SEC. 803. REVISION TO EFFECTIVE DATE APPLICABLE TO PRIOR EXTENSION OF APPLICABILITY OF THE SENIOR EXECUTIVE BENCHMARK COMPENSATION AMOUNT FOR PURPOSES OF ALLOWABLE COST LIMITATIONS UNDER DEFENSE CONTRACTS.

(a) REPEAL OF RETROACTIVE APPLICABILITY.—Section 803(c) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1485) is amended by striking "amendments made by" and all that follows and inserting "amendments made by this section shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into on or after December 31, 2011.".

(b) APPLICABILITY.—The amendment made by subsection (a) shall take effect as of December 31, 2011, and shall apply as if included in the National Defense Authorization Act for Fiscal Year 2012 as enacted.

Section-by-Section Analysis

This proposal would remove the retroactive application requirements of section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012. Section 803 expanded the existing executive compensation cap requirements for DoD, NASA, and Coast Guard contracts, to all contractor employees. The Section 803 compensation cap applies to compensation costs incurred after January 1, 2012 for contracts entered into before, on, or after December 31, 2011. When the cap is applied to contracts entered into before [December 31, 2011] a constructive change to those contracts is created which gives rise to a claim against the Government.

The implementation of section 803 as written is similar to the implementation of section 808 of the National Defense Authorization Act for Fiscal Year 1998, which imposed a cap on allowable costs for senior executive compensation both prospectively and retroactively to existing contracts. In litigation on the application of the requirements of section 808, the courts held that the requirements of section 808 breached contracts that pre-dated the statutory date of enactment. See General Dynamics vs. US, 47 Fed Cl. 514 (Sept 15, 2000).

There is a high probability that the retroactive implementation of the requirements of section 803 would be found to violate the terms of FAR clause 52.216-7, Allowable Cost and Payment, in contracts existing prior to the date of the enactment of the Act, thereby creating a Government breach of contract. Based on the legal precedence established during the implementation of similar requirements under section 808 of the National Defense Authorization

Act for Fiscal Year 1998, the Department of Justice has cautioned DoD that the Government may be liable for affected costs, plus associated interest penalties and costs associated with contractor claims.

Budgetary Implications: This proposal would not increase costs to the Government. There are no budgetary implications outside of avoiding the costs of the filing and processing of the claims for breach of contract, and associated interest penalties.

Changes to Existing Law: This proposal would make the following changes to section 803 of the National Defense Authorization Act for Fiscal Year 2012 (P.L. 112-81).

SEC. 803. EXTENSION OF APPLICABILITY OF THE SENIOR EXECUTIVE BENCHMARK COMPENSATION AMOUNT FOR PURPOSES OF ALLOWABLE COST LIMITATIONS UNDER DEFENSE CONTRACTS.

(a) CERTAIN COMPENSATION NOT ALLOWABLE UNDER DEFENSE CONTRACTS.—Subsection (e)(1)(P) of section 2324 of title 10, United States Code, is amended—

(1) by striking "senior executives of contractors" and inserting "any contractor employee"; and

(2) by adding before the period at the end the following: ", except that the Secretary of Defense may 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".

(b) CONFORMING AMENDMENT.—Subsection (l) of such section is amended by striking paragraph (5).

(c) EFFECTIVE DATE.—<u>The amendments made by this section shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into on or after December 31, 2011.</u> ~~The amendments made by this section--~~

~~(1) shall be implemented in the Federal Acquisition Regulation within 180 days after the date of the enactment of this Act; and~~

~~(2) shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after, but not before, the date of the enactment of this Act.~~