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APR 1 9 2002

The Honorable Richard B. Cheney
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

The Department of Defense proposes the enclosed legislation relating to our civilian personnel, home-to-work transportation of our employees, small business matters, reporting requirements in the Office of Federal Procurement Policy Act, and contractor claims. These proposals are part of the departmental legislative program for the Second Session of the 107th Congress, and we urge their enactment. The purpose of each proposal is stated in its accompanying section-by-section analysis.

The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these initiatives for your consideration and the consideration of the Congress.

Sincerely,

William J. Haynes II

Enclosures
As Stated

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APR 1 9 2002

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

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SEC. ___. ADJUSTMENTS TO REQUIRED TERMINATION WHEN DISADVANTAGED SMALL BUSINESS ELIGIBILITY LOST AND OWNERSHIP OR CONTROL RELINQUISHED OR TRANSFERRED.

Section 8(a)(21)(A) of the Small Business Act (15 U.S.C. 637(a)(21)(A)) is amended—

(1) by striking "such contract or option shall be terminated for the convenience of the Government," and inserting "the contracting officer of the contracting agency for which the contract or option is being performed shall terminate the contract or option for the convenience of the Government,"; and

(2) by inserting before the last sentence the following new sentence: "The requirement for a termination for the convenience of the Government under this paragraph does not affect the right of the Government to terminate the contract or option for default in those circumstances where the contractor is in default at the time of the transfer of ownership or control of the concern.".

Section-by-Section Analysis

The proposed amendment to section 8 of the Small Business Act (15 U.S.C. 637) would make two changes to the requirement that a section 8(a) contract be terminated for convenience whenever the owner or owners upon whom section 8(a) eligibility is based relinquish ownership or control of the concern. First, the termination provision in subparagraph 8(a)(21)(A) is changed expressly to require action by the contracting officer before the contract is effectively terminated. Second, the provision is amended specifically to reserve the right of the Government to terminate a section 8(a)[1] contractor for default. These proposed changes would enable the statute better to achieve its overarching goal - to maintain the credibility and integrity of the

[1] This provision was originally introduced in March 1987 as section 16(c) of H.R. 1807, the Capital Ownership Development Reform Act of 1987, by Rep. Mavroules, then-Chairman of the House Small Business Subcommittee on Procurement, Innovation and Minority Enterprise Development. 133 CONG. REC. H1586 (1987). In undertaking to reform the 8(a) Program, the drafters of H.R. 1807 sought to restore the true "business development purpose" to the program, as well as to restore the program's credibility and integrity through new safeguards against fraud, waste, and abuse. 133 CONG. REC. H10,762 (1987) (statement of Rep. Mavroules). *See also* 133 CONG. REC. H10,762 (1987) (statement of Rep. LaFalce). Section 16, entitled "FRAUD, WASTE, AND ABUSE," included seven specific provisions dealing exclusively with the issues of fraud, waste, and abuse.

section 8(a) program - by preventing abuse of the program by defaulting section 8(a) contractors.

The first proposed change to the termination provision in subparagraph 8(a)(21)(A) is required because subparagraph 8(a)(21)(A) currently is subject to the construction that it provides for an "automatic" termination for convenience, *i.e.*, termination for convenience by operation of law. This is not only at odds with Congress' intent in enacting this statute,[2] but is also in direct conflict with the well-established principle of Government contract law that holds that a contract may be terminated for convenience only by written notice from the procuring agency contracting officer.[3] The second proposed change goes hand-in-hand with the first by preserving the Government's right to terminate a section 8(a) contractor for default in appropriate circumstances notwithstanding any attempt to transfer of ownership or control of the concern. These two changes are equally necessary for subparagraph 8(a)(21)(A) to fulfill its purpose as an *anti-abuse* provision.

In fact, without these proposed changes, subparagraph 8(a)(21)(A) serves as an open invitation for abuse of the section 8(a) program by section 8(a) contractors, particularly those in default, who wish to escape their contractual obligations and avoid the consequences of non-performance. If the contract can be *automatically* terminated under this provision, the section 8(a) contractor who is in default, or anticipating a cure notice, literally can foreclose the contracting officer's ability to exercise the rights and remedies of the Government under the "Default" clause, for example, by temporarily transferring ownership or control of the section

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[2] The legislative history of the 8(a) Reform Act shows that the notion of termination for convenience by operation of law was specifically rejected by Congress. Indeed, the Senate amendment to H.R. 1807 provided, in part, that an 8(a) contract "shall be *deemed to be terminated* for the convenience of the Government, if the eligible concern, directly or indirectly, transfers the contract to another business concern." H.R. 1807, AS PASSED BY THE SENATE (ENGROSSED AMENDMENTS). 100th CONG. § 404 (1988) (emphasis added). However, the language of the Senate amendment to H.R. 1807 was subsequently dropped. As passed by Congress and enacted into law, section 407 of H.R. 1807 instead included the language of the original House version of the bill (§ 16(c)), which provided "if the owner or owners upon whom eligibility was based relinquish ownership or control of such concern, or enter into any agreement to relinquish such ownership or control, *such contract or option shall be terminated for the convenience of the Government.*" (emphasis added). In enacting H.R. 1807 in its final form, Congress thus rejected the termination for convenience by operation of law language of the Senate amendment.

[3] *See* Federal Acquisition Regulation (FAR) 52.249-2, 48 C.F.R. § 52.249-2 (1998) ("The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date"), *and* 41 U.S.C. § 111(a). *Termination of contracts* ("[E]ach contracting agency . . . shall provide its prime contractors with notice of termination"). *See also Executive Court Reporters, Inc. v. United States,* 29 Ct. Fed. Cl. 769, 776 (1993) (court denied the contractor's claim of constructive termination for convenience and held that "FAR 49.1021 specifies that the contracting officer may only terminate after providing adequate written notice to the contractor . . . [thus], to invoke the termination for convenience clause of the contract, a contractor must allege an *action* taken on behalf of the procuring agency to terminate the contract." (emphasis added)), *and American Constr. & Energy, Inc.,* ASBCA 34934, 88-1 BCA Par. 20,361 at 102,984 ("FAR 49.102 provides, inter alia, that the contracting officer shall terminate contracts for convenience only by a written notice to the contractor."). *Compare with* SBA Minority Small Business Development Program, 13 C.F.R. § 124.319(b) (1996) ("Convenience terminations pursuant to 15 U.S.C. 637(a)(21)(A) shall be processed in accordance with the FAR."), *and* FAR 19.812(d) ("[T]he contracting officer shall terminate the contract for convenience upon receipt of a written request from the SBA.").

8(a) concern to a trust or a family member. The facts in the recent Armed Services Board of Contract Appeals (ASBCA) case of *EFG Associates, Inc.*, ASBCA No.50546, 99-1 BCA ¶ 30,231, demonstrates the immediate need for these proposed changes.

In *EFG, supra,* the contractor received one cure notice for failing to provide performance bonds and a second cure notice for initiating removal of its office trailer from the job site without notice. The contractor then notified the contracting officer that the section 8(a) owner had transferred all ownership and control of his stock in the section 8(a) concern to a family trust and that, as a result, pursuant to subparagraph 8(a)(21)(A), the contract was "automatically terminated for the convenience of the Government." Thereafter, the contractor abandoned the job site, ceased all performance under the contract, and appealed the Government's assertion that the contract was still alive. All of the delivery orders that the contractor left incomplete when it abandoned the job site were ultimately terminated for default.

