United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 104th CONGRESS, SECOND SESSION

Vol. 142 WASHINGTON, TUESDAY, APRIL 23, 1996 No. 53

Senate

The Senate met at 10 a.m., and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Dear Father, help us to use things and love people rather than using people and loving things. Enable us all through this day to communicate esteem and affirmation to the people with whom we work. Help us to take time to express our gratitude for who people are, not just for what they do. Make us sensitive to those burdened with worries, problems, or heartaches and help us to make time to listen to them. May we take no one for granted.

Gracious God, we want to live this entire day with a sure sense of Your presence with us. Our desire is to do every task for Your glory, speak every word knowing You are listening. Remind us that every thought, feeling, and attitude we have is open to Your scrutiny. We commit ourselves to work for You with excellence so that when this day is done we will have that sheer delight of knowing we did our best for You. In the name of our blessed Lord. Amen.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The able acting majority leader, Senator LOTT of Mississippi, is recognized.

SCHEDULE

Mr. LOTT. Thank you, Mr. President.

Mr. President, this morning the Senate will immediately resume consideration of Calendar No. 201, Senate Joint Resolution 21, the constitutional amendment limiting congressional terms. Debate between now and 12 noon is equally divided in the usual form. Under a previous order, at noon the Senate will begin 30 minutes of debate on H.R. 3103, the health insurance reform bill.

Following that debate, the Senate will recess between the hours of 12:30 and 2:15 for the weekly policy conferences to meet.

Shortly, it is expected, we will be able to reach unanimous consent which will allow for the vote on passage of the health insurance reform bill to occur at 2:15 this afternoon.

Following that vote, the Senate will debate the cloture motion on term limits with the vote on cloture occurring at 3:45 today.

The Senate may consider any other legislative items during today's session that can be cleared on both sides for action.

Mr. President, I yield the floor.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER (Mr. SANTORUM). Under the previous order, leadership time is reserved.

CONSTITUTIONAL AMENDMENT TO LIMIT CONGRESSIONAL TERMS

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of Senate Joint Resolution 21, a joint resolution proposing a constitutional amendment limiting congressional terms, which the clerk will report.

The legislative clerk read as follows:

A joint resolution (S.J. Res. 21) proposing a constitutional amendment to limit congressional terms.

The Senate resumed consideration of the joint resolution.

Pending:

Thompson (for Ashcroft) amendment No. 3692, in the nature of a substitute.

Thompson (for Brown) amendment No. 3693 (to amendment No. 3692), to permit each State to prescribe the maximum number of terms to which a person may be elected to the House of Representatives and the Senate.

Thompson (for Ashcroft) amendment No. 3694, of a perfecting nature.

Thompson (for Brown) amendment No. 3695 (to amendment No. 3694), to permit each State to prescribe the maximum number of terms to which a person may be elected to the House of Representatives and the Senate.

Thompson amendment No. 3696, to change the length of limits on Congressional terms to 12 years in the House of Representatives and 12 years in the Senate.

Thompson (for Brown) amendment No. 3697 (to amendment No. 3696), to permit each State to prescribe the maximum number of terms to which a person may be elected to the House of Representatives and the Senate.

Thompson motion to recommit the resolution to the Committee on the Judiciary with instructions.

Thompson (for Ashcroft) amendment No. 3698 (to the motion to recommit), to change instructions to report back with limits on Congressional terms of 6 years in the House of Representatives and 12 years in the Senate.

Thompson (for Brown) modified amendment No. 3699 (to amendment No. 3698), to change instructions to report back with language allowing each State to set the terms of members of the House of Representatives and the Senate from that State.

The PRESIDING OFFICER. Under the previous order, the time for debate until noon today is equally divided and controlled in the usual form.

Who yields time?

Mr. THOMPSON addressed the Chair.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. Mr. President, I thank the Chair.

Mr. President, several of my colleagues have expressed a desire to speak on the term limits amendment. As they work their way to the floor, I would like to make a couple of comments.

We have had a good debate in the last couple of days on term limits. It has

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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taken about 50 years to get such a clear vote to the floor, and I can assure the President that it will not take another 50 years to get another vote on it. It is an idea that is not only demanded by the American people, but I think more and more the people in this body understand that we are incapable institutionally now of dealing with the problems facing this country under the current setup.

One could not be anything but amazed and somewhat saddened to listen to that giant oak of a man, Senator ALAN SIMPSON from Wyoming, yesterday as he recounted his experiences of three terms in this body. It was with a twinkle in his eye—because he always has a twinkle in his eye even under the most serious circumstances—but somewhat with a heavy heart as he is leaving this body after this year that he had to recount one more time what everyone in this body knows behind closed doors; that is, that we are bankrupting our country; that our Social Security system cannot survive as currently constituted; that Medicare will fall; that within a relatively few years a handful of programs and the interest on the national debt will take all of our revenues. He has seen this happen in his work on the entitlement commission, which is a bipartisan entitlement commission, and it comes to this same result, Democrats and Republicans alike. It was an almost unanimous report coming out of there saying basically that we are on the road to destruction for this country.

We probably cannot do enough wrong over the next 2 or 3 years, or maybe even past that, to really run our ox totally in the ditch. But just as sure as I am standing here, catastrophe lies down the road, and we are all fiddling while Rome continues to burn. That is what this constitutional amendment for term limits is all about because we are putting reelection above all else. Reelection requires spending because that is the way we buy votes with taxpayers' own money—by giving it back to them a little bit at a time. That is the cruel, hard truth. I do not claim to be the first one that said it.

In looking over some old documents in books, I ran across a quotation from Senator Danforth of Missouri who served in this body, who had the respect, I believe, of everyone on both sides of the aisle. As he left, he said these words:

> Deep down in our hearts, we believe that we have been accomplices to something terrible and unforgivable to this wonderful country. Deep down in our hearts, we know that we have bankrupted America and that we have given our children a legacy of bankruptcy. We have defrauded the country to get ourselves elected.

Those are harsh words spoken by a gentle man just as Senator SIMPSON did yesterday. All of the pundits and folks in the media who are only concerned about wins and losses and numbers of votes will have their day perhaps this time because we will have a vote this afternoon. But I can assure you that on down the road, as the consequences of our actions become clearer and clearer and clearer, the time will come with the success of a constitutional amendment for term limits.

