SEC. 809. TREATMENT OF PROCUREMENTS ON BEHALF OF THE DEPARTMENT OF DEFENSE IN ACCORDANCE WITH THE DEPARTMENT OF ENERGY'S WORK FOR OTHERS PROGRAM.

(a) EXEMPTION FROM INSPECTOR GENERAL REVIEWS AND DETERMINATIONS.—Subsection (a) of section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 2304 note) is amended by adding at the end the following new paragraph:

"(7) TREATMENT OF PROCUREMENTS THROUGH THE DEPARTMENT OF ENERGY.—For purposes of this subsection, the procurement of any property or services on behalf of the Department of Defense pursuant to an interagency agreement between the Department of Defense and the Department of Energy in accordance with the Department of Energy's Work For Others Program, where the property or services are provided by a Management and Operating contractor of the Department of Energy, and are procured on behalf of the Department of Defense, shall not be considered a procurement of property or services on behalf of the Department of Defense by a covered non-defense agency.".

(b) EXEMPTION FROM CERTAIN CERTIFICATION REQUIREMENTS.—Subsection (b) of such section is amended—

(1) in paragraph (1), by striking "paragraph (2)" and inserting "paragraphs (2) and (4)"; and

(2) by adding at the end the following new paragraph:

"(4) EXCEPTION FOR PROCUREMENTS IN ACCORDANCE WITH THE DEPARTMENT OF ENERGY'S WORK FOR OTHERS PROGRAM —The limitation in paragraph (1) shall not apply to the procurement of any property and services on behalf of the Department of Defense pursuant to an interagency agreement between the Department of Defense and the Department of Energy in accordance with the Department of Energy's Work for Others

Program, where the property or services are provided by a Management and Operating contractor of the Department of Energy and procured on behalf of the Department of Defense.”.

Section-by-Section Analysis

This section would authorize an exemption for certain procurements performed by the Department of Energy (DOE) on behalf of the Department of Defense (DOD) from duplicative Inspector General (IG) reviews and compliance certification requirements in the National Defense Authorization Act for FY 2008 (NDAA FY08). The process for waiver of the certification requirements has the potential to hinder critical national security activities supported by the DOE and is unnecessary because DOE will continue to ensure that its procurement policies are consistent with those of the Department of Defense.

Section 801 of the NDAA FY08 requires IG reviews of non-defense agency procurement policies, procedures and internal controls to determine consistency with defense procurements requirements, as well as certification of compliance with these requirements for each procurement of property or services for the Department of Defense in excess of the simplified acquisition threshold from a non-defense agency. These review and certification requirements are unnecessary for DOE given the structure of DOE’s contractual relationship with its Management and Operating (M&O) contractors. These requirements have significantly reduced the efficiency of operations for DOE in its provision of services to DOD clients. DOE requests the attached changes to the statutory language to restore the efficiency of operations by exempting work performed by DOE’s Management and Operating (M&O) contractors from these requirements.

DOE’s innovative acquisition system is made possible by DOE’s close partnership with M&O contractors to substantially perform essential mission functions. This approach dates back to the Manhattan Engineering District of the War Department during World War II when the Government contracted with industrial and academic organizations for the construction and operation of manufacturing, research and community facilities for the atomic energy program, which were later transferred to the Atomic Energy Commission (AEC).

Consistent with FAR 17.604, the DOE M&O contracts are for the operation of Government-owned and controlled facilities performing work closely related to DOE’s mission that private enterprise is unable or unwilling to use its own facilities to perform. These contracts are characterized by the Federal government having a close relationship with the contractor in various important areas including safety, security, cost controls and site conditions. For DOE, this close working relationship has existed for many years. In its ninth semiannual report to Congress in 1951, the AEC stated:

The firms operating large Government-owned, production plants carry on extensive development projects, and undertaking urgent construction jobs, work in close day-by-day cooperation with the Commission and its staff. They have been selected for their competence, and the Government is contracting with them not only for technical ability but for managerial ability as well. The working relationship between the Commission and its operating contractors resemble in some respects those between industrial companies and their branch offices. The contractor undertakes to carry on an extensive operation; the Commission establishes the objectives and makes the decisions required to fit the operation into the national program, and exercises the controls necessary to assure security, safety, desirable personnel administration, and prudent use of public funds.