The Government moved that the ASBCA grant summary judgment on the question of whether, as a result of the alleged stock transfer, the contract had been "automatically" terminated for the convenience of the Government under subparagraph 8(a)(21)(A). In part, the Government maintained that the contractor's assertion that application of this statute resulted in a termination for convenience *by operation of law* was erroneous and that the provision instead required that the contracting officer terminate the contract for convenience. Finding that there were a number of issues of material fact on the record that needed to be better developed, the Board declined to rule on the proper interpretation to be given to the statute.

A result such as that sought by EFG would render meaningless the express language of the Federal Acquisition Regulation, which provides that the Government may terminate a contractor for default if the contractor refuses or fails to perform diligently or fails to complete work within the time specified in the contract. It also would further undermine both the effectiveness of subparagraph 8(a)(21)(A) as an anti-abuse measure and the integrity of the section 8(a) program as a whole. Moreover, as noted in section 101 of the Business Opportunity Development Reform Act of 1988, this invitation for abuse severely erodes the credibility of the section 8(a) program as "a primary tool for improving opportunities for small business concerns owned by socially and economically disadvantaged individuals in the Federal procurement process." (15 U.S.C. 631 note; Public Law 100-656; 102 Stat. 3876).

If the proposed changes to subparagraph 8(a)(21)(A) are enacted, the potential conflict between this subparagraph and the deeply-rooted rule that convenience terminations be in writing would be resolved. In addition, the Government's right to terminate a section 8(a) contractor for default would be secured. The changes would thus prevent future misuse of this provision by section 8(a) contractors that are in default of their contracts and, thereby, curb a potential abuse of the section 8(a) program. In this way, these proposed changes would ensure that the intent of Congress in promulgating this anti-abuse provision is carried out.

SEC. ___ . CONTRACT DISPUTES ACT AMENDMENT RELATING TO PAYMENT OF INTEREST ON CONTRACTOR CLAIMS.

(a) SPECIFICITY OF DATE FOR INTEREST.—Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) is amended to read as follows:

"The Government shall pay interest, at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board, on a contractor's claim on the amount found to be due and unpaid from—

(1) the date the contracting officer receives the claim pursuant to sections 6(a) and 6(c)(1) of this Act; or

(2) the date the contractor incurred the cost,

whichever is later, until date of payment.".

(b) IMPLEMENTATION.—The Federal Acquisition Regulatory Council shall issue amendments to the Federal Acquisition Regulation not later than 180 days after the date of the enactment of this Act.

Section-by-Section Analysis

This proposal would amend section 12 of the Contract Disputes Act of 1978 by striking out the first sentence, which provides that interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) of this Act from the contractor until payment. Section 6(a) requires contractor claims against the Government to be in writing and to be submitted to the contracting officer for a decision. This section would revise that to require the Government to pay interest on contractor claims from the date the contracting officer receives a claim pursuant to sections 6(a) and 6(c)(1) of this Act or the date the contractor incurred the cost, whichever is later, until date of payment. The proposal would require contractors to specify how much of the claimed amount has been expended as of the claim certification date.

Section 6(c)(1) requires contractors to certify claims in excess of $100,000. By adding a reference to section 6(c)(1), the amended language would clarify that interest will not run on a claim over $100,000 that is not certified. This clarification is in consonance with the decision

reached in Fidelity Construction Company v. United States, 700 F.2d 1379 (Fed. Cir. 1983), cert. denied, 464 U.S. 826 (1983).

Some claims include estimated costs for work to be completed in the future. Since the Contract Disputes Act awards interest from the date the contracting officer receives the written claim, interest is currently computed without regard to when the contractor incurred the costs, even though substantial costs can be incurred subsequent to receipt of the written claim by the contracting officer. It is contrary to sound business practice, and inequitable to the Government, to pay contractors interest on costs not yet incurred.

In Servidone Construction Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991), and J.S. Alberici Construction Co. Inc. & Martin K. Eby Construction Co. Inc. (Joint Venture), ENG BCA, No. 6179-R. 97-1 BCA paragraph 28,919, aff'd. 153 F.3d 1381 (Fed. Cir. 1998), the contractors were awarded interest on the amounts found due on their claims from the time the claims were received by the contracting officers until payment by the Government. In both cases, the amounts found due included claimed costs not yet incurred at the time the contracting officers received the claims. This proposal would require that costs actually be incurred before interest begins to accrue. The result is a more customary situation where interest is paid based on the use of money.

The proposal would preclude contractors from receiving windfall payments of interest on claimed costs not yet incurred. Clearly, taxpayer dollars should not be wasted paying contractors unearned interest on their claims.

SEC. ___ . AMOUNTS RECEIVED FOR JURY OR WITNESS SERVICE.

(a) IN GENERAL.—Section 5515 of title 5, United States Code, is amended by striking "credited against pay payable to him by the United States or the District of Columbia with respect to that period" and inserting "retained by the employee".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect 90 days after the enactment of this Act.

Section-by-Section Analysis

This proposal would allow civil service employees (except those whose pay is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives) and employees of the District of Columbia to keep compensation they receive for jury and witness duty.

Currently, 5 U.S.C. § 5515 requires amounts received by civil service employees (except those whose pay is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives) and by employees of the District of Columbia, for service as a juror or as a witness, when entitled to court leave under 5 U.S.C. § 6322(a) or when testifying on official duty under 5 U.S.C. § 6322(b), to be credited against the employees' pay for that period of time.

Many State court systems provide some form of payments to persons serving as jurors or witnesses. Some jurisdictions consider these payments to represent a reimbursement for such daily expenses as mileage and parking. Others consider the payments to be compensation for services to the individual. Payments are generally nominal, often less than $25 per day. The Comptroller General has taken the position in numerous opinions that, under 5 U.S.C. § 5515, the Government must recoup all payments made to civil service employees as compensation for jury duty or for attendance as a witness, as opposed to reimbursement of expenses. *See, e.g.*, Comp. Gen. B-240962, February 13, 1991; Comp. Gen. B-219496, January 22, 1986; Comp. Gen. B-214863, July 23, 1984; Comp. Gen. B-214558, July 23, 1984; Comp. Gen. B-192043, August 11, 1978; *and* Comp. Gen. B-183711, August 23, 1977. However, it has become increasingly burdensome and costly for Federal agencies to collect such fees.

In practice, although 5 U.S.C. § 5515 speaks of credit against pay for jury and witness fees, agencies must recoup the fees paid to employees for such service after salaries have been paid, because civil service employees paid by automated payroll systems generally will receive their civil service pay before they receive their fees from a State. These recoupments must be done manually, and require that different employees take actions with regard to the jury duty/witness fees. In the Department of Defense (DoD), customer service representatives at the employing activities and payroll technicians at the consolidated payroll offices may be involved

in the collection process. Additionally, since the fees are normally paid by check, a cashier must process the fees for deposit. Manual, off-line actions such as these are labor-intensive, and impair the efficiency of the automated payroll system. A survey in late 2000 revealed an average labor cost of $59.13 per collection at the employing activities of the Departments of the Army, the Navy, and the Air Force. Additionally, the average labor cost is $17.80 to process each collection at DoD's payroll/disbursing offices. Therefore, DoD's current average cost for each collection is approximately $75.

Once an agency locates employees who have failed to turn in a check received from a court, the agency must initiate some form of involuntary collection from the employees. Within DoD, payroll deductions are made whenever jury duty/witness fees are not submitted by employees in a timely fashion. These actions must be done manually and on an individual basis. Involuntary collection procedures are labor-intensive and often result in minimal recovery for a relatively high cost.

The agency may have to decide whether, under the law of the State in which a given employee resides, a specific payment for jury or witness duty constitutes reimbursement or compensation from the State where the payment was made. This may require action by the servicing personnel office and guidance from the agency's Office of General Counsel. The cost of collecting the jury duty/witness fee rises accordingly.