One of our distinguished colleagues took the floor yesterday opposing term limits, and it seems that he took the matter somewhat personally. He operated under the assumption that this amendment cannot possibly be anything other than an attack, a personal attack, on Members who have been here for a long time, and he seems to take it as such; it cannot be anything but based on an assumption that everybody that comes to the U.S. Congress is coming to line their own pockets. He said that he thought basically that was the assumption for the term limits movement—that we wanted to get even with somebody; that we wanted to punish somebody.

That is not it, Mr. President. That is not it. Had he listened to the debate, listened to Senator SIMPSON, listened to Senator BROWN, who served in the House and the Senate—and he is also leaving this body of his own volition to return to private life—Senator ASHCROFT, and the other Members, I think he would have found a gentleness of approach, a gentleness of spirit, of sincerity, and a concern for the future of this country.

This is not about getting even. This is not about besmirching the reputation of those who have served here before so gallantly. This is not about defiling the names of the giants who have walked these aisles.

As I said, yesterday, I used to sit up here in the galleries, not much more than a small boy, and look at these giants whose shoulders we stand on today, and listened to their debates. Back in a time not too long ago when we had more time to debate, we had more time to reflect, the Government had not grown quite so large. We were still balancing the budget in this country as late as 1969.

A good argument can be made that our system has worked pretty well now for a long period of time. The only problem is now that circumstances have changed. Our Founding Fathers never could have anticipated a professional Congress, but our Founding Fathers could anticipate changes in society and circumstances. They could not probably have ever guessed of the modern technological miracles we have today such as television, such as the fax machine, such as airplanes, and the vast numbers of things bringing people to Washington, DC, wanting more—wanting more programs, wanting more money, wanting a bigger share: ''Yes, I know you have to balance the budget but take a look at ours; this is different,'' which we get day in and day out, day in and day out.

Over the past relatively few decades, it has resulted in a situation where, as I said before, a relatively few, a handful of programs are going to take all of the revenues that we have. Those who are concerned about children, there will be no money for children's programs. Those who are concerned about the elderly, there will be no money for that. Infrastructure, many thoughtful people in this country, with whom I agree, say that in some areas we ought to be spending more on infrastructure—roads and bridges are falling into disrepair; research and development, things that will make us stronger in the future, we are not spending enough on that.

The reason, of course, is that there is no immediate political payoff. If you cannot send somebody a check in the mail before the next election, there is no immediate political payoff, and it comes right back around again. Our desire for constant reelection pushes the spending, pushes the growth of Government, and pushes the next generation into bankruptcy just as surely as I am standing here.

That is what this is about, trying to come up with a system, adjusting under the Constitution as our Founding Fathers anticipated and as they provided for in the Constitution, a thoughtful deliberation, which is very difficult to get. It has to pass here by a two-thirds vote and then be sent to the States, and the States have 7 years to ratify it—a very long and difficult process. So it is not radical. It is a conservative process based on the principles of the Founding Fathers.

So that is what it is about, trying to come up with a system, trying to adjust our system in a way so that we are better equipped to deal with the problems we do not seem to be able to deal with today.

Would it solve all of our problems? Certainly not. Would we immediately start balancing the budget and would the prestige of Congress immediately change? Probably not. But we would be on the right path. If we try something long enough and keep getting the same results, is it not, when the stakes are so high, incumbent upon us to try something a little bit different? As much as most of us respect and revere this institution—and I do—it has never made any sense to me to struggle so hard and sacrifice so much to become a Member of a body that you do not respect. But despite our respect, we must recognize that among the American people it is not there anymore. It is not there the way it should be.

So in our constant scramble to supposedly be responsive and give people what they want, that is, money, programs, expanded in many cases at 10 percent a year ad infinitum, which we all know cannot be sustained, we are creating the enmity of the American people at the same time, as if they were not aware of all of these wonderful things we were supposedly doing for them.

It has been pointed out that we would lose the benefit of the services of many people who have served long terms in this body before, and that is true.

There is no question but that term limits would deprive us of the services of some good people. But I urge, Mr. President, that as we continue this debate we refrain from personalizing this debate. This has nothing to do with myself. This has nothing to do with individual Members who are currently serving in this body. We will be lucky if they remember us 24 hours after we leave.

This has to do with the institution. This has to do with the country. This has to do with the kind of institution that this country needs in order to carry us into the next century to cope with these terrible problems. Certainly we would lose some valuable experience, but in all candor the experience that we have has not shown or demonstrated the ability to keep us out of the fiscal and reputation quagmire we see in Congress today.

We would lose some expertise, but what would we gain? We have 250 million people in this country. Under the current system where the incumbent has all of the advantages because of the spending I referred to and because of the reciprocation by those who have the money spent on them, usually in terms of campaign support, incumbents even in revolutionary years are reelected at the rate of 90 percent if they choose to stand for reelection.

So we have a small fraction of 1 percent of the people who have a realistic chance, a realistic opportunity to serve in this body. Most good people now do not bother. If the system were opened up to these positions after 12 years, 12 years is by some measures not a great deal of time but by some measures it is not a short period of time either. It is much longer than George Washington served. It is longer than Thomas Jefferson served. They managed to make a name for themselves in less than 12 years. So it is not an onerous, punishing type of proposition. But look at what expertise and experience we would bring into the system if people knew these positions were going to be open from time to time. We would have people coming in from the private sector. We would have people with acknowledged experience in business and labor, in farming, in being a mother and a father to mix and mingle with those who have already been here for a while.

Senator FRIST, my colleague from Tennessee, pointed out the number of physicians we used to have in this body, a high percentage of physicians when the country was first founded, members of the clergy. You do not see that much anymore. I simply think that if we had the system open, it would encourage more people, knowing they could not stay forever when they came, that it would be not a career for them but an interruption to a career, and they would come in with that experience, bring it to bear on their public service and, while they were here, I think would be more likely to do what it would take to speak the plain truth even if they risked the voters getting angry at them and sending them home a little prematurely because they are going home anyway. It would not be a catastrophic condition. I believe we would see a little more courage, a little more ability to stand up to the tough challenges that this country is going to face.

So just to attempt to refocus as we begin the morning—I see Senator BYRD is in the Chamber—I reiterate this is not about vindictiveness. It is not about personalities. It is not about quick fixes. It is a sincere effort on the part of many people around this country and in this body to think in terms of how best can we be equipped.

The current system arguably has served us very well for a long period of time. But is it not incumbent upon us to make adjustments as we go along to better equip ourselves to cope with the problems that we are leaving the next generation?

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. BYRD. Mr. President, I yield myself such time as I might consume.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. I thank the Chair.

