SEC. __. LIMITATION ON ALLOWABLE GOVERNMENT CONTRACTOR COMPENSATION COSTS.

(a) LIMITATION.—

(1) CIVILIAN CONTRACTS.—Section 4304(a)(16) of title 41, United States Code, is amended to read as follows:

"(16) Costs of compensation of any contractor employee for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds the annual amount paid to the President in accordance with section 102 of title 3, except that the head of an executive agency may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.".

(2) DEFENSE CONTRACTS.—Section 2324(e)(1)(P) of title 10, United States Code, is amended to read as follows:

"(P) Costs of compensation of any contractor employees for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds the annual amount paid to the President in accordance with section 102 of title 3, except that the head of the agency may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the agency has continued access to needed skills and capabilities.".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply with respect to costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of this Act.

(b) CONFORMING AMENDMENT.—(1) Section 1127 of title 41, United States Code, is amended by adding at the end the following new subsection:

"(c) APPLICABILITY.—This section shall apply only with respect to costs of compensation incurred under contracts entered into before the date that is 180 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2014.".

(2) Section 4301 of title 41, United States Code, is amended by striking paragraph (4).

Section-by-Section Analysis

This proposal would replace the formula for calculating the cap on the amount that the Federal government will reimburse Federal contractors for executive compensation with a reimbursement cap equal to the amount paid to the President of the United States in accordance with section 102 of title 3, United States Code (currently $400,000 annually). Under current law, the cap is determined by the median amount of annual compensation for the five most highly compensated management employees at public-owned companies with annual sales over $50 million.

The proposal would also extend to civilian contractors the reforms made for defense contractors in section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Public Law 112-81). Those reforms broaden application of the cap for defense contractors from the contractor's senior-most executives to all contractor employees. Similar to section 803, the proposal would authorize the head of an executive agency to establish narrowly-targeted exceptions to the cap for scientists and engineers upon a determination that such exceptions are needed to ensure that the agency has continued access to needed skills and capabilities. The proposal would also permit executive agencies to exercise exceptions for other specialists based on the same determination. Changes made by the proposal would apply to costs of compensation under contracts entered into on or after 180 days after enactment of this Act.

The proposal is designed to reduce the excessive amount that the Federal Government must reimburse its contractors for the compensation paid to their employees. The current cap, which, as explained above, is based on a statutory formula built around the annual compensation for the top executives at large publicly-traded companies, is not serving taxpayers well. As a result of the rapid growth over the past 15 years in the compensation that those companies pay to their senior executives, taxpayers are being forced to reimburse contractors at a rate which has

outpaced the growth of inflation, the growth of Federal salaries, and the wages of most of America's working families.

In the fall of 2011, as part of the Plan for Economic Growth and Deficit Reduction, the President proposed to replace the current cap with a new reimbursement cap equal to the Executive Schedule Level I pay rate. In the winter of 2012, Congress expanded the reach of the executive compensation cap for defense contractors from the contractor's senior-most executives to all contractor employees and authorized the Secretary of Defense to establish one or more narrowly targeted exceptions for scientists and engineers upon a determination that "such exceptions are needed to ensure that the Department of Defense has continued access to needed skills and capabilities."

Section 803 did not address civilian contracts (other than those awarded by NASA and the Coast Guard). In addition, section 803 left in place the existing statutory formula, set forth in 41 U.S.C. 1127, for determining the cap. While Congress considered a number of proposals in 2012 to lower the cap, it ultimately decided to leave the current cap in place and instead directed the Government Accountability Office to study the impact of tying the cap to either the President's or the Vice President's salary. As a result, the Office of Federal Procurement Policy was required by existing statutory requirements to publish a notice in the *Federal Register* announcing the 2011 benchmark amount and raising the 2010 cap of $693,951 by 10% to $763,029. (The notice appears in the April 23, 2012 Federal Register, at http://www.gpo.gov/fdsys/pkg/FR-2012-04-23/html/2012-9747.htm.) It is the continued required application of this formula, and not any comparable improvement in contractor performance (and the benefits that the taxpayers receive from these contracts), that has resulted in a one year increase of nearly $70,000 from FY 2010 to FY 2011, and the tripling from FY 1995 to FY 2011 in the amount that taxpayers can be required to reimburse Federal contractors for the compensation that the contractors have chosen to pay to their senior executives.

By lowering the cap, covering all contractor employees (subject to limited, narrowly tailored exceptions), and applying these changes Government-wide, the proposal would restore fiscal responsibility to the amount that taxpayers are required to reimburse contractors for the compensation costs that they have decided to pay to their senior executives and other highly paid employees.