Under this proposal, some revenue could be lost to the Government if the cost of collecting money in an individual case is less than the amount of the fees. However, given current labor costs, it seems likely that agencies do not currently realize net gains from the collection of such fees. It is not possible to specify the actual collection cost for all agencies. That depends upon the timekeeping system adopted by the agency and on the degree of centralization and automation achieved in a particular agency's payroll system. However, it appears likely that, in general, agencies would experience an increase in efficiency because they would no longer have to expend increasingly-scarce manpower on the collection of de minimis amounts of jury duty or witness fee compensation.

Enactment of this proposal would have no effect on the budgetary requirements of the affected departments.

SEC. ___. CRITICAL NEED AND EXPEDITED HIRING SYSTEM.

Section 3304(a) of title 5, United States Code, is amended —

(1) at the end of in paragraph (1) by striking "and";

(2) by striking the period at the end of paragraph (2) and inserting "; and"; and

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

"(3) authority for agencies to appoint, without regard to the provisions of sections 3309 through 3318 of this title, candidates directly to positions for which—

"(A) public notice has been given; and

"(B) the Office of Personnel Management has determined that there exists a severe shortage of candidates or there is a critical hiring need. The Office shall prescribe, by regulation, criteria for identifying such positions and may delegate authority to make determinations under such criteria.".

Section-by-Section Analysis

This section will authorize agencies to streamline the hiring process. The recruitment flexibility gained will increase efficiency and expedite making job offers to highly-qualified candidates while adhering to both merit principles and veterans' preference.

The proposal also will authorize agencies to appoint candidates directly to positions for which public notice has been given and it has been determined any of the following conditions exist— there is a severe shortage of candidates; there is a critical hiring need; or the positions are historically hard-to-fill.

SEC. ___. STUDENT LOAN REPAYMENTS.

Section 5379(b)(2)(A) of title 5, United States Code, is amended by striking "$6,000" and inserting "$10,000".

Section-by-Section Analysis

Section 5379 of title 5, United States Code, authorizes the head of an agency, in order to recruit or retain highly qualified personnel, to repay a student loan previously taken out by an employee. The repayment amount is limited to $6,000 per year for an employee, not to exceed $40,000 total in the case of any employee. Repayment of student loans, as a recruitment and retention incentive, offsets the higher starting salaries offered by private industry and is a tool for restructuring the Federal civilian workforce to meet changing mission needs.

This section would increase the calendar year amount from $6,000 to $10,000, reflecting an increase in annual college tuition costs since the original statute was published. The total for any individual employee would remain unchanged.

SEC. ___. CONTINUATION OF FEDERAL EMPLOYEE HEALTH BENEFITS PROGRAM ELIGIBILITY.

Paragraph (4)(B) of section 8905a(d) of title 5, United States Code, is amended—

(1) in clause (i), by striking "2003" and inserting "2006"; and

(2) in clause (ii)—

(A) by striking "2004" and inserting "2007"; and

(B) by striking "2003" and inserting "2006".

Section-by-Section Analysis

Under Section 8905a(d)(4) of title 5, United States Code, a Department of Defense civilian employee who is involuntarily separated or voluntarily separated from a surplus position is eligible to elect continued health benefits coverage for up to 18 months under the Federal Employees Health Benefits Program (FEHBP). Eligibility is limited to separations that occurred before October 1, 2003, or February 1, 2004, if specific notice of such separation was given before October 1, 2003. If an employee elects to continue coverage, the Department is responsible for the employer portion of the FEHBP premium and an administrative fee, and the employee is responsible for the employee share of the premium.

This section would extend eligibility for continued health benefit coverage to employees separated before October 1, 2006, or February 1, 2007, if specific notice of such separation was given before October 1, 2006. Extension of this authority coincides with the continued Department of Defense downsizing and restructuring efforts.

SEC. ___. ELIMINATION OF THE LIMITATION ON THE LENGTH OF DETAILS.

Section 3341 of title 5, United States Code, is amended—

(1) by striking subsections (b) and (c);

(2) in subsection (a), by inserting at the end "Details may be made only by written order of the head of the department."; and

(3) by striking the designator "(a)" that precedes the remaining matter.

Section-by-Section Analysis

This section would amend section 3341 of title 5, United States Code, to eliminate the 120-day limit on details. The change significantly would reduce paperwork associated with details to the same or lower grades.

SEC. ___ . EXTENSION OF LUMP-SUM PAYMENT OF SEVERANCE PAY.

Section 5595(i)(4) of title 5, United States Code, is amended by striking "2003" and inserting "2006".

Section-by-Section Analysis

Under section 5595 of title 5, United States Code, an eligible employee who is involuntary separated from service is entitled to severance pay in regular pay periods by the agency from which the employee is separated. An eligible employee who is involuntarily separated from the Department of Defense, however, may receive a lump-sum payment equal to the total amount of the severance pay to which he is entitled. To qualify, the employee's separation must occur before October 1, 2003.

This section would amend section 5595 to allow an eligible Department of Defense employee to qualify for a lump-sum separation payment if the separation occurs before October 1, 2006. The extension period coincides with continued downsizing and restructuring efforts.

SEC. ___. REPEAL OF THE MONRONEY PROVISION; THE IMPORTING OF WAGE RATES IN CERTAIN AREAS WITH SPECIALIZED MILITARY INDUSTRIES.

(a) IN GENERAL.— Section 5343 of title 5, United States Code, is amended by striking subsection (d).

(b) CONFORMING AMENDMENTS.—Title 5, United States Code, is amended as follows:

(1) Section 5343 is amended—

(A) in subsection (a)(3), by striking "and (d)";

(B) in subsection (c)(1), by striking ", subject to subsection (d) of this section,"; and

(C) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

(2) Section 6123(c)(2) is amended—

(A) by striking "(f)" and inserting "(e)"; and

(B) in paragraph (A), by striking "(f)" and inserting "(e)".

Section-by-Section Analysis

The Federal Wage System uses wage surveys of local prevailing rates to determine pay in a given wage area. Section 5343(d) of title 5, United States Code—commonly known as the "Monroney Provision" after former Oklahoma Senator Mike Monroney—provides a means for importing supplemental wage data from outside the local area as a basis for establishing local wage rates in selected areas. The Monroney Provision applies to wage areas identified with production or repair of such specialized industries as aircraft, ammunition, artillery and combat vehicles, guided missiles, and shipbuilding, but applies to all blue-collar positions in the area.

The Monroney Provision is contrary to the principles of the Federal Wage System since wage information imported into the wage area contravenes and distorts local survey results. The artificial increase of Federal wages in a wage area not only adds to payroll costs, but enhances the possibility that performance of the work by the government will be less competitive than

performance of the work by contractors in the area. To address this issue, the section would amend section 5343, striking the Monroney Provision. Existing administrative remedies (e.g., special rates, increased minimum rates, unrestricted rates and others) are available to fully address local pay issues.

SEC. ___. LONG-TERM CARE INSURANCE FOR DEPARTMENT OF DEFENSE NONAPPROPRIATED FUND EMPLOYEES.

(a) IN GENERAL.—Section 9001(1) of title 5, United States Code, is amended—

(1) in subparagraph (B), by striking "and";

(2) in subparagraph (C), by striking the comma at the end and inserting "; and"; and

(3) by inserting after subparagraph (C) the following new subparagraph:

"(D) an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard described in section 2105(c),".

(b) DISCRETIONARY AUTHORITY.—Section 9002 of such title is amended—

(1) by redesignating subsections (b), (c), (d), and (e) as subsections (c), (d), (e), and (f), respectively; and

(2) by inserting after subsection (a) the following new subsection (b):

"(b) DISCRETIONARY AUTHORITY REGARDING NONAPPROPRIATED FUND INSTRUMENTALITIES.—The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not serving in the Department of the Navy, may determine that a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, respectively, is covered under this chapter or is covered under an alternative long-term care insurance program.".