DOE continues to foster this close working relationship with its M&O contractors today and views the facilities as scientific, engineering and national security assets to be shared with other Federal agencies. The DOE acquisition system is designed specifically to provide other Federal agencies' personnel with the same level of direct access to world class technical expertise. DOE has evolved methods equal to DOD procurement requirements for ensuring efficient and effective contractor support, including continuous monitoring of the acquisition system by the DOE IG.

Obtaining detailed pricing and invoicing information for each tasking of the M&O contractor is unnecessary because DOE already employs cost controls beyond those required by other Federal contracts. DOE has direct access to the M&O contractor finance and accounting systems. The DOE reviews and approves M&O contractor employee compensation packages which are made a part of the contract, under the Personnel Appendix. Each year the Department reviews and approves the cost allowed for M&O contractor compensation plans for employee wages and salaries based on an analysis using a comparator group, a group of companies that compete with the M&O contractor for the same scientific and engineering talent. Similarly, DOE reviews and approves the cost allowed for M&O contractor employee benefit plans through comparison with the comparator group using employee actuarial benefit valuation studies and employee benefits cost survey comparisons. The DOE also reviews and approves M&O contractor workforce restructuring plans.

When other Federal agencies purchase M&O contractor services from DOE, they are essentially purchasing an allocation of hours (i.e., level of effort) that DOE has already determined, through the methods described above, to be fair and reasonable in price. It would be duplicative and unnecessary for DOE to make separate price reasonableness determinations or obtain cost or pricing data each time it tasks an M&O contractor to perform work, including work for other Federal customers.

The process for receiving a waiver from the statutory limitations from DOD is time and resource consuming, and has the potential to be implemented inconsistently. To avoid significant interruptions in critical national security activities supported by DOE, the Department proposes this exemption from the Inspector General reviews and

compliance certification requirements for work performed by DOE M&O contractors on behalf of DOD.

Changes to Existing Law: This proposal would make the following changes to section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 10 U.S.C. 2304 note), as amended:

SEC. 801. INTERNAL CONTROLS FOR PROCUREMENTS ON BEHALF OF THE DEPARTMENT OF DEFENSEBY CERTAIN NON-DEFENSE AGENCIES.

(a) INSPECTORS GENERAL REVIEWS AND DETERMINATIONS.—

(1) IN GENERAL.—For each covered non-defense agency, the Inspector General of the Department of Defense and the Inspector General of such covered non-defense agency shall, not later than the date specified in paragraph (2), jointly—

(A) review—

(i) the procurement policies, procedures, and internal controls of such covered non-defense agency that are applicable to the procurement of property and services on behalf of the Department by such covered non-defense agency; and

(ii) the administration of such policies, procedures, and internal controls; and

(B) determine in writing whether such covered non-defense agency is or is not compliant with defense procurement requirements.

(2) DEADLINE FOR REVIEWS AND DETERMINATIONS.—The reviews and determinations required by paragraph (1) shall take place as follows:

(A) In the case of the General Services Administration, by not later than March 15, 2010.

(B) In the case of the Department of the Interior, by not later than March 15, 2011.

(C) In the case of each of the Department of Veterans Affairs and the National Institutes of Health, by not later than March 15, 2012.

(D) In the case of each of the Department of Commerce and the Department of Energy, by not later than March 15, 2015.

(3) SEPARATE REVIEWS AND DETERMINATIONS.—The Inspector General of the Department of Defense and the Inspector General of a covered non-defense agency may by joint agreement conduct separate reviews of the procurement of property and services on behalf of the Department of Defense that are conducted by separate business units, or under separate government-wide acquisition contracts, of the covered non-defense agency. If such separate reviews are conducted, the Inspectors General shall make a separate determination under paragraph (1)(B) with respect to each such separate review.

(4) MEMORANDA OF UNDERSTANDING FOR REVIEWS AND DETERMINATIONS.—Not later than one year before a review and determination is required under this subsection with respect to a covered non-defense agency, the Inspector General of the Department of Defense and the Inspector General of the covered non-defense agency shall enter into a memorandum of understanding with each other to carry out such review and determination.