Mr. President, I compliment those Senators on both sides of the aisle and those on both sides of the question. Everyday we disagree about one thing or another, and so we can expect to disagree in this instance, on this issue. I have nothing but the utmost respect, however, for those Senators who hold a different viewpoint from the one that I hold and that I will undertake to express.

Mr. President, proposing to amend the Constitution of the United States is one of the most serious and profound endeavors that this or any other Congress can undertake. It is not an act that any Senator or any Member of the House of Representatives, having sworn to support and defend the Constitution, can take lightly or inadvertently or absent great deliberation. On the contrary, a constitutional amendment must be considered thoroughly and exhaustively if it is going to be adopted here and ratified in the States. All of its ramifications must be rooted out and fully understood.

While some may believe that it is important to consider an amendment with deference to the views of the American people—and I think that is important—I believe it is equally important that we also maintain a deep respect for the wisdom and the vision of those Framers who painstakingly crafted the Constitution 209 years ago.

It is extremely important, then, particularly as we consider a constitutional amendment to limit the service of Members of the House of Representatives and the Senate, that each of us looks beyond the opinion polls, beyond the radio talk shows, beyond the op-ed pages. We must, as I believe our duty requires, go beyond the rhetoric, the political posturing and pandering and the 30-second sound bites that have enveloped this issue.

Instead, we must look back, back to the history of the Federal Convention of 1787. Cicero said, ''To be ignorant of what occurred before you were born is to remain always a child.'' So, let us look back. It is paramount, I think, that we take the time to understand and reflect on what the Founding Fathers intended, but before proceeding down that path, I think it is also important to point out the often overlooked fact that a limit on the terms of the Members of Congress already exists in the Constitution.

Here in my hand is my Contract With America. I took an oath to support and defend it. I have taken that oath many times. It is the Constitution of the United States, and in article I, section 2, a limit is placed on the terms of the Members of the House of Representatives, and in article I, section 3 of the Constitution—not the so-called Contract With America—the Constitution, article I, section 3, a limitation of 6 years is placed upon the terms of U.S. Senators.

And so, Mr. President, by that very language that was written into this Constitution, one can see that Members of Congress have already been subjected to limited terms—2 years in the case of the House and 6 years in the Senate.

Consequently, what we are debating here with respect to this proposed constitutional amendment is not a term limits amendment, per se, but rather an amendment that would limit the tenure, an amendment that would limit the service of a Member of Congress; a vastly different proposition, a limitation on the service of Members of the Senate, a limitation on the service of Members of the House.

I am hardly surprised that when proponents of the so-called term limits amendment refer to the Framers, they do so to evoke the image of a citizen legislator as a way of bolstering support for their cause. They say we need to amend the Constitution in order to preserve the Framers' original vision of individuals who would set aside their plows—as did Cincinnatus in the year 458 B.C.—to serve this great Republic, only to return to their fields as swiftly as possible. Citizen legislators! Well, I am a citizen. I am a citizen legislator. I do not look at service here as a hobby, something I should engage in for one or two terms. I look upon it as a service which I can contribute to my State and my country.

When I think about those men who labored to write the Constitution—men like James Madison who served in the other body four terms, not a maximum of three terms, he served four terms in the House of Representatives—George Mason, James Wilson, Benjamin Franklin and others who labored to write the Constitution—I have serious doubts about the veracity of that claim. That such men could truly embrace that bucolic notion is, at best,

dubious, particularly in light of the fact that these were men who devoted nearly all of their adult lives to public service. No one, then, should be misled by this romanticized interpretation of the Framers' views.

The lack of a provision in the Constitution limiting the tenure of Members of Congress was certainly no oversight. In fact, the issues of terms and tenure were discussed by the delegates on several different occasions.

As early as May 29, 1787, days after the requisite number of delegates had taken their place in Philadelphia, the so-called Virginia plan was laid before the participants. May 29, that is my wedding anniversary. Next May 29, the good Lord willing, my wife and I will have been married 59 years. So it is easy for me to remember the day on which Edmund Randolph submitted his plan—May 29, 1787. That plan, which would become the basis from which the convention worked, was offered by the State's Governor, Edmund Randolph, on behalf of his fellow delegates from Virginia. The Virginia, or Randolph, plan proposed 15 resolutions for the formation of a government, with the fourth and fifth resolutions directly addressing the issues of terms and tenure.

It is instructive to note that with respect to tenure for Members of the House and Senate, both the fourth and fifth resolutions of the Virginia plan remained silent. Neither offered the assembled delegates a specific recommendation. On the contrary, the spaces on the page stipulating how long it would be before a Member would be ''incapable of reelection,'' were simply left blank. Moreover, by June 12, after initially debating the issue of term length, the Convention unanimously agreed to strike the clauses in both the fourth and fifth resolutions limiting reelection. Here we have, then, the assembled delegates to the Federal Convention refusing to limit the number of terms a member of the proposed national legislature could serve.

Mr. President, notwithstanding their unanimous agreement on the matter of tenure, we also know from Madison's notes on the debates that there was a wide range of views among the delegates as to how long a Senator's term should be. While there was a general consensus that, of the two legislative bodies, the Senate was to be the one of greater deliberation, greater stability, greater continuity, the duration of that term was the subject of much debate.

On June 12, which happens to be my lovely wife's birthday—but she was not around on the June 12 that I am talking about—on June 12, 1787, for example, before striking the clause limiting tenure, the delegates turned their attention to the issue of term length. While in the Committee of the Whole, the first proposal for senatorial terms came from Richard Spaight of North Carolina, who thought that 7 years would be a proper amount of time. Roger Sherman thought 7 years was too long, arguing that if Senators did their jobs well, they would be reelected, and if they ''acted amiss, an earlier opportunity should be allowed for getting rid of them.'' As a compromise, Sherman thought a term of 5 years suitable.

Edmund Randolph, who offered the original Virginia plan, weighed in on the matter with the observation that the object of the Senate would be to control the House. If it were not a firm body, according to Randolph, the House, by virtue of its superior number of Members, would overwhelm the Senate. Madison agreed. He considered a 7-year term appropriate and not giving too much stability to the Senate. On the contrary, Madison ''conceived it to be of great importance'' that a stable and firm government, ''organized in the republican form,'' was what the people desired. With that, the delegates adopted a 7-year Senate term by a vote of 8 to 1.

On June 25 and June 26, the delegates returned to the issue of senatorial terms. Nathaniel Gorham of Massachusetts initially suggested a 4-year term, with one-fourth of the Senate to be elected every year. Roger Sherman of Connecticut proposed a 6-year term. George Read of Delaware went so far as to suggest that Senators hold their offices ''during good behavior,'' thus, in effect, constituting a lifetime term.