Section-by-Section Analysis

Department of Defense nonappropriated fund employers may offer employee-funded long-term care insurance coverage. At least one larger nonappropriated fund employer does, yet smaller nonappropriated fund employers may find doing so to be impractical. For smaller nonappropriated fund employers, participation in the Office of Personnel Management's Long Term Care Insurance program may be desirable. Such participation would not be without precedent—Tennessee Valley Authority employees, who are not normally considered to be

Federal employees and whose salaries are not paid from appropriated funds, may participate in the program.

This proposal would permit employees of nonappropriated fund employers to participate in the Long Term Care Insurance program.

SEC. ___ . MODIFY THE OVERTIME PAY CAP.

Section 5542(a)(2) of title 5, United States Code, is amended by striking "the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law)" and inserting "the overtime hourly rate of pay is an amount equal to the greater of one and one-half times the minimum hourly rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) or the employee's hourly rate of basic pay.".

Section-by-Section Analysis

Section 5542 of title 5, United States Code, provides that the overtime hourly rate of pay for an employee whose basic pay is at a rate which exceeds the basic pay of a GS-10, step 1 (including any applicable locality-based comparability payment and any applicable special rate) is equal to one and one-half times the hourly rate of a GS-10/01 (including any applicable locality-based comparability payment or special rate).

This proposal would amend section 5542 to permit an employee whose basic pay exceeds one and one-half times the hourly rate of a GS-10/01 (including any applicable locality-based comparability payment and any applicable special rate) – *i.e.*, an employee at the GS-12, step 6 or above – to receive an overtime hourly rate in an amount equal to the basic pay of the employee.

This proposal would cost $18.75 million in Fiscal Year 2003, $18.77 million in Fiscal Year 2004, $18.79 million in Fiscal Year 2005, $18.82 million in Fiscal Year 2006, and $18.84 million in Fiscal Year 2007. It would be paid for out of existing funds.

SEC. ___. TRIENNIAL FULL-SCALE FEDERAL WAGE SYSTEM WAGE SURVEYS.

Section 5343(b) of title 5, United States Code, is amended—

(1) in the first sentence, by striking "2 years" and inserting "3 years"; and

(2) in the second sentence, by striking the period at the end and inserting "based on criteria developed by the lead agency in consultation with the Office of Personnel Management.".

Section-by-Section Analysis

Section 5343(b) requires the Office of Personnel Management (OPM) to conduct a full-scale survey every two years and an interim or "wage-change" survey in the alternate years. Full-scale surveys are conducted by teams of local management and labor data collectors who obtain wage data through on-visits to selected private sector employers in the wage area. Wage-change surveys are conducted by much smaller groups of Federal employees using telephone interviews or mail inquiries to obtain local wage data.

This section would change the full-scale survey cycle from two to three years. With the reduction in resources available to participate in the survey process, a three-year cycle would reduce the burden on local activities and, as the frequency of on-site surveys would be reduced, should increase private sector participation. For wage areas where the economy is unstable, this proposal provides that full-scale surveys may be conducted more frequently based on criteria established by the lead agency in consultation with the OPM and the Federal Prevailing Rate Advisory Committee.

SEC. ___. EXTENSION OF VOLUNTARY SEPARATION INCENTIVE PAY.

Section 5597of title 5, United States Code, is amended—

(1) in subsection (b), by inserting ", consistent with any regulations that may be prescribed by the Office of Personnel Management," after "Secretary"; and

(2) in subsection (e), by striking "2003" and inserting "2006".

Section-by-Section Analysis

Section 5597 of title 5, United States Code, authorizes the Secretary of Defense to pay separation incentives to an employee as an inducement to separate from service voluntarily. The Department of Defense has used separation incentives to reduce significantly the number of involuntary separations during extensive and prolonged downsizing. This authority expires September 30, 2003.

This section would extend the authority for three additional years, a period that coincides with the Department's ongoing downsizing and restructuring efforts. This section also adds a provision that the Secretary will establish the voluntary separation incentive program in accordance with any regulations that may be prescribed by the Office of Personnel Management.

SEC. ___. ALTERNATIVE RANKING AND SELECTION PROCEDURES.

(a) IN GENERAL.—Chapter 33 of title 5, United States Code, is amended by inserting after section 3318 the following new section:

"§ 3319. Alternative ranking and selection procedures

"(a) Notwithstanding section 2302(b)(11) of this title or any other provision of this chapter—

"(1) the Office of Personnel Management, in exercising its authority under section 3304 of this title; or

"(2) an agency to which the Office has delegated examining authority under section 1104(a)(2)of this title may establish category rating systems for evaluating job applicants for positions in the competitive service, under which qualified candidates are divided into two or more quality categories, consistent with regulations prescribed by the Office of Personnel Management, rather than assigned individual numerical ratings.

"(b) Within each quality category established under subsection (a), preference eligibles shall be listed ahead of individuals who are not preference eligibles. For other than scientific and professional positions at GS-9 (equivalent or higher), qualified preference eligibles who have a compensable service-connected disability of 10 percent or more shall be listed in the highest quality category.

"(c) An appointing official may select any applicant in the highest quality category or, if fewer than three candidates have been assigned to the highest quality category, in a merged category consisting of the highest and the second highest quality categories. Notwithstanding the

preceding sentence, the appointing official may not pass over a preference eligible in the same category from which selection is made, unless the requirements of section 3317(b) or 3318(b), as applicable, are satisfied.

(b) CLERICAL AMENDMENT.—The item relating to section 3319 in the table of sections at the beginning of such chapter 33 is amended to read as follows:

"3319. Alternative Ranking and Selection Procedures.".

Section-by-Section Analysis

Under current authority, applicants are numerically ranked from 70 to 100, with the distinction between candidates often as small as 1/2 of a point. This is not a meaningful distinction. This provision would allow the rating and ranking of candidates into meaningful categories.

Also under current authority, selection officials only receive the top three numerically ranked applicants from which to choose. This provision would eliminate the requirement that managers make selections for appointments to each vacancy from the highest three eligibles available on the referral certificate.

These changes acknowledge the Merit Systems Protection Board report which says assessment tools are not capable of making precise distinctions among applicants and, therefore, cannot assure that the top three candidates referred are the best three applicants. This revision would allow managers to consider a broader range of applicants for positions while preserving Veterans' Preference and merit principles.

This process also would streamline the referral and selection process.

SEC. ___. STREAMLINED DEMONSTRATION PROJECT AUTHORITY AND ALTERNATIVE PERSONNEL SYSTEMS.

(a) STREAMLINED DEMONSTRATION PROJECTS.—Chapter 48 of title 5, United States Code, is amended by inserting at the end the following new section:

"§ 4803. Department of Defense streamlined demonstration projects

"(a) For the purposes of this section—

"(1) 'agency' means the Department of Defense; and

"(2) 'streamlined demonstration project' means a demonstration project conducted under subsection (b).

"(b) Except as provided in this section, the Office of Personnel Management may, directly or through agreement or contract with one or more agencies and other public and private organizations, conduct, modify, and evaluate streamlined demonstration projects. Subject to the provisions of this section, the conducting of streamlined demonstration projects shall not be limited by any lack of specific authority under this title to take the action contemplated, or by any provision of this title. The decision to initiate or modify a project under this section shall be made by the Office.