Changes to Existing Law: This proposal would make the following changes to existing law:

TITLE 41, UNITED STATES CODE

§1127. Determining benchmark compensation amount

(a) DEFINITIONS.—In this section:

(1) BENCHMARK COMPENSATION AMOUNT.—The term "benchmark compensation amount", for a fiscal year, is the median amount of the compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available at the time the determination under subsection (b) is made.

(2) BENCHMARK CORPORATION.—The term "benchmark corporation", with respect to a fiscal year, means a publicly-owned United States corporation that has annual sales in excess of $50,000,000 for the fiscal year.

(3) COMPENSATION.—The term "compensation", for a fiscal year, means the total amount of wages, salary, bonuses, and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer's cost accounting records for the fiscal year.

(4) FISCAL YEAR.—The term "fiscal year" means a fiscal year a contractor establishes for accounting purposes.

(5) PUBLICLY-OWNED UNITED STATES CORPORATION.—The term "publicly-owned United States corporation" means a corporation—

(A) organized under the laws of a State of the United States, the District of Columbia, Puerto Rico, or a possession of the United States; and

(B) whose voting stock is publicly traded.

(6) SENIOR EXECUTIVES.—The term "senior executives", with respect to a contractor, means the 5 most highly compensated employees in management positions at each home office and each segment of the contractor.

(b) DETERMINING BENCHMARK COMPENSATION AMOUNT.—For purposes of section 4304(a)(16) of this title and section 2324(e)(1)(P) of title 10, the Administrator shall review commercially available surveys of executive compensation and, on the basis of the results of the review, determine a benchmark compensation amount to apply for each fiscal year. In making determinations under this subsection, the Administrator shall consult with the Director of the Defense Contract Audit Agency and other officials of executive agencies as the Administrator considers appropriate.

(c) APPLICABILITY.—This section shall apply only with respect to costs of compensation incurred under contracts entered into before the date that is 180 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2014.

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CHAPTER 43—ALLOWABLE COSTS

§4301. Definitions

In this chapter:

(1) COMPENSATION.—The term "compensation", for a fiscal year, means the total amount of wages, salary, bonuses, and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer's cost accounting records for the fiscal year.

(2) COVERED CONTRACT.—The term "covered contract" means a contract for an amount in excess of $500,000 that is entered into by an executive agency, except that the term does not include a fixed—price contract without cost incentives or any firm fixed-price contract for the purchase of commercial items.

(3) FISCAL YEAR.—The term "fiscal year" means a fiscal year established by a contractor for accounting purposes.

~~(4) SENIOR EXECUTIVE.—The term "senior executive", with respect to a contractor, means the 5 most highly compensated employees in management positions at each home office and each segment of the contractor.~~

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§4304. Specific costs not allowable

(a) SPECIFIC COSTS.—The following costs are not allowable under a covered contract:

(1) Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with those costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(2) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(3) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the Federal Government where the contractor is found liable or had pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(4) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance those payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(5) Costs of membership in any social, dining, or country club or organization.

(6) Costs of alcoholic beverages.

(7) Contributions or donations, regardless of the recipient.

(8) Costs of advertising designed to promote the contractor or its products.

(9) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(10) Costs for travel by commercial aircraft that exceed the amount of the standard commercial fare.

(11) Costs incurred in making any payment (commonly known as a "golden parachute payment") that is—

(A) in an amount in excess of the normal severance pay paid by the contractor to an employee on termination of employment; and

(B) paid to the employee contingent on, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(12) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(13) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry

providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(14) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a Federal Government facility in that country at the request of the government of that country.

(15) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the Federal Government or a State, to the extent provided in section 4310 of this title.

~~(16) Costs of compensation of senior executives of contractors for a fiscal year, regardless of the contract funding source, to the extent that the compensation exceeds the benchmark compensation amount determined applicable for the fiscal year by the Administrator under section 1127 of this title.~~

(16) Costs of compensation of any contractor employee for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds the annual amount paid to the President in accordance with section 102 of title 3, except that the head of an executive agency may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

(b) WAIVER OF SEVERANCE PAY RESTRICTIONS FOR FOREIGN NATIONALS.—

(1) EXECUTIVE AGENCY DETERMINATION.—Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of paragraphs (13) and (14) of subsection (a) to that contract if the executive agency determines that—

(A) the application of those provisions to that contract would adversely affect the continuation of a program, project, or activity that provides significant support services for employees of the executive agency posted outside the United States;

(B) the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(C) the payment of severance pay is necessary to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(2) SOLICITATION TO INCLUDE STATEMENT ABOUT WAIVER.—An executive agency shall include in the solicitation for a covered contract a statement indicating—

(A) that a waiver has been granted under paragraph (1) for the contract; or

(B) whether the executive agency will consider granting a waiver and, if the executive agency will consider granting a waiver, the criteria to be used in granting the waiver.