(5) TERMINATION OF NON-COMPLIANCE DETERMINATION.—If the Inspector General of the Department of Defense and the Inspector General of a covered non-defense agency determine, pursuant to paragraph (1)(B), that a covered non-defense agency is not compliant with defense procurement requirements, the Inspectors General shall terminate such a determination effective on the date on which the Inspectors General jointly—

(A) determine that the non-defense agency is compliant with defense procurement requirements; and

(B) notify the Secretary of Defense of that determination.

(6) RESOLUTION OF DISAGREEMENTS.—If the Inspector General of the Department of Defense and the Inspector General of a covered non-defense agency are unable to agree on a joint determination under this subsection, a determination by the Inspector General of the Department of Defense under this subsection shall be conclusive for the purposes of this section.

(7) TREATMENT OF PROCUREMENTS THROUGH THE DEPARTMENT OF ENERGY.—For purposes of this subsection, the procurement of any property or services on behalf of the Department of Defense pursuant to an interagency agreement between the Department of Defense and the Department of Energy in accordance with the Department of Energy's Work For Others Program, where the property or services are provided by a Management and Operating contractor of the Department of Energy, and are procured on behalf of the Department of Defense, shall not be considered a procurement of property or services on behalf of the Department of Defense by a covered non-defense agency.

(b) LIMITATION ON PROCUREMENTS ON BEHALF OF DEPARTMENT OF DEFENSE.—

(1) Except as provided in ~~paragraph (2)~~ paragraphs (2) and (4), an acquisition official of the Department of Defense may place an order, make a purchase, or otherwise procure property or services for the Department of Defense in excess of the simplified acquisition threshold through a non-defense agency only if—

(A) in the case of a procurement by any non-defense agency in any fiscal year, the head of the non-defense agency has certified that the non-defense agency will comply with defense procurement requirements for the fiscal year;

(B) in the case of—

(i) a procurement by a covered non-defense agency in a fiscal year for which a memorandum of understanding is required by subsection (a)(4), the Inspector General of the Department of Defense and the Inspector General of the covered non-defense agency have entered into such a memorandum of understanding; or

(ii) a procurement by a covered non-defense agency in a fiscal year following the Inspectors General review and determination required by subsection (a), the Inspectors General have determined that a covered non-defense agency is compliant with defense procurement requirements or have terminated a prior determination of non-compliance in accordance with subsection (a)(5); and

(C) the procurement is not otherwise prohibited by section 817 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364) or section 811 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109–163).

(2) EXCEPTION FOR PROCUREMENTS OF NECESSARY PROPERTY AND SERVICES.—

(A) IN GENERAL.—The limitation in paragraph (1) shall not apply to the procurement of property and services on behalf of the Department of Defense by a non-defense agency during any fiscal year for which there is in effect a written determination of the Under Secretary of Defense for Acquisition, Technology, and Logistics that it is necessary in the interest of the Department of Defense to procure property and services through the non-defense agency during such fiscal year.

(B) SCOPE OF PARTICULAR EXCEPTION.—A written determination with respect to a non-defense agency under subparagraph (A) shall apply to any category of procurements through the non-defense agency that is specified in the determination.

(3) TREATMENT OF PROCUREMENTS UNDER JOINT PROGRAMS WITH INTELLIGENCE COMMUNITY.—For purposes of this subsection, a contract entered into by a non-defense agency that is an element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) for the performance of a joint program conducted to meet the needs of the Department of Defense and the non-defense agency shall not be considered a procurement of property or services for the Department of Defense through a non-defense agency.

(4) EXCEPTION FOR PROCUREMENTS IN ACCORDANCE WITH THE DEPARTMENT OF ENERGY'S WORK FOR OTHERS PROGRAM.—The limitation in paragraph (1) shall not apply to the procurement of any property and services on behalf of the Department of Defense pursuant to an interagency agreement between the Department of Defense and the Department of Energy in accordance with the Department of Energy's Work for Others Program, where the property or services

are provided by a Management and Operating contractor of the Department of Energy and procured on behalf of the Department of Defense.