"(c) Before conducting or entering into any agreement or contract to conduct a streamlined demonstration project, the Office shall ensure—

"(1) that each project has a plan which describes—

"(A) its purpose;

"(B) the employees to be covered;

"(C) its anticipated outcomes and resource implications, including how the project relates to carrying out the agency's strategic plan, including meeting

performance goals and objectives, and accomplishing its mission;

"(D) the personnel policies and procedures the project will use that differ from those otherwise available and applicable, including a specific citation of any provisions of law, rule, or regulation to be waived and a specific description of any contemplated action for which there is a lack of specific authority;

"(E) the method of evaluating the project;

"(F) the agency's system for ensuring that the project is implemented in a manner consistent with merit system principles;

"(2) notification of the proposed project to employees who are likely to be affected by the project;

"(3) an appropriate comment period;

"(4) publication of the final plan in the Federal Register;

"(5) notification of the final project at least 30 days in advance of the date any project proposed under this section is to take effect to employees who are likely to be affected by the project;

"(6) publication of any subsequent modification in the Federal Register; and

"(7) notification of any subsequent modification to employees who are included in the project.

"(d) No streamlined demonstration project under this section may provide for a waiver of—

"(1) any provision of chapter 63 or subpart G of part III of this title;

"(2) any provision of law implementing any provision of law referred to in section 2303(b)(1) by—

"(A) providing for equal employment opportunity through affirmative action; or

"(B) providing any right or remedy available to any employee or applicant for employment in the civil service;

"(3) any provision of chapter 15 or subchapter III of chapter 73;

"(4) section 7342, 7351, or 7353;

"(5) Appendix 4 of this title;

"(6) any rule or regulation prescribed under any provision of law referred to in paragraphs (1) through (5); and

"(7) any provision of chapter 23, or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system principle or any provision thereof relating to prohibited personnel practices. Notwithstanding section 2302(e)(1), for purposes of applying section 2302(b)(11) in a streamlined demonstration project under this section, 'veterans' preference requirement' means any of the specific provisions of the streamlined demonstration project plan that are designed to ensure that the project is consistent with veterans' preference principles.

"(e) Before the end of the 5-year period beginning on the date on which a streamlined demonstration project takes effect, the Office shall determine whether the project shall be—

"(1) terminated;

"(2) continued beyond the end of such 5-year period for purposes of evaluation; or

"(3) converted to an alternative personnel system under chapter 49.

"(f) The Office may terminate a streamlined demonstration project under this section if it determines that the project—

"(1) is not consistent with merit system principles set forth in section 2301, veterans' preference principles, or the provisions of this chapter; or

"(2) otherwise imposes a substantial hardship on, or is not in the best interests of, the public, the Government, employees, or eligibles.

"(g) Employees within a unit with respect to which a labor organization is accorded exclusive recognition under chapter 71 shall not be included within any project under subsection (b)—

"(1) if the project would violate a collective bargaining agreement (as defined in section 7103(8)) between the agency and the labor organization, unless there is another written agreement with respect to the project between the agency and the organization permitting the inclusion; or

"(2) if the project is not covered by such a collective bargaining agreement, until there has been consultation or negotiation, as appropriate, by the agency with the labor organization.

"(h) Employees within any unit with respect to which a labor organization has not been accorded exclusive recognition under chapter 71 shall not be included within any project under subsection (b) unless there has been agency consultation regarding the project with the employees in the unit.

"(i) The Office shall ensure that each streamlined demonstration project is evaluated. Each evaluation shall assess—

"(1) the project's compliance with the plan developed under subsection (c)(1); and

"(2) the project's impact on improving public management.

"(j) Upon request of the Director of the Office of Personnel Management, an agency shall

cooperate with and assist the Office in any evaluation or conversion undertaken under subsection (d) and provide the Office with requested information and reports relating to the conducting of streamlined demonstration projects.".

(b) ALTERNATIVE PERSONNEL SYSTEMS.—Subpart C of part III of such title 5 is amended by adding at the end the following:

"CHAPTER 49—ALTERNATIVE PERSONNEL SYSTEMS

"§ 4901. Definitions

"For the purpose of this chapter—

"(1) 'agency' has the meaning set forth in section 4803(a)(1);

"(2) 'alternative personnel system' means a system for human resources management in an agency which—

"(A)(i) requires a waiver (except as prohibited under section 4902(c)) of one or more of the provisions of this title or any rule or regulation prescribed under this title; or

"(ii) exercises authorities not specifically in law, rule, or regulation;

"(B) is designed to improve the agency's ability to carry out its strategic plan and accomplish its mission efficiently and effectively; and

"(C)(i) is similar to one or more systems already tested successfully in at least one other agency as a demonstration project under chapter 47 or in a

streamlined demonstration project under section 4803; or

"(ii) has otherwise been determined by the Office of Personnel Management not to require testing as a demonstration project under chapter 47 or as a streamlined demonstration project under section 4803 before being implemented by the agency as an alternative personnel system;

"(3) 'eligible' has the meaning set forth in section 4701(a)(3);

"(4) 'employee' has the meaning set forth in section 4701(a)(2); and

"(5) 'modification' means a significant change in one or more of the elements of an alternative personnel system plan as described in section 4902(b)(1).

"§ 4902. Alternative personnel systems

"(a) An agency may implement and subsequently modify one or more alternative personnel systems in accordance with the provisions of this chapter. An alternative personnel system shall not be limited by any lack of specific authority under this title to take the action contemplated or, except as otherwise provided in this section, by any provision of this title or any rule or regulation prescribed under this title which is inconsistent with the action.

"(b) Except as provided in section 4903(b), before implementing an alternative personnel system an agency shall—

"(1) develop a plan for such system which describes—

"(A) its purpose;

"(B) the employees to be covered;

"(C) its anticipated outcomes and resource implications, including how the system relates to carrying out the agency's strategic plan, including meeting

performance goals and objectives, and accomplishing its mission;

"(D) the personnel policies and procedures the alternative system will use that differ from those otherwise available and applicable, including a specific citation of any provisions of law, rule, or regulation to be waived and a specific description of any contemplated action for which there is a lack of specific authority; and

"(E) the agency's system for ensuring that the alternative system is consistent with merit system principles;

"(2) submit the plan and any subsequent modification to the Office of Personnel Management for approval; and

"(3) provide advance notification of the plan and any subsequent modification to employees who are likely to be affected by the alternative personnel system.

"(c) No alternative personnel system under this section may provide for a waiver of—

"(1) any provision of chapter 63 or subpart G of part III of this title;

"(2)(A) any provision of law referred to in section 2302(b)(1); or

"(B) any provision of law implementing any provision of law referred to in section 2302(b)(1) by—

"(i) providing for equal employment opportunity through affirmative action; or

"(ii) providing any right or remedy available to any employee or applicant for employment in the civil service;

"(3) any provision of chapter 15 or subchapter III of chapter 73;

"(4) section 7342, 7351, or 7353;

"(5) Appendix 4 of this title;

"(6) any rule or regulation prescribed under any provision of law referred to in paragraphs (1) through (5); or

"(7) any provision of chapter 23, or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system principle or any provision thereof relating to prohibited personnel practices. Notwithstanding section 2302(e)(1), for purposes of applying section 2302(b)(11) in an alternative personnel system under this chapter, 'veterans' preference requirement' means any of the specific provisions of the alternative personnel system plan that are designed to ensure that the system is consistent with veterans' preference principles.

"(d) Employees within a unit with respect to which a labor organization is accorded exclusive recognition under chapter 71 shall not be included within any alternative personnel system implemented or subsequently modified under this chapter—

"(1) if the alternative system would violate a collective bargaining agreement (as defined in section 7103(8)) between the agency and the labor organization, unless there is another written agreement with respect to the alternative system between the agency and the organization permitting the inclusion; or

"(2) if the alternative system would not violate such a collective bargaining agreement, until there has been consultation or negotiation, as appropriate, by the agency with the labor organization.