Despite these differences, the delegates did, as we know, eventually agree to a 6-year term. But even that decision was tempered with a ''check'' by requiring that one-third of the Senate stand for election every 2 years, a provision aimed at ensuring the frequent participation in the electoral process of the State legislatures, whose members, prior to the adoption of the 17th amendment in 1913, were charged with selecting Members of the U.S. Senate.

Mr. President, clearly, the underlying issue for the delegates to the Federal Convention, as it should be for us here today, was the degree to which limited tenure, the degree to which limited service in office would adversely impact on the level of experience gained by a Member of Congress.

Mr. President, one of the great advantages that comes from allowing voters to return their Representatives and Senators to Congress again and again is that Members of Congress are able to gain experience in the legislative process—the experience. It is a process that has become increasingly difficult to master. James Madison understood that. He told us right there in Federalist No. 53 that a crucial part of experience ''can only be attained, or at least thoroughly attained,'' by the actual experiences a person gains as a result of practicing his craft.

I shall read from Federalist Paper No. 53 this excerpt:

> No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lie within the compass of men in private as well as public stations. Another part can only be attained, or at least thoroughly attained, by actual experience in the station which requires the use of it.

No Senator, Mr. President, can garner more experience as a legislator, and no Member of the House can become a more seasoned Member of that body, through the route of constitutionally mandating limited service in the Senate or in the House.

I know of no other profession in which we actually consider experience a disadvantage. Would anyone needing open heart surgery seriously consider going to someone who had never performed the operation? Or would one tend to seek out a seasoned surgeon who had performed many such operations, perhaps hundreds?

I recently had the experience of having a root canal done. It was the second such that I had experienced. Would I have felt confident in the hands of someone who just walked in off the street or in the hands of someone who had practiced only, say, for 6 months? When that drill starts twirling and whirling and cutting, throwing the dust, I feel better that the person who is handling that drill is a person long experienced. The individual who performed my root canal had done perhaps 40,000 to 50,000 such operations over a long period of time. I submit that the answer is obvious. Only in the area of public service are the people being asked to believe that less is really more.

I do not like to fly. I never have liked to fly, and when I have been on an airliner in a storm I have always felt better believing that that pilot possessed the long experience that gave me the confidence that I needed so much at that point in time.

Mr. President, we are discussing an amendment to the Constitution that would, by definition, create a class of legislators who would, for virtually all of their service, remain relatively inexperienced. Patrick Henry said in a speech delivered in the Virginia House of Delegates, in 1775, ''I have but one lamp by which my feet are guided, and that is the lamp of experience.'' Benjamin Franklin, in ''Poor Richard's Almanac,'' said, ''Experience keeps a dear school, but fools will learn in no other.''

There is no substitute for it—none! It takes years to master many of the difficult issues with which this country must contend, but here we are, discussing an amendment to the Constitution that would, by definition, create a class of legislators who would, for virtually all of their service, remain relatively inexperienced.

Clear comprehension of national defense policy or the Federal budget or tax issues does not come without long, long years of study and experience. Yet, this amendment implies that we can cure the Nation's ills if only we can find a way to eliminate, or at least

reduce, experience. It is really a turning of logic on its head.

Additionally, I wonder if the proponents of the amendment have considered the effect which limiting terms may have on the careful attempt by the Framers to balance the power of the small States and those with larger populations. There has historically been a desirable offset, an advantage that such experience can bring to a State like Rhode Island or North Dakota or Montana or my own State of West Virginia. As it is now, a small State can have confidence that if its Members are in the other body long enough under the system of seniority, they may become chairmen of important committees.

Under this amendment, the small States will be at the mercy of the large States. The few large States will control the House of Representatives under this amendment. They would determine who would serve as chairmen of the committees. The small States will be at a great disadvantage. The large States will be able to control the committee chairmanships in the other body. The other States will not be in a position to control, but will be controlled by the large States. How can a small State, stripped of even the advantage of an experienced legislator, hold its own against the more populous States, which have a numerical advantage in the House of Representatives?

Mr. President, I will also point out that the issue of experience goes well beyond the ability of a single Member of Congress to offer effective representation to a State or district. Indeed, the lack of experience on the part of the whole would affect each and every one of us in this Chamber or in the House of Representatives. For to whom is the inexperienced legislator to look for guidance if all of his colleagues are inexperienced? When we have our debates on national defense, I listen to SAM NUNN. He has no equal in this body when it comes to knowledge of military affairs—national defense. I listen to him. I do not have that knowledge. I serve on his committee. I have been serving there 3 or 4 years. But SAM NUNN possesses the knowledge that not only benefits him and his own constituents, but benefits me and my constituents, and benefits every other Member of this body. We look to him for guidance.

What about a PAT MOYNIHAN, when we think about legislation affecting Social Security or welfare? He has been here 19 years, and he has gained through the experience. So I listen to him. With whom do Members of the Senate discuss defense issues if there is no SAM NUNN? Or foreign affairs, if there is no J. William Fulbright, or if there is no RICHARD LUGAR? From whom do the less experienced Members seek advice on the difficult issue of immigration? I go to ALAN SIMPSON on matters affecting immigration. I do not serve on the committee that has jurisdiction over that subject matter, so I go to someone who serves on that committee and who, by virtue of his long service and experience, is in a position to advise me. The same thing can be said about the freshman legislator who is concerned with the issue of Medicaid or Medicare. Again, I would look to PAT MOYNIHAN.

So each of us seeks out the advice of senior colleagues on these other matters. Each of us looks to the more experienced Senator when trying to understand the great issues that face this body. Each of us seeks advice. All of us benefit from that advice and that experience.

The problem with the issue of term limits is that it is but another quick fix in the growing list of quick fixes which have been advocated by those who seek easy answers to our Nation's complex problems. Well, there is an easy answer to every problem. But, unfortunately, those easy answers are usually the wrong answers.

In each of the last six congressional elections, less than 40 percent of the voting age population in this country actually voted—less than 40 percent. Interest in Government, generally, is not very high. I believe that putting congressional elections on a sort of automatic pilot would very likely have the unintended effect of further lessening that voter interest—meaning that Members of Congress would, instead of drawing closer to the folks at home, likely become even more distant. Voters would, I fear, tend to not even bother to follow the views of a Member in his or her second term, since that individual could not run for the same office again anyway.