(c) GUIDANCE ON INTERAGENCY CONTRACTING.—

(1) REQUIREMENT.—Not later than 180 days after the date of enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall issue guidance on the use of interagency contracting by the Department of Defense.

(2) MATTERS COVERED.—The guidance required by paragraph (1) shall address the circumstances in which it is appropriate for Department of Defense acquisition officials to procure goods or services through a contract entered into by an agency outside the Department of Defense. At a minimum, the guidance shall address—

(A) the circumstances in which it is appropriate for such acquisition officials to use direct acquisitions;

(B) the circumstances in which it is appropriate for such acquisition officials to use assisted acquisitions;

(C) the circumstances in which it is appropriate for such acquisition officials to use interagency contracting to acquire items unique to the Department of Defense and the procedures for approving such interagency contracting;

(D) the circumstances in which it is appropriate for such acquisition officials to use interagency contracting to acquire items that are already being provided under a contract awarded by the Department of Defense;

(E) tools that should be used by such acquisition officials to determine whether items are already being provided under a contract awarded by the Department of Defense; and

(F) procedures for ensuring that defense procurement requirements are identified and communicated to outside agencies involved in interagency contracting.

(d) COMPLIANCE WITH DEFENSE PROCUREMENT REQUIREMENTS.—For the purposes of this section, a non-defense agency is compliant with defense procurement requirements if the procurement policies, procedures, and internal controls of the non-defense agency applicable to the procurement of products and services on behalf of the Department of Defense, and the manner in which they are administered, are adequate to ensure the compliance of the non-defense agency with the following:

(1) The Federal Acquisition Regulation and other laws and regulations that apply to procurements of property and services by Federal agencies.

(2) Laws and regulations (including applicable Department of Defense financial management regulations) that apply to procurements of property and services made by the Department of Defense through other Federal agencies.

(e) TREATMENT OF PROCUREMENTS FOR FISCAL YEAR PURPOSES.—For the purposes of this section, a procurement shall be treated as being made during a particular fiscal year

to the extent that funds are obligated by the Department of Defense for the procurement in that fiscal year.

(f) DEFINITIONS.—In this section:

(1) NON-DEFENSE AGENCY.—The term 'non-defense agency' means any department or agency of the Federal Government other than the Department of Defense. Such term includes a covered non-defense agency.

(2) COVERED NON-DEFENSE AGENCY.—The term 'covered non-defense agency' means each of the following:

(A) The General Services Administration.
(B) The Department of the Interior.
(C) The Department of Veterans Affairs.
(D) The National Institutes of Health.
(E) The Department of Commerce.
(F) The Department of Energy.

(3) GOVERNMENT-WIDE ACQUISITION CONTRACT.—The term 'government-wide acquisition contract' means a task or delivery order contract that—

(A) is entered into by a non-defense agency; and
(B) may be used as the contract under which property or services are procured for one or more other departments or agencies of the Federal Government.

(4) SIMPLIFIED ACQUISITION THRESHOLD.—The term 'simplified acquisition threshold' has the meaning provided by section 2302(7) of title 10, United States Code.

(5) INTERAGENCY CONTRACTING.—The term 'interagency contracting' means the exercise of the authority under section 1535 of title 31, United States Code, or other statutory authority, for Federal agencies to purchase goods and services under contracts entered into or administered by other agencies.

(6) ACQUISITION OFFICIAL.—The term 'acquisition official', with respect to the Department of Defense, means—

(A) a contracting officer of the Department of Defense; or
(B) any other Department of Defense official authorized to approve a direct acquisition or an assisted acquisition on behalf of the Department of Defense.

(7) DIRECT ACQUISITION.—The term 'direct acquisition', with respect to the Department of Defense, means the type of interagency contracting through which the Department of Defense orders an item or service from a government-wide acquisition contract maintained by a non-defense agency.

(8) ASSISTED ACQUISITION.—The term 'assisted acquisition', with respect to the Department of Defense, means the type of interagency contracting through which acquisition officials of a non-defense agency award a contract or task or delivery order for the procurement of goods or services on behalf of the Department of Defense.