"(e) Employees within any unit with respect to which a labor organization has not been accorded exclusive recognition under chapter 71 shall not be included in any alternative personnel system implemented or subsequently modified under this chapter unless there has been

agency consultation regarding the alternative system with the employees in the unit.

"§ 4903. Responsibilities of the Office of Personnel Management

"(a)(1) No alternative personnel system under this chapter may be implemented or subsequently modified without the approval of the Office of Personnel Management. Approval shall be based on a determination that the proposed alternative system or any subsequent modification meets all of the requirements of this chapter. The Office shall inform the agency of the approval or disapproval of its proposed alternative system within 90 days after receiving a complete plan as described in section 4902(b)(1).

"(2) The Office shall publish in the Federal Register a notice of its approval of each alternative personnel system. The notice shall include a summary of the alternative system. This notice requirement shall apply to a modification of an alternative personnel system which is determined by the Office in its sole discretion to be sufficiently significant to warrant publication.

"(b) At the request of the agency and subject to sections 4703(d)(2) and 4902(d), the Office may convert a demonstration project under chapter 47 or a streamlined demonstration project under section 4803 to an alternative personnel system, without requiring the agency to develop a plan as described in section 4902(b), when the Office determines that the project has demonstrated sufficient success to be implemented permanently in the agency. When a project is converted under this subsection, the demonstration project plan under section 4703(b)(1) or streamlined demonstration project plan under section 4803(c)(1), including any subsequent modifications, is deemed to be the alternative personnel system plan under section 4902(b)(1).

"(c) The Office may terminate an alternative personnel system if it determines that the alternative system—

"(1) is not consistent with merit system principles set forth in section 2301, veterans' preference principles, or the provisions of this chapter; or

"(2) otherwise imposes a substantial hardship on, or is not in the best interests of, the public, the Government, employees, or eligibles.

"§ 4904. Regulations

"The Office of Personnel Management shall prescribe regulations needed to administer this chapter.".

(c) CLERICAL AMENDMENTS.—(1) The table of sections for chapter 48 of such title is amended by inserting after the item relating to section 4802 the following new item:

"4803. Department of Defense streamlined demonstration projects.".

(2) The tables of chapters for part III of such title is amended by adding at the end of subpart C the following:

"49. Alternative Personnel Systems ..... 4901.";

(d) CONFORMING AMENDMENTS.—(1) The demonstration project authorized by section 4703 of such title, at the Naval Weapons Center, China Lake, California, and at the Naval Ocean Systems Center, San Diego, California, as subsequently modified and continued, shall become an alternative personnel system under chapter 49 of such title on the effective date set forth in subsection (f).

(2) Section 6 of the Civil Service Miscellaneous Amendments Act of 1983 (Public Law 98-224; 98 Stat. 49), as amended, is repealed.

(3) Any demonstration project authorized by section 342(b) of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 108 Stat. 2721), as

amended, shall become a streamlined demonstration project under section 4803 of title 5, United States Code, on the effective date set forth in subsection (f).

(e) STANDARDS AND OVERSIGHT.—Section 1104 of title 5, United States Code, is amended—

(1) in subsection (b)—

(A) by amending paragraph (1) to read as follows:

"(b)(1) The Office shall establish standards which shall apply to—

"(A) the activities of the Office or any other agency under authority delegated under subsection (a); and

"(B) any agency operating a demonstration project under chapter 47, a streamlined demonstration project under chapter 48, or an alternative personnel system under chapter 49."; and

(B) in paragraph (2), by striking "of this section" and inserting "and any activities under chapter 47, 48, or 49"; and

(2) in subsection (c), by striking "pursuant to authority delegated under subsection (a)(2) of this section" and inserting "under chapter 47, 48 or 49 or pursuant to authority delegated under subsection (a)(2)".

(f) EFFECTIVE DATE.—The amendments made by this section shall take effect 180 days after enactment of this Act.

Section-by-Section Analysis

The time is critical for the Department of Defense to adopt a more flexible and adaptable system of civilian personnel management if it is going to fully support a capabilities-based defense strategy. The Department must be more competitive in the marketplace for talent at a

time when it faces the possibility of increased retirements. The Department must have greater flexibility, within a framework of equity and equal opportunity, to recognize, utilize, and develop the capabilities of employees. The Department has learned much from various personnel management demonstration projects that will be useful in developing a flexible and fair system of civilian human resource management in order to meet the national security challenges that face our nation

Where testing of a civilian personnel management initiative is involved, the proposal would simplify and streamline that process under chapter 47 of title 5, United States Code. In addition to streamlining the procedures to implement a demonstration project, this proposal would create a mechanism for making a demonstration project permanent. Because there is no such mechanism in current law, innovations that have been tested successfully in a demonstration project cannot be implemented permanently in the testing agency unless authorized by Congress in special legislation.

This proposal also would authorize the creation of a permanent alternative personnel system (APS) in the Department. An APS would be a system that requires a waiver of a provision of title 5 (or a rule or regulation prescribed under title 5) or that uses policies and procedures not specifically authorized. An APS would have to be designed to improve the agency's ability to accomplish its mission efficiently and effectively, and would have to be determined by the Office of Personnel Management (OPM) not to require testing as a demonstration project before being implemented on a permanent basis in the agency. Like a demonstration project, an APS would be barred from waiving certain specified provisions of title 5, including provisions relating to certain employee benefits such as retirement and insurance, certain provisions relating to merit system principles and prohibited personnel practices, restrictions on political activities, and other ethics laws. This proposal offers the agency great flexibility while ensuring that we adhere to the core values of the Government-wide merit system.

Subsection (a)—Streamlined Demonstration Project Authority

Specifically, this proposal would create a new section 4803 of title 5 for streamlined demonstration project authority:

Paragraph (a)(1) would define agency to mean the Department of Defense.

Subsection (b) provides that OPM may conduct, modify, and evaluate streamlined demonstration projects. Of course, the agency could request a modification of a project, just as it may request that a project be terminated. Although OPM would continue to make the final decisions on such matters, it would do so only in extremely close consultation with the agency and other interested parties. OPM regulations would address the process for considering a proposed modification.

Subsection (c) provides a more streamlined process for developing demonstration projects than currently exists under chapter 47 of title 5. For instance, this provision would

eliminate the requirement for a public hearing on each proposed demonstration project and would shorten the requirement for OPM to provide advance notification of the project to the affected employees from 180 days to 30 days before the project is to take effect. This advance notification requirement is only a minimum, however. The agency could provide more notice than this if it so chooses. Consistent with recent efforts to moderate reporting requirements, this proposal does not include a requirement to notify Congress of a proposed demonstration project. A proposed plan would not have to be published in the Federal Register; only a final plan and any subsequent modification would have to be published. The agency would be required to address resource implications in the plan, as well as the project's relationship to carrying out the agency's strategic plan and its mission. The agency's system for ensuring accountability for merit system principles would have to be described.

The list of provisions of title 5 that could not be waived in a demonstration project would include references to ethics laws that have been enacted since the original demonstration project authority was first created. The list would include a clarification to ensure that categorical ranking procedures like those that have already been tested in demonstration projects, including the project at the Department of Agriculture (USDA) that was made permanent in 1998, could not be viewed as prohibited personnel practices under chapter 23 of title 5. This proposal would not remove anything from the list of provisions that cannot be waived, nor would it be inconsistent with the current bar on waivers of any statutory provision for equal employment opportunity through affirmative action.