Consider that what we may be doing here, in the case of the second term for a Senator, should this amendment be adopted—which God avert—is to create an individual accountable to absolutely no one in his second term in the Senate. Once he is elected to that second term and walks up there and takes the oath, he can forget about his constituents. He need not be obligated to them. He cannot be elected to a third term. He or she could vote any way they pleased, cutting a deal that benefits them or rip off the Public Treasury with wild abandon, because there would be no election or voter scrutiny to worry about. Why even bother to answer the mail in that second term? He will be looking at every lobbyist who walks in the door of the office as a potential employer. ''That is the guy I will be working for, perhaps, after this 6-year term is up. I cannot run again for reelection. So he is a potential employer. I should align myself with his interests and feather my own nest in that fashion.''

Mr. ASHCROFT. Will the Senator yield?

Mr. BYRD. I am happy to yield.

Mr. ASHCROFT. Is the Senator representing that, because a person is term limited he will automatically ignore his constituency? I ask that question because I spent two terms as Governor of my State. In my second term as Governor, I was term limited. But the kind of considerations which the Senator appears to be suggesting are really foreign to my mentality. I did not seek to rip off the public treasury, and I did not ignore my constituents. I did not view people who came to my office as potential employers. I sought to serve the people of my State. I am just not sure what the line of reasoning is. I inquire of the Senator, is this projection something that he thinks is an inevitable consequence of term limits?

Mr. BYRD. Mr. President, I heard the distinguished Senator from Tennessee [Mr. THOMPSON] say a little earlier today that it was his hope that we would avoid dealing in personalities. Of course, I do not imply anything of the sort of the distinguished Senator from Missouri. He may read that implication into what I have said. But I do not intend to imply that. I wish that he would not infer such. I am simply saying that Members who are elected to the Senate for a second term, under the pending constitutional amendment, could—and in some instances would, human nature being what it is—tend to forget their constituents, the people who sent them to this body, and look upon the lobbyist as a potential employer. That is plain language, and it should be easy to understand.

Mr. ASHCROFT. I thank the Senator.

Mr. BYRD. I thank the Senator.

Mr. President, one of the arguments put forth in favor of term limits is that Members of Congress, over a period of years, become corrupt as they acquire power. Well, let us see. BOB DOLE has been a Member of this body 28 years. Has he been corrupted? If he has, why does some Member not take action to haul him up before the Ethics Committee? I have never heard even a whisper of corruption directed toward BOB DOLE. But he has been here 28 years. What about Senator Russell, who was here 38 years? Not a whisper. Not a whisper of corruption. According to term limit advocates, the longer legislators stay around, the worse the corruption. What about Henry Jackson? He was here 30 years in this body, serving here the day he died. Was he corrupt? What about Everett Dirksen, a great Republican leader. I served here when Everett Dirksen was the Republican leader. He had been here 18 years when he died in office. Was he corrupt? What about TED STEVENS, who has been here 28 years. Is he corrupt? No. He is an experienced, dedicated legislator. His constituents are fortunate in having a man like TED STEVENS here, with all the experience he brings to bear in their behalf.

So to avoid this corruption, they say, limit legislators to a specific number of terms. Well, no one doubts that some individuals will abuse power. They always have since the beginning of the human race. Whether they are in the private sector or in the public sector, in the legislative, executive, or judicial branches, the examples of corruption are obvious.

It is highly specious, however, to jump to the conclusion that corruption is a result of long service in office. Yes, of course, there are examples of legislators abusing their power over the years. But there are many more examples of legislators using their office, tenure, and experience for the public good, without thought of private reward, other than the satisfaction of seeing a job well done.

If we believe that tenure breeds corruption, why not extend that theory to other occupations? At the very moment when surgeons, engineers, teachers, carpenters, electricians, and other specialists master their jobs and hone their skills, down comes the decision to end their careers. ''Sorry, you might be good at your job, but you are apt, over the years, to abuse the trust we have placed in you and become corrupt. We are replacing you with neophytes and amateurs.''

What a transparently arid theory. What a colossal loss of talent. What a lamentable waste of money.

If there had been a constitutional amendment limiting service in the other body to six terms, John Quincy Adams would not have served there 17 years after he had been President of the United States—17 years, and he died while serving in that office. TRENT LOTT would not have served in the House of Representatives for 16 years before coming to this body.

Howard Baker would not have served 18 years in this body, had this amendment been in place.

Sam Ervin, one of the great constitutional experts in our Nation's history, would not have served in this body 20 years and given to those of us who served with him, to his constituents, and to the people of the country the benefit of his valuable service.

Ed Muskie, who was the father of the Clean Water Act and the father of the Clean Air Act, served 21 years in this body. But with this amendment in place we would not have had an Ed Muskie.

Arthur Vandenberg, a great Republican statesman, who was steeped in foreign affairs, was able to give to the service of this country 23 years in this body.

Look at PETE DOMENICI from the State of New Mexico. Nobody in this body is his peer on budget matters when it comes to knowledge in depth about the budget. PETE DOMENICI is a man who is, in my judgment, the best informed on the budget of anyone in this Chamber. With this amendment in place, he could not have served the 23 years by virtue of which he has acquired that knowledge.

Thomas Hart Benton of Missouri would not have served 30 years in this body.

Moses would not have led the Israelites from Egypt through the wilderness to bring them to view the Promised Land—he led them for 40 years—if there had been a limit on service. He would have been out a long time ago. Cato would not have served long in the Roman Senate, and Cicero would not have served long in the Roman Senate.

Winston Churchill served the people of England 50 years in Parliament. I am told that Churchill served 50 years in the Parliament. Would the people of Great Britain have had the path of leadership of that great giant Churchill in World War II, who talked about sweat, blood, and tears? Not if there had been a term limitation. If there had been a limitation on terms, they would not have had that leadership, nor would the free world have had it.

The awful simplicity of the term limits idea is even more obvious when we think about the practical results. Right now, Members of Congress can remain in office so long as their interest in public office continues and they are successful in primary and general elections. Their thoughts are devoted to reelection and service in office.

Mr. President, do you know how many Senators in this body today have served less than two full 6-year terms? More than half—51 Senators—51 percent of the Senators, have served less than two full terms in this body as of this moment. In the other body, almost half of the membership has served less than 4 years—less than two full 2-year terms. One-hundred and ten came into the House in 1992, and six more by special election in between, and 87 freshmen last year.

So there are 203—almost half—218 would be half. Almost half of the other body has served less than two full terms.