(3) DETERMINATION TO BE MADE BEFORE CONTRACT AWARDED.—An executive agency shall make the final determination whether to grant a waiver under paragraph (1) with respect to a covered contract before award of the contract.

(c) ESTABLISHMENT OF DEFINITIONS, EXCLUSIONS, LIMITATIONS, AND QUALIFICATIONS.—The provisions of the Federal Acquisition Regulation implementing this chapter may establish appropriate definitions, exclusions, limitations, and qualifications. A submission by a contractor of costs that are incurred by the contractor and that are claimed to be allowable under Department of Energy management and operating contracts shall be considered a proposal for settlement of indirect costs incurred by the contractor for any period after those costs have been accrued.

TITLE 10, UNITED STATES CODE

§2324. Allowable costs under defense contracts

(a) INDIRECT COST THAT VIOLATES A FAR COST PRINCIPLE.—The head of an agency shall require that a covered contract provide that if the contractor submits to the agency a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation or applicable agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

* * * * * *

(e) SPECIFIC COSTS NOT ALLOWABLE.—(1) The following costs are not allowable under a covered contract:

(A) Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

(C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(D) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or foreign laws and regulations, except when

incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable provisions of the Federal Acquisition Regulation.

(E) Costs of membership in any social, dining, or country club or organization.

(F) Costs of alcoholic beverages.

(G) Contributions or donations, regardless of the recipient.

(H) Costs of advertising designed to promote the contractor or its products.

(I) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(J) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(K) Costs incurred in making any payment (commonly known as a "golden parachute payment") which is—

(i) in an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(L) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(M) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under the Federal Acquisition Regulation.

(N) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States military facility in that country at the request of the government of that country.

(O) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k).

(P) Costs of compensation of any contractor employee for a fiscal year, regardless of the contract funding source, to the extent that such compensation exceeds ~~the benchmark compensation amount determined applicable for the fiscal year by the Administrator for Federal Procurement Policy under section 1127 of title 41~~ the annual amount paid to the President in accordance with section 102 of title 3, except that the head of the agency ~~Secretary of Defense~~ may establish one or more narrowly targeted exceptions for scientists, ~~and~~ engineers, or other specialists upon a determination that such exceptions are needed to ensure that the agency ~~Department of Defense~~ has continued access to needed skills and capabilities.

(2) ***

(3)(A) Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, the head of an agency awarding a covered contract (other than a contract to which paragraph (2) applies) may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract if the head of the agency determines that—

(i) the application of such provisions to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for members of the armed forces stationed or deployed outside the United States;

(ii) the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and

(iii) the payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

(B) The head of an agency shall include in the solicitation for a covered contract a statement indicating—

(i) that a waiver has been granted under subparagraph (A) for the contract; or

(ii) whether the head of the agency will consider granting such a waiver, and, if the agency head will consider granting a waiver, the criteria to be used in granting the waiver.

(C) The head of an agency shall make the final determination regarding whether to grant a waiver under subparagraph (A) with respect to a covered contract before award of the contract.

(4) The provisions of the Federal Acquisition Regulation implementing this section may establish appropriate definitions, exclusions, limitations, and qualifications.

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(l) DEFINITIONS.—In this section:

(1)(A) The term “covered contract” means a contract for an amount in excess of $500,000 that is entered into by the head of an agency, except that such term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of commercial items.

(B) Effective on October 1 of each year that is divisible by five, the amount set forth in subparagraph (A) shall be adjusted to the equivalent amount in constant fiscal year 1994 dollars. An amount, as so adjusted, that is not evenly divisible by $50,000 shall be rounded to the nearest multiple of $50,000. In the case of an amount that is evenly divisible by $25,000 but is not evenly divisible by $50,000, the amount shall be rounded to the next higher multiple of $50,000.

(2) The term “head of the agency” or “agency head” does not include the Secretary of a military department.

(3) The term “agency” means the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration.

(4) The term “compensation”, for a year, means the total amount of wages, salary, bonuses and deferred compensation for the year, whether paid, earned, or otherwise accruing, as recorded in an employer's cost accounting records for the year.

[(5) Repealed. Pub. L. 112–81, div. A, title VIII, §803(b), Dec. 31, 2011, 125 Stat. 1485.]

(6) The term “fiscal year” means a fiscal year established by a contractor for accounting purposes.