Neither the limitation on the number of employees who can be covered by chapter 47 demonstration project authority, nor the limit on the number of demonstration projects that could be underway at the same time under chapter 47 would apply to projects under chapter 48. The five-year time limit on these projects also would be changed. New subsection 4803(e) would require OPM, before the fifth anniversary of the launching of the project, to determine whether the project should be terminated, continued beyond the five-year time limit for purposes of evaluation, or converted to an APS as authorized by the proposed new chapter 49 of title 5. In effect, conversion would mean that the demonstration project would be made permanent. A decision to convert a demonstration project to an alternative personnel system would be made at the agency's request. The conversion of a demonstration project to an alternative personnel system would be subject to the same provisions regarding union involvement and employee consultation that apply to the launching of a demonstration project.

Subsection 4803(f) would allow OPM to terminate a demonstration project if OPM found that the project was not consistent with merit system principles or veterans' preference principles. OPM also could terminate a project if it found the project was not in the best interests of the public, the Government, employees, or eligible candidates for appointments in the agency. OPM regulations would address the process for considering a proposed termination. Of course, the agency could request OPM to terminate a project. Termination always would be considered in close consultation with the affected agency and employees.

Subsection (b)—Alternative Personnel System

Subsection (b) of this proposal would create a new chapter 49 in title 5 authorizing an alternative personnel system.

Section 4901 would provide definitions for the new chapter. "Alternative personnel system" is defined as a system for human resources management in an agency, defined as the Department of Defense, which requires a waiver of a provision of title 5 or a rule or regulation prescribed under title 5 (or which uses policies and procedures not specifically authorized by law, rule, or regulation); is designed to improve the agency's ability to accomplish its mission and strategic goals efficiently and effectively; and is similar to one or more systems already tested as a demonstration project or has been determined by OPM not to require testing as a demonstration project before being implemented on a permanent basis in the agency.

New section 4902 would authorize the agency to implement APS. Before implementing a particular APS, an agency would have to develop a specific plan for the APS, the elements of which would be virtually the same as for a demonstration project under section 4803. The plan would have to be submitted to OPM for approval, and the agency would have to provide advance notification to affected employees. Section 4902 explicitly allows for subsequent modifications of an APS that is already underway. OPM regulations would address the process for considering a proposed modification.

Like a demonstration project, an APS would be barred from waiving certain specified provisions of title 5, including provisions relating to certain employee benefits such as retirement and insurance, certain provisions relating to merit system principles and prohibited personnel practices, and restrictions on political activities. Provisions relating to the acceptance of gifts and other ethics requirements also have been included in this list.

Under subsection 4902(d), the agency would be bound by the same requirements regarding union involvement and employee consultation that apply to demonstration projects under chapter 47. For purposes of the duty to bargain under section 7117 of title 5, an APS would be considered to be a Government-wide regulation.

New section 4903 would set forth OPM's responsibilities relating to APS. An APS could not be implemented or subsequently modified without the approval of OPM, in consultation with OMB. Approval would be based on a determination that the proposed APS met all the requirements of chapter 49. OPM would be required to approve or disapprove an APS plan within 90 days after receiving a complete plan. OPM would have to publish a notice of its approval of an APS in the Federal Register. The notice requirement also would apply to any subsequent modification of an APS which OPM determines is sufficiently significant to warrant publication.

OPM also could, at the request of the agency, convert a demonstration project (including one that is already underway when this proposal is enacted) to an APS, without requiring the agency to develop a plan for the APS as otherwise required by section 4902, if it determined that the project had been tested sufficiently to warrant being made permanent. Of course, the conversion of a demonstration project under chapter 47 or a streamlined demonstration project

under chapter 48 to an APS would be subject to the same labor-management relations provisions that would apply to any implementation of a proposed APS under subsection 4902(d). Subsequent modifications to a converted demonstration project still would require OPM approval.

Like a demonstration project, an APS could be terminated by OPM if found to be inconsistent with merit system principles, veterans' preference principles, or the provisions of chapter 49, or if OPM otherwise determined it was not in the best interests of the public, the Government, employees, or individuals eligible for an appointment in the agency. The agency could ask OPM to terminate an APS. OPM regulations would address the process for considering a requested termination.

New section 4904 would require OPM to prescribe regulations to administer chapter 49.

Other Provisions

Subsection (d) of this proposal would convert the demonstration project covering both the Naval Weapons Center, China Lake, California and the Naval Ocean Systems Center, San Diego, California to APS under chapter 49. By being designated APS under the new chapter 49, these projects would not be frozen in place, but would have access to all of the flexibility, including the ability to be modified as provided in chapter 49, that is available to any APS.

Subsection (d) also would convert the demonstration projects at DoD laboratories to streamlined demonstration projects under section 4803.

Subsection (e) of this proposal would amend section 1104 of title 5 to extend the oversight authority OPM currently has with respect to authorities delegated to agencies under section 1104 so that it also applied to activities exercised by an agency as part of a demonstration project or APS under chapter 47, 48 or 49 of title 5.

SEC .___. SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM.

(a) ELIMINATION OF REQUIREMENT TO PARTICIPATE.—Sections 714 (b)(3) of the Small Business Competitiveness Demonstration Program Act of 1988 (15 U.S.C. 644 note) is amended —

(1) by striking subparagraph (C);

(2) by inserting "and" after the semicolon at the end of subparagraph (B); and

(3) by redesignating subparagraph (D) as subparagraph (C).

(b) CONFORMING AMENDMENT.—Section 718(c)of such Act, (15 U.S.C. 644 note) is amended —

(1) by striking paragraph (2); and

(2) by redesignating subparagraphs (3) through (10) as paragraphs (2) through (9), respectively.

(c) SET-ASIDES FOR ARMY DREDGING.— Section 722 of such Small Business Competitiveness Demonstration Program Act of 1988 is repealed.

Section-by-Section Analysis

This provision would relieve the Department of Defense of the statutory requirement to participate in the Small Business Competitiveness Demonstration Program. DoD is one of ten Federal agencies participating in this program that restricts the Department's ability to set-aside requirements for small businesses in the following designated industry groups: construction, refuse systems, architectural and engineering services, and non-nuclear ship repair. In addition, this program is burdensome in its reporting, monitoring, and administration. For example, the Small Business Competitiveness Demonstration Program, alone, accounts for eighteen small business program goals.

Section 714(b)(3) requires the Department to execute an Individual Contract Action Report

for acquisitions in the designated industry categories even when the award is $25,000 or less and would not require this level of reporting. This proposal would delete this statutory requirement for the Army Corps of Engineers to report in such a manner.

Section 718(c) requires that the Department of Defense, with each component reporting separately, participates in this program. This change would delete the Department from the list of participants under this program.

Section 722 provides for a program that limits small business set-asides for the Department of the Army in the dredging industry. This unique program with its attendant reporting requirements would be deleted.

Relieving the Department from the burden of participation in the program would lessen the demands upon acquisition personnel created by this Program's administrative and reporting requirements, create increased opportunities for small business participation in the designated industry groups, and delete the necessity of reporting and tracking the eighteen small business program goals associated with this program.

SEC. ___. REVISIONS OF APPROVAL AUTHORITY FOR DETERMINATIONS RELATING TO HOME TO WORK TRANSPORTATION DURING THREAT SITUATIONS.

Section 1344(d) of title 31, United States Code, is amended—

(1) in paragraph (1), by striking "name and";

(2) in paragraph (2)—

(A) in the first sentence, by striking "for a period of not more than 90 additional calendar days" and inserting "for an additional period of not more than one year"; and

(B) in the second sentence, by striking "90 calendar days" and inserting "one year";

(3) in paragraph (3), by striking "may not be delegated" and inserting "may be delegated to as high an administrative level as practicable to a person appointed, by and with the advice and consent of the Senate, to a position in the concerned Federal agency; to a member of the Senior Executive Service; and to a general or flag officer";"; and

(4) in paragraph (4), by striking "name and".