Then why do we talk about term limits? The American people already have it within their hands to limit the service, the tenure, of Members. Look at the membership in both of these bodies, and you will see that the scheme which was laid down by the Framers of the American Constitution has been working, and working well.

It takes little imagination to realize what happens when legislators, under the shadow of term limits, meet with lobbyists and members of the private sector. No longer are these meetings limited to an exchange of ideas and information. The agenda widens. Legislators look at lobbyists as potential employers after they leave Congress. Lobbyists treat legislators as future members of their work force.

What could be more corrupting? Legislators would then be tempted, from the start, to perform their public jobs with an eye toward private employment. Legislative decisions, trips, speeches, meetings, and other activities would be carried out not by focusing on public policy but on private ends: the private ends of legislators seeking jobs and the private ends of people in industry seeking special favors.

Talk about corruption? There it is, front and center. Why should legislators be concerned about the well-being of their own constituents? Why not, instead, feather their own nests? Why not elevate private interests over the public good?

That will be the contribution of this amendment to the Constitution.

Madison warned us against amending the Constitution too often. And, since that Constitution was written, there have been 10,869 constitutional amendments proposed—10,869. How many have been adopted and ratified? Twenty-seven, and the first 10 of those 27 constituted the American Bill of Rights.

(Mr. THOMAS assumed the chair.)

Mr. DORGAN. Mr. President, I wonder if the Senator will yield for a question?

Mr. BYRD. Yes. Let me say that I intended to yield the floor soon because I see other Senators here who are wanting to speak.

Yes. I yield.

Mr. DORGAN. Mr. President, I have listened with interest to those who have made their case, and the Senator from West Virginia, as always, makes a compelling case against term limits. It occurs to me that the term ''term limits'' is used to suggest somehow that it will limit those in politics.

Is not the case that this proposed constitutional amendment really limits the choices of the American people?

As I was thinking about that, there are very few examples, it seems to me, in the history of this country where we have changed the Constitution in a way that takes power away from the people. Prohibition was one, for example, and, of course, the country changed its mind on that after discovering its failure. But there are only a couple of instances in which proposed changes to the Constitution have diminished the people's opportunities and the people's right of expression.

This constitutional amendment, it seems to me, would say to the people in Arizona, or in Minnesota, that you cannot have the service of Barry Goldwater, even if you want him, beyond 12 years.

You are prevented from selecting Hubert Humphrey to serve beyond 12 years even if you choose to want that to happen. So is not this constitutional amendment one that is one of those unusual circumstances proposing to limit the choices the American people can make?

Mr. BYRD. The Senator is preeminently correct. It is a very undemocratic amendment. It is saying to the people: You are not smart enough to make a choice, so we are going to put into automatic pilot the limitation on the service of your Senators or your Members of the House of Representatives.

Mr. THOMPSON. Will the Senator yield?

Mr. BYRD. We are not going to leave to the people that choice. That choice will be taken away from them.

Yes, I yield.

Mr. THOMPSON. But is it not true that we often as a people place restrictions on ourselves as a part of our process? Is it not true that if 51 percent of

the people or 60 percent of the people or 75 percent of the people want to abridge my speech, they cannot do that because of the Constitution, because of limitations we have placed on us, and specifically limitations we have placed on Congress, our elected representatives, that prohibit certain things regardless of how appropriate they may be? But it is a deliberate decision of the American people to restrict themselves. It is not that unusual. That is called the Bill of Rights and happens in other constitutional amendments.

Mr. DORGAN. Will the Senator yield for one additional question?

Mr. BYRD. Yes. Let me comment on what has been said by the distinguished Senator from Tennessee.

People may restrict themselves, but here we are talking about an amendment that restricts the people from exercising their own good judgment as to selecting for additional terms men and women who have served them honestly and well. So we are doing the restricting here through this amendment. Let us look at what the constitutional Framers did and see how well it has worked. They discussed that restriction and rejected it.

Yes, I yield.

Mr. DORGAN. I appreciate the Senator yielding. The point made by the Senator from Tennessee is an interesting one. I sat in the room in Philadelphia where they wrote the Constitution, and those who visit that room, called the ''Assembly Room,'' will see George Washington's chair still in the front of the room, Ben Franklin, Madison, Mason. You will sit in there and experience the goose bumps, understanding what was done there over a couple of hundred years ago.

The point I was making was that with respect to constitutional change, it has been very rare that we would change the Constitution in a way that would provide a limitation on people. The Constitution largely sets out what are the powers of the Government specifically and all other powers vest in the people of this country. And so it has been only very rarely that anyone has successfully proposed placing limitations in the Constitution on the rights of the people—the right of the people from Tennessee to say to Howard Baker: We would like you to serve a third term. This change would say to the people of Tennessee: You no longer have that right. We are going to take that right away from you by amending the Constitution.

That is the point I was making. We certainly have the capability of changing the Constitution to do that. The point I was making is that we have done that only rarely because in most cases proposed constitutional changes are done to take rights away from Government and say, no, there is too much encroachment here. This by contrast is to say, no, we will diminish somehow the rights people now have. That is the point.

Mr. THOMPSON. Will the Senator yield?

Mr. BYRD. Yes, I yield.

Mr. THOMPSON. I appreciate that. The Senator makes a very good point. But I would ask, what do we say to those people who go to the ballot box in their own States on a referendum and vote overwhelmingly to restrict themselves and say we choose for our own good reasons to restrict our Members as, what, 22 States have done? And now the Supreme Court, of course, has said you cannot do that. That is the one of the reasons we are here today.

I thank the Senator.

Mr. BYRD. Mr. President, I thank both Senators. Not only is this amendment undemocratic, but it also weakens the only branch of Government in which all of the members are elected by the people. Look at the executive branch and the judicial branch. Only two members, the President and the Vice President, are elected by the people, and they are not directly elected by the people. They are indirectly elected by the people, who elect the electors, who, in turn, elect the President and Vice President. But in this body and in the body across the way, on the other side of the Capitol, all Members are elected by the people. So this amendment would weaken the only branch of Government that is wholly elected by the people. It is going to say: You can only elect this person for two terms to the Senate, only three terms in the House.

I see in this ill-advised ''solution-for-everything'' called term limits, yet a further weakening of the people's branch. Few Americans realize how severely we have already tipped the checks and balances toward the executive branch. Thousands of executive branch bureaucrats, elected by no one remain in their posts for 20 or even 30 years. Congress is supposed to be the watchdog of executive branch activity. We are already badly outnumbered. Are we to totally cripple our ability to perform our oversight function by stripping ourselves of our one possible advantage, the ability of Members to become specialists, and, in many instances, experts in certain critical areas? This proposed change will leave Members of Congress mostly dependent upon the advice of executive branch bureaucrats, because they will have the only reservoir of indepth knowledge around.

