performing like functions; or

“(II) such other person working for the employer described under subclause (I) who has the authority to investigate, discover, or terminate misconduct.

“(B) ENFORCEMENT OF PROHIBITION AGAINST RETALIATION.—Any whistleblower who alleges discharge or other discrimination or is otherwise aggrieved by an employer in violation of subparagraph (A) may seek relief—
“(i) by filing a complaint with the Secretary of Labor; or

“(ii) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

“(C) PROCEDURE.—

“(i) IN GENERAL.—An action under subparagraph (B)(ii) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

“(ii) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

“(iii) BURDENS OF PROOF.—An action brought under subparagraph (B)(ii)
shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

“(iv) Statute of limitations.—An action under subparagraph (B) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the whistleblower became aware of the violation.

“(v) Jury trial.—A party to an action brought under subparagraph (B) shall be entitled to trial by jury.

“(D) Remedies.—Any whistleblower who prevails in any action brought under this paragraph shall be entitled to all relief necessary to make the whistleblower whole, including—

“(i) reinstatement with the same seniority status that the whistleblower would have had, but for the discrimination;

“(ii) 2 times the amount of back pay otherwise owed to the whistleblower, with interest;

“(iii) consequential and compensatory damages;
“(iv) special damages, including damages for emotional distress and reputational harm; and

“(v) compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees.

“(E) CONFIDENTIALITY.—

“(i) IN GENERAL.—Except as provided in clause (ii), the Board and any officer or employee of the Board may not disclose any information without the written consent of the whistleblower, including information provided by the whistleblower to the Board, which could reasonably be expected to reveal the identity of the whistleblower unless and until the Board is required to disclose such information to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in clause (iv).

“(ii) NOTICE.—If the Board shall, before making information referred to in clause (i) available to a defendant or respondent in connection with a public pro-
ceeding instituted by the Commission or
any entity described in clause (iv), provide
notice to the whistleblower that such infor-
mation is being made available.

“(iii) Rule of construction.—
Nothing in this section is intended to limit,
or shall be construed to limit, the ability of
the Attorney General to present such evi-
dence to a grand jury or to share such evi-
dence with potential witnesses or defend-
ants in the course of an ongoing criminal
investigation.

“(iv) Availability to government
agencies.—

“(I) In general.—Without the
loss of its status as confidential in the
hands of the Board, all information
referred to in clause (i) may, in the
discretion of the Board, when deter-
mined by the Board to be necessary to
accomplish the purposes of this Act
and to protect investors, be made
available to—

“(aa) the Attorney General
of the United States;

...
“(bb) an appropriate regulatory authority;

“(cc) a self-regulatory organization;

“(dd) a State attorney general in connection with any criminal investigation;

“(ee) any appropriate State regulatory authority;

“(ff) the Commission;

“(gg) a foreign securities authority; and

“(hh) a foreign law enforcement authority.

“(II) CONFIDENTIALITY.—Each of the entities described in items (aa) through (ff) of subclause (I) shall maintain such information as confidential in accordance with the requirements established under clause (i) and each of the entities described in subclauses (gg) and (hh) of subclause (I) shall maintain such information in accordance with such assur-
ances of confidentiality as the Board determines appropriate.

“(III) NOTICE.—If the Board makes information referred to in clause (i) available pursuant to subclause (I), the Board shall

“(F) RIGHTS RETAINED.—Nothing in this subsection shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

“(G) UNENFORCEABILITY.—

“(i) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any condition of employment, including a predispute arbitration agreement.

“(ii) REQUIRED ARBITRATION.—Any provision of a predispute arbitration agreement that requires arbitration of a dispute arising under this paragraph shall be invalid and unenforceable.”; and

(2) in section 109(c)(2) (15 U.S.C. 7219(c)(2)) by striking “all funds collected” and inserting “at least 50 percent of funds collected”.

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