Section-by-Section Analysis

This section would amend section 1344 of title 31, United States Code, to authorize transportation for a Federal officer or employee from the place of residence to the place of employment when either highly unusual circumstances present a clear and present danger, an emergency exists, or other compelling operational considerations make such transportation essential to the conduct of official business.

Under current law, the head of a Federal agency may authorize transportation for officers and employees under the conditions discussed above for a period of 15 calendar days and extend this 15-day period for an additional 90 days. Determinations to provide transportation may be reviewed by the head of the agency at the end of the 90-day period; a subsequent determination may be made that the danger, emergency, or consideration continues and that an additional extension, not to exceed 90 days, is warranted. Any determination must be in writing and include the name and title of the officer or employee affected, the reason for the determination,

and the duration of the authorization for such transportation. The agency head may not delegate this authority.

This section would authorize the head of an agency, or a person who was delegated the authority of the head of the agency, to extend the initial 15-day period of transportation for an additional period of one year, rather than only 90 days. Additional extensions could also be authorized for periods not to exceed one year.

In addition, this section would eliminate the requirement that a determination be made by name—thus, in appropriate cases where the position of the person is the basis for providing the transportation, a new appointee to the position could immediately receive transportation without a subsequent determination.

SEC. ___. *COMMON OCCUPATIONAL AND HEALTH STANDARDS FOR DIFFERENTIAL PAYMENTS AS A CONSEQUENCE OF EXPOSURE TO ASBESTOS.*

(a) PREVAILING RATE SYSTEMS.—Section 5343(c)(4) of title 5, United States Code, is amended by inserting before the semicolon at the end the following: "(for any hardship or hazard related to asbestos, such differentials shall be determined by applying occupational safety and health standards consistent with the permissible exposure limit (PEL) promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq))".

(b) GENERAL SCHEDULE PAY RATES.—Section 5545(d) of such title 5 is amended by inserting before the period at the end of the first sentence the following: "(for any hardship or hazard related to asbestos, such differentials shall be determined by applying occupational safety and health standards consistent with the permissible exposure limit (PEL) promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.)".

(c) APPLICABILITY.—Subject to any vested constitutional property rights, any administrative or judicial determination after the date of enactment of this Act concerning backpay for a differential, established under sections 5343(c)(4) or 5545(d) of such title 5, related to asbestos shall be based on occupational safety and health standards described in subsections (a) and (b).

Section-by-Section Analysis

This section would create an objective standard to govern the payment of pay differentials to federal employees exposed to asbestos. Section 5343(c)(4) of title 5, United

States Code, requires that a differential for duty involving "unusually severe working conditions or unusually severe hazards" be included in determining the wages to be paid a Federal employee under a prevailing wage system. Similarly, section 5545(d) requires that a differential be paid to a Federal employee paid under general schedule pay rates during any period the employee is "subjected to physical hardship or hazard not usually involved in carrying out the duties" of the employee.

Currently, for asbestos there are different standards regarding pay differentials for general schedule and wage system employees. The hazardous pay differential covering general schedule employees for asbestos is paid when exposure exceeds the Occupational Safety and Health Act (OSHA) permissible exposure limit. Environmental differential pay covering wage system employees is paid when asbestos concentrations "may expose employees to potential illness or injury." The environmental differential pay standard is open to interpretation and allows local arbitrators to determine subjectively the amount of asbestos exposure warranting the payment of the differential. This lack of an objective standard has resulted in questionable arbitration awards (totaling millions of dollars) in cases where air sampling results showed airborne asbestos concentrations to be well below the OSHA standard

This proposal would provide an objective asbestos standard for both wage system and general schedule employees. Differentials would be based on occupational safety and health standards consistent with those promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.). This would ensure consistency and fairness in agency responses to environmental differential pay and hazardous pay differential claims by providing an objective, scientifically-based standard that could be relied upon by all parties.

SEC. ___. REPEAL OF REPORTING REQUIREMENTS IN THE OFFICE OF FEDERAL PROCUREMENT POLICY ACT.

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended—

(1) in section 6, by striking subsection (k) (41 U.S.C. 405(k)); and

(2) in section 30, (40 U.S.C. 426)—

(A) by striking subsection (e); and

(B) by redesignating subsection (f) as subsection (e).

Section-by-Section Analysis

(1) Report Title: **Performance-based Acquisition Management**

Code Provision: 41 U.S.C. §405(k)

Section 6(k) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(k)) requires the Administrator for Federal Procurements Policy to submit, on an annual basis, an assessment of agency progress in implementing section 313(a) of the Federal Property and Administrative Services Act of 1949. Section 313(a) establishes the policy that the head of each executive agency should achieve, on average, 90 percent of the cost and schedule goals established for major acquisition programs of the agency without reducing the performance or capabilities of the items being acquired.

Reason the Report Should be Repealed: This reporting requirement largely duplicates information that can be obtained from the President's Budget. OMB Circular A-11, Part 3, Planning, Budgeting, and Acquisition of Capital Assets, requires an agency to prepare and submit a capital asset plan (so-called Form 300) to OMB as part of its annual budget request for each major acquisition program. Form 300s are required for each new program to set cost, schedule and performance goals. If the project is approved and funded, a Form 300 is submitted to OMB each year thereafter which shows the achievement of, or deviation from, the original goals using an Earned Value Management System or similar project management measurement system. Programs that are not within 90 percent of goals will not be recommended for continued funding until OMB reviews and approves a new baseline. Requests, if necessary, for additional funding are contained in the budget request sent to Congress. Congress, therefore, has the information required by the report in individual agency budget requests, where it can be used to make funding decisions.

(2) Report Title: Use of Electronic Commerce in Federal Procurement

Code Provision: 41 U.S.C. §426(e)

Section 30(e) of the Office of Federal Procurement Policy Act (OFPP Act) requires the Administrator for Federal Procurement Policy to report to Congress every 2 years through 2004 in detail on progress in the use of electronic commerce in procurement. The reporting requirement includes a discussion of progress made in facilitating access, including for small business, to procurement opportunities through a government-wide entry point (GPE) on the Internet and opportunities to expand this functionality. Section 30(e) also calls for agency-by-agency reporting on volume and dollar value of transactions using various electronic commerce methods.

Reason the Report Should be Repealed: This reporting requirement provides limited management insight for the burden it imposes. First, a main objective of the reporting requirement has been satisfied. This reporting requirement was designed, in part, to ensure a timely transition from paper-based to electronic processes for providing access to notices of solicitations through the GPE. As of October 1, 2001, all agencies have been required to use the Federal Business Opportunities website (i.e., "FedBizOpps"), the designated GPE, to provide access not just to notices for planned actions over $25,000 but also to associated solicitations.

Second, the reporting emphasis on collecting transactional data, in addition to being difficult, is likely to be of little benefit. Many of the past investments that near term reporting would measure are not the focus of current and future efforts -- at least not in their current form. In the past, agencies have often been too quick to adopt technology applications without having first evaluated them to ensure effective return on investment. Broader functional needs within and outside the agency have been frequently ignored, which has resulted in islands of automation and performance shortfalls throughout government. To address this problem, the Administration is pursuing a new strategic vision that recognizes the integrated nature of acquisition activities and the need for technology to reinforce this integration. Under this vision, investment decisions will be the product of better up front planning that considers how technology can be leveraged within and across the various functional activities that make up the acquisition process. Efforts are focused around: (1) improving seller access to government business opportunities and buyer awareness of contractor offerings, (2) reducing the burden agencies impose on contractors to collect information needed to do business, and (3) improving the quality of information reflecting our current activities that can support future critical agency business decision-making and performance measurement. Resources need to remain fully dedicated on the effective implementation of these initiatives in order to realize return on electronic commerce investments.