In a country that tends to lurch and knee-jerk on questions of public policy, intentionally destroying any hope of institutional memory—and this body is lacking in institutional memory, almost totally lacking, and it will be more lacking when some of our good Members retire this year, and if this amendment is added to the Constitution it will be gone—seems to be a peculiar course to advocate.

As a matter of fact, the word ''peculiar'' fairly well sums up my own personal view of the popularity of this term limits idea, for it seems to imply that voters are not intelligent enough to decide for themselves when they wish to get rid of any single representative of the Senate or the House and put someone else in that person's place. This approach would make that decision for the voter, a sort of unfounded Federal mandate, if you will excuse the play on words. It would say, whether you want this person or not for a third or fourth term, you cannot make that decision. Whether or not a good job is being done for your State is an irrelevancy.

Such an approach is arbitrary. Such an approach diminishes the quality and depth of our national leadership overall, and is based on very little in the way of concrete evidence to recommend it. It is instead, an idea rooted in popular anger, whipped up by demagogues who peddle simplicity for political advantage.

This so-called term limits idea is little more than an over-sold bromide, purporting to fix everything from budget deficits to corns and bunions. In reality, it will do none of the above and should be roundly rejected in this body as it has already been in the House of Representatives. I urge Senators to vote against cloture later today on the resolution proposing this amendment to the Constitution.

I yield the floor.

Mr. President, I thank the Chair and I thank all Senators.

I yield the floor.

Mr. THOMPSON addressed the Chair.

The PRESIDING OFFICER. The Senator from Tennessee.

UNANIMOUS-CONSENT AGREEMENT

Mr. THOMPSON. I ask unanimous consent that the vote on the passage of H.R. 3103, the health insurance reform bill, occur at 2:15 today, and further that immediately following that vote, the Senate resume consideration of Senate Joint Resolution 21, with the vote on the motion to invoke cloture occurring at the hour of 3:45, with all debate prior to the vote equally divided in the usual form, for debate only.

I understand this meets with the Democratic leader's approval.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. THOMPSON. Mr. President, I ask unanimous consent that Senator GRAMS and Senator THURMOND be listed as cosponsors of Senate Joint Resolution 21.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. THOMPSON. Mr. President, I ask unanimous consent that Senator ABRAHAM be listed as cosponsor of amendments Nos. 3693, 3695, 3697, and 3699.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. THOMPSON. Mr. President, I yield 10 minutes to the Senator from Indiana.

The PRESIDING OFFICER. The Senator from Indiana is recognized for 10 minutes.

Mr. COATS. Mr. President, I thank my colleague for yielding.

It is really not my purpose today to criticize the 104th Congress. I have

been a long-time advocate of congressional reform, and I think a number of important reforms have been undertaken and at least debated and discussed in this Congress. For the first time in my experience in Congress, we have actually addressed in a serious manner some of the reforms that I think the American people have advocated and that many of us who have studied the institution believe are necessary to respond to a more effective and efficient means of doing business.

We have finally applied those laws and regulations that we impose on others to ourselves. I think that alone will bring about a fairly dramatic way in which we analyze and review those laws, because for too long, we have followed the unconscionable practice of saying, ''It is good enough for you but not good enough for us.''

We have also passed the line-item veto, returning accountability to the budget process, an extraordinary transfer, voluntary transfer of authority and power from the Congress to the executive branch in recognition of our inability to grasp and get ahold of necessary spending limitations in order to be responsive to the principle of not spending more than we take in or ask from the people who we represent.

We have not only paid lip service to a balanced budget, but this Congress passed what I think was the most courageous budget in a generation, which, unfortunately, the President vetoed.

Some may argue that this issue of term limits is now less urgent or even unnecessary given these changes that we have made. But I argue that this is not the case. We have learned that changes in our laws must be accompanied by changes in the procedures of our institutions if change is to be meaningful and if it is to be lasting. Term limits remain, in my opinion, the single most important reform that will restore this institution to a position of public trust, and the trust in this institution is near an all-time low.

Mr. President, I believe that the most effective method for turning the tide of public cynicism toward Congress to a positive vein is to break the tie between careerism and power.

Prior to the Civil War, it was the common conviction that the surest protection from an imperial Congress—we hear a lot of words about an imperial Presidency here—but the best protection from an imperial Congress—and we have had imperial Congresses—was a frequent rotation of office.

Americans expected a Government of citizen legislators then, not career politicians. Though the principle was voluntary, it worked, because during the first half of the 19th century, between 40 and 50 percent of the Congress left office in every election. The theory is simple: Public servants will pass better laws, or perhaps no laws at all, when they expect to go home and live under the product of their work.

One delegate to the American Constitutional Convention warned, ''By remaining in the seal of Government, they would acquire the habits of the place, which might differ from those of their constituents.''

Mr. President, I am certainly not opposed to professionalism, but limits on a career would make the normal time-consuming, wasted business of reelection less urgent, because no amount of effort would guarantee job security. This would leave more time to the serious work of Congress, and strengthen the trust of this institution in the minds of the citizenry.

In addition, term limits, by forcing representatives to have one foot in the real world, might help restore their ability to empathize and their capacity for outrage.

A story about a former Senator George McGovern, I think, is instructive here. After retiring from public life, he opened an inn in Connecticut, a lifetime dream of his. After covering startup costs, meeting payroll, complying with regulations, and the general ups and downs in the free market, the inn, unfortunately, went belly up.

His comment on these events is instructive, and I quote him:

> I wish someone had told me about the problems of running a business. I have to pay taxes, meet payroll. I wish I had a better sense of what it took to do that while I was in Washington.

And, therefore, we are back to the concept of citizen legislator. Those who have had one foot in the real world, those who have experienced the problems of meeting a payroll, running a business, performing in a profession, being apart from the governmental process, have learned lessons that are invaluable when they give to public service and bring that experience with them.

Term limits serve two very important purposes: They rotate politicians back into the private sector to labor under the results of their work, and they create more opportunity for people of broad experience to come to Washington with the practical knowledge and innovative ideas in the private sector, assuring that our laws pass the reality check. We need public servants connected to their community by experience, not just by sympathy.

Do we risk losing the contributions of some very fine people? Without question, we do. However, as John Taylor said in 1814: ''More talent is lost on long contrivances in office than by a system of rotation.''

The hard fact is that our greatest problem is not the lack of talented men and women waiting in the ranks to take the place of those who leave; rather, it remains a surplus of entrenched power.

Some have argued that term limits would vest too much power with congressional staff, and that is hardly true either. The average length of service for House staff is 5 years; for Senate staff, 5.7 years. This is hardly a problem. Further, when you have new Representatives and Senators who come to office, they generally bring their own people with them, rather than inherit an entrenched staff. Term limits would more likely limit the tenure of powerful staffers who would lose their long-time patrons.

Others argue that term limits would restrict the public's choice. The Senator from North Dakota just argued that a few moments ago. I think just the opposite is true. By denying the American people the opportunity through their States and their State legislatures to ratify under the constitutional process what this Congress has done is a limitation on the power of people, not as the Senator from North Dakota said, term limits being a limitation.

It is clearly a more democratic process to give the people the right to make this decision as to their elected representatives through a constitutional ratification process than for 100 people to stand here arrogantly and say, ''We're not going to give the people those choices. We're going to deny them that opportunity. And even though they exercise those powers through their State legislatures and impose those restrictions on us, we're going to draw an iron curtain across that process and say, 'No, you cannot reach into the Federal level to impose that.' ''

So I think it is just the opposite of what the Senator from North Dakota has said. Well over three-quarters of the American people have chosen term limits. Opinion polls show that constantly. Aside from the balanced budget amendment, which has always been denied to the American people, there is no other issue that has so much popular support.

Only in Washington could an idea ensuring a rotation from office creating entirely new choices for office be seen as a limitation on the American people. It certainly is not seen that way by the people outside of Washington. It is an example, Mr. President, of the newspeak that has produced so much cynicism on the part of the American people toward their Government.

This measure may not pass the Senate. As the past year has demonstrated, even with the revolutionary changes of the last election, the system continues to be weighted against change.

We are now faced with a procedural process here where we need to obtain the 60 votes in order to just bring this issue to debate and to a vote. The vote that will be taken this afternoon at 3:45 is not a direct vote on the measure, it is simply a vote on whether or not we will go forward to examine the legislation, to offer amendments, to modify it, and then to bring it to a final vote, which appears we may not get to that point.

We will, however, I believe, ultimately prevail in this battle. The question comes down to individuals. Will a candidate for Congress commit to limited terms even if it is not the law?

Will those of us in the Congress make the commitment to limited terms even though it is not in the law?

Mr. President, one of the first bills that I introduced in the Congress when I was a Member of the House of Representatives was a term limits bill, a limitation of 12 years of service in the House, no more than six 2-year terms, and 12 years in the Senate, no more than two 6-year terms. I made an exemption in that legislation for those who served partial terms, appointed because of a death of a sitting Member or the resignation of a sitting Member. I thought it was fair for them to be able to fill out that term and then have the full term limit apply. I never realized that that would apply to me. A serendipitous act. I would call it an act of providence. I received an appointment to the Senate to fill the unexpired term of the recently resigned Senator from Indiana, Senator Quayle, who then became Vice President. I fulfilled that unexpired term.

At the time I pledged to the people of Indiana that I was a strong advocate of term limits and felt, whether or not it was the law of the land, I should abide by it. And I pledged to the people of Indiana that I would not serve more than two full terms in the U.S. Senate. I hold to that pledge.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. COATS. Mr. President, I ask for 1 additional minute to conclude my statement.

The PRESIDING OFFICER. Is there objection? Hearing none, without objection, it is so ordered.

Mr. COATS. Mr. President, as I said, this is a procedural bill. Even though this bill will not completely conform to my own legislation regarding unexpired terms, I do believe that the debate should go forward. If changes are necessary, amendments obviously can be offered. This is too important an issue, too vital a reform to die in a procedural vote here today. The American people deserve full consideration, and only a vote of 60 Senators to invoke cloture will allow that full consideration to take place.

So I urge my colleagues to join with me in voting for cloture. Hopefully we can garner 60 votes so that we can, in this important debate, fulfill the wishes of more than 80 percent of the American people, that we address this fairly, and give them a fair opportunity to weigh in, as I think they deserve.

Mr. President, I thank Senator THOMPSON and Senator ASHCROFT for their diligent efforts in this and the additional time they have yielded me, and I yield the floor.

Mrs. HUTCHISON addressed the Chair.

Mr. THOMPSON. Mr. President, I yield 10 minutes to the Senator from Texas.

The PRESIDING OFFICER. The Senator from Texas is recognized for 10 minutes.

Mrs. HUTCHISON. Thank you, Mr. President.

I want to thank Senator THOMPSON and Senator ASHCROFT for taking the lead on this very important measure.

Mr. President, our Founding Fathers crafted a Constitution that was built around balance. The checks and balances have made this Constitution endure for over 200 years. Part of the balance was that the Federal Government would be limited, that Federal Government would have very narrow responsibilities. It would be strong in its responsibilities, but nevertheless the social programs, the education, the time-consuming, more detailed areas of responsibility were clearly left to the States and to the people.

So, Mr. President, our Founding Fathers intended for us to have a small Federal Government, made by citizen legislators, citizen legislators who would come to Washington to do the business of the Federal Government, which was limited, and go home and have professions. The people that wrote the Constitution were not full-time writers of the Constitution. The Congresses in the early days were not full-time Congresses. They were made up of citizens who had vocations, who understood what the problems of the States were, who came together on a limited basis to correct those problems.

Mr. President, we have gotten out of kilter. The balance is no longer there because we have a full-time Congress, because we have people who have been here as a career for 20, 25, 30 years, some of whom are wonderful people.

This is not a personal attack in any way on those people. They are good people. I think every Member of this Congress is sincere about what he or she is trying to do. But, nevertheless, because it is career politicians who are making the laws, our Government has grown and grown, and the Federal Government is out of control. Part of the reason is because we have a Congress that is out of touch with the real world, with the small businessperson that is trying to make it, trying to make ends meet with all of the regulations and the taxes and the litigation that is complicating our lives today.

To bring back the balance, Mr. President, we need term limits because we need citizen legislators. We need small businesspeople who have lived with the regulations and the taxes that keep them from growing and creating the new jobs that will really make this economy strong. We need the working people of this country who know what it is like to go into a workplace and not be sure if they can walk inside the line on the factory floor or outside the line on the factory floor.

Mr. President, we need citizen legislators because