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ANTI-BORDER CORRUPTION ACT OF 2010

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R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 3243

TO REQUIRE U.S. CUSTOMS AND BORDER PROTECTION TO ADMINISTER POLYGRAPH EXAMINATIONS TO ALL APPLICANTS FOR LAW ENFORCEMENT POSITIONS WITH U.S. CUSTOMS AND BORDER PROTECTION, TO REQUIRE U.S. CUSTOMS AND BORDER PROTECTION TO COMPLETE ALL PERIODIC BACKGROUND REINVESTIGATIONS OF CERTAIN LAW ENFORCEMENT PERSONNEL, AND FOR OTHER PURPOSES



SEPTEMBER 29, 2010.—Ordered to be printed

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## ANTI-BORDER CORRUPTION ACT OF 2010

SEPTEMBER 29, 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. 3243]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 3243) to require U.S. Customs and Border Protection to administer polygraph examinations to all applicants for law enforcement positions with U.S. Customs and Border Protection, to require U.S. Customs and Border Protection to complete all periodic background reinvestigations of certain law enforcement personnel, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

#### I. PURPOSE AND SUMMARY

The purpose of S. 3243 is to strengthen the ability of U.S. Customs and Border Protection (CBP) to evaluate the suitability for employment of applicants and current law enforcement employees. It would do so by requiring CBP to submit all applicants to a polygraph examination prior to hiring them, and by mandating that CBP clear its existing backlog of periodic reinvestigations of current employees.

#### II. BACKGROUND AND NEED FOR LEGISLATION

According to the Department of Justice, Mexican drug trafficking organizations (DTOs) constitute the greatest organized crime threat to the United States.<sup>1</sup> Mexican DTOs supply illicit narcotics to 230 U.S. cities, and they utilize a broad range of tactics to ensure the successful transport of their narcotics. These tactics include bribery and intimidation of U.S. law enforcement personnel, particularly those charged with securing the border and interdicting contraband. As the United States has increased enforce-

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<sup>1</sup>“National Drug Threat Assessment 2009,” National Drug Intelligence Center, Department of Justice, December 2008, pp III.

ment activities along the U.S. side of the border, the DTOs have increasingly begun to target U.S. law enforcement personnel with bribes and other inducements in order to facilitate moving drug loads across the border.

On March 11, 2010, the Subcommittee on State, Local, and Private Sector Preparedness and Integration (SLPSPI) held a hearing to examine the threat posed by the attempted corruption of CBP law enforcement personnel by the DTOs. CBP testified that the number of corruption investigations within the agency has been increasing, and that the DTOs have been attempting to infiltrate the agency by sending drug traffickers to take the entrance examination.<sup>2</sup> CBP believes that the most effective way to screen new applicants is to administer a polygraph examination. According to CBP, less than one percent of applicants who are cleared by a polygraph examination subsequently fail the required single scope background investigation (SSBI), while roughly 22% of applicants who are not subjected to polygraph investigations fail the SSBI. Because SSBIs cost an average of \$3,200, CBP believes that expanding the use of polygraph examinations would cut down on failed investigations and create a more streamlined and cost-effective process for bringing new applicants on board. Additionally, an internal CBP investigation revealed that candidates who did not take a polygraph examination prior to employment with CBP were more than twice as likely to have a subsequent disciplinary record than those who were administered a polygraph examination.<sup>3</sup>

Despite the benefits of polygraph examinations, the hearing revealed, fewer than fifteen percent of applicants for CBP law enforcement positions receive a polygraph examination during the hiring process. CBP has stated that they want to administer the exam to all applicants, but they have not been given the resources necessary to accomplish this. Of those applicants who do take a polygraph test, CBP finds 60 percent of them ineligible for employment,<sup>4</sup> primarily due to prior drug use or a criminal history that the applicant had not previously disclosed.<sup>5</sup>

The hearing also revealed that CBP has experienced a spike in internal corruption cases in recent years. According to CBP, this spike is largely due to the agency's swift growth. The Border Patrol, for example, has seen its number of agents double, from 10,045 in fiscal year (FY) 2002 to 20,119 in FY 2009.<sup>6</sup> There have been 129 arrests of CBP officers and agents since 2003, and 576 allegations of corruption in 2009 alone. Between FY2005 and FY2010, cases of employee delinquency have increased by 42%.<sup>7</sup> Of-

<sup>2</sup>Testimony of James F. Tomsheck, Assistant Commissioner, Office of Internal Affairs, Customs and Border Protection, "New Border War: Corruption of U.S. Officials By Drug Cartels", Hearing of the Senate Homeland Security and Governmental Affairs Subcommittee on State, Local, and Private Sector Preparedness and Integration; March 11, 2010.

<sup>3</sup>From telephone and email correspondence between Committee and Subcommittee staff and Customs and Border Protection Office of Congressional Affairs, September 13–21, 2010.

<sup>4</sup>Testimony of James F. Tomsheck, Assistant Commissioner, Office of Internal Affairs, Customs and Border Protection, "New Border War: Corruption of U.S. Officials By Drug Cartels", Hearing of the Senate Homeland Security and Governmental Affairs Subcommittee on State, Local, and Private Sector Preparedness and Integration; March 11, 2010.

<sup>5</sup>From Committee and Subcommittee staff discussions with Mr. Tomsheck and Customs and Border Protection Office of Congressional Affairs, July 15, 2010.

<sup>6</sup>From telephone and email correspondence between Committee and Subcommittee staff and Customs and Border Protection Office of Congressional Affairs, July 15, September 13–21, 2010.

<sup>7</sup>Employee delinquency cases include non-mission compromising misconduct, mission-related misconduct, corruption, and mission-compromising corruption. From email correspondence be-

officials at the hearing also said that CBP employees are required to undergo a periodic reinvestigation every five years under DHS' authority to reinvestigate law enforcement officers periodically.<sup>8</sup> However, due to the hiring surge for the Border Patrol, which required CBP to undertake an unprecedented number of SSBI, CBP Internal Affairs has been unable to keep up with the reinvestigations it needs to fulfill this policy. The agency, which currently has approximately 42,000 law enforcement personnel, has a backlog of 10,000 reinvestigations. That backlog is expected to rise to 19,000—45 percent of CBP's total law enforcement positions—by year's end.<sup>9</sup>

To provide a better and more efficient hiring process, S. 3243 would require CBP to give pre-employment polygraphs to all new hires within two years of the bill's enactment. It would also address the reinvestigation backlog by requiring CBP to initiate all pending periodic background reinvestigations within 180 days of enactment. The bill's original text required CBP to eliminate the periodic reinvestigation backlog within six months. However, in response to concerns expressed by DHS regarding the inadequacy of resources to fulfill this requirement, the Committee adopted an amendment to modify the language to require that CBP initiate, rather than complete, periodic reinvestigations within six months.

### III. LEGISLATIVE HISTORY

S. 3243 was introduced on April 21, 2010, by Senator Mark Pryor. The bill was read twice and referred to the Committee on Homeland Security and Governmental Affairs. On July 28, 2010, the Committee considered S. 3243. Senator Pryor offered an amendment that adjusted the mandate that CBP initiate or complete all pending periodic background reinvestigations for CBP personnel within 180 days of enactment to require that CBP merely initiate the pending investigations. The amendment was adopted by voice vote. The Committee ordered the bill as amended reported favorably by voice vote. Members present for the vote on the Pryor amendment were Senators Lieberman, Levin, Akaka, Carper, Pryor, Landrieu, McCaskill, Tester, Collins, and McCain. Senators present for the vote on the bill as amended were Senators Lieberman, Levin, Akaka, Carper, Pryor, Landrieu, McCaskill, Tester, Kaufman, Collins, and McCain.

### IV. SECTION-BY-SECTION ANALYSIS

#### *Section 1. Short title*

This section designates the short title of the bill as the "Anti-Border Corruption Act of 2010."

#### *Section 2. Findings*

This section articulates the findings that CBP has not adhered to its policy of mandatory pre-employment and periodic background

tween Committee staff and Customs and Border Protection Office of Congressional Affairs, September 23, 2010.

<sup>8</sup>See 5 C.F.R. 731 and 732. Additionally, OPM is currently revising 5 CFR 731 (per Executive Order 13488) to require a periodic reinvestigation every five years for all high risk public trust positions.

<sup>9</sup>From telephone and email correspondence between Committee and Subcommittee staff and Customs and Border Protection Office of Congressional Affairs, July 15, September 13–21, 2010.

investigations due to a lack of resources, and that these investigations are crucial in light of recent increases in corruption investigations of CBP personnel.

*Section 3. Requirements with respect to administering polygraph examinations to law enforcement personnel of U.S. Customs and Border Protection*

This section mandates that within 2 years of enactment, CBP subject all applicants for law enforcement positions in CBP to polygraph examinations prior to hiring them. It also requires that CBP initiate all pending periodic background reinvestigations within 180 days of enactment.

*Section 4. Progress report*

This section requires the Secretary of Homeland Security to report to Congress every 180 days for the two years following enactment of the bill on the progress made by CBP in complying with the mandates in section 3 of the bill.

V. EVALUATION OF REGULATORY IMPACT

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 effect state, local, and tribal governments. The enactment of this legislation will not have significant regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

SEPTEMBER 28, 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. 3243, the Anti-Border Corruption Act of 2010.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

*S. 3243—Anti-Border Corruption Act of 2010*

Summary: S. 3243 would require U.S. Customs and Border Protection (CBP), within two years of the bill's enactment, to administer polygraph examinations to all applicants for law enforcement positions before those individuals are hired. The bill also would direct CBP, within 180 days of enactment, to initiate background reinvestigations for all law enforcement personnel who are currently scheduled to undergo such reviews.

Assuming appropriation of the necessary amounts, CBO estimates that implementing the bill would cost \$19 million over the 2011–2015 period. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.



S. 3243 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 3243 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—					
	2011	2012	2013	2014	2015	2011–2015
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level .....	10	0	3	3	3	19
Estimated Outlays .....	10	0	3	3	3	19

Basis of estimate: For the purposes of this estimate, CBO assumes that S. 3243 will be enacted in 2010. CBO assumes that the estimated amounts will be appropriated near the start of each fiscal year and that outlays will follow the historical rate of spending for those activities. Under the bill, CBP would administer polygraph examinations to all applicants for law enforcement positions before those individuals are hired starting in fiscal year 2013.

#### *Costs for background reinvestigations*

CBP law enforcement personnel are required to undergo background reinvestigations every five years. Each year, reinvestigations are scheduled for the cohort of law enforcement officers hired five years before. Those investigations have not been conducted as scheduled, however, and a backlog has developed.

CBP expects to have a backlog of about 3,000 reinvestigations at the beginning of fiscal year 2011. In addition, about 4,800 reinvestigations will be required during the first 180 days of fiscal year 2011. To meet the bill's requirements, CBP would have to initiate about 7,800 reinvestigations within 180 days of the bill's enactment.

Under current law, CBP anticipates initiating only about 4,800 reviews within that time period. Thus, we estimate that implementing S. 3243 would require CBP to initiate an additional 3,000 reinvestigations in 2011. According to CBP, the cost of each reinvestigation is about \$3,200; CBO estimates that implementing this provision would cost about \$10 million in fiscal year 2011, assuming appropriation of the necessary funds.

#### *Costs for polygraph examinations*

Under current law, CBP does not administer polygraph examinations to all applicants for law enforcement positions; in 2011, the agency expects to administer polygraphs to about 40 percent of the individuals hired for those positions. CBP plans to hire about 2,000 law enforcement officers in each of fiscal years 2013 through 2015. Thus, CBO expects that about 800 polygraphs will be administered in each of those years under current practice. S. 3243 would require CBP to administer polygraph examinations to all applicants for law enforcement positions before those individuals are hired. Because not all applicants would be hired, CBP anticipates that it would meet the bill's requirement by administering polygraphs to about 4,000 individuals annually over the 2013–2015 period. Thus,

CBO expects that implementing the bill would require the agency to administer polygraphs to an additional 3,200 persons annually beginning in 2013.

Based on information from CBP, CBO estimates that each polygraph examination would cost about \$850 in 2013. Thus, implementing this provision would cost nearly \$3 million annually over the 2013–2015 period, assuming appropriation of the necessary funds.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 3243 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Mark Grabowicz; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

S. 3243 does not make any changes to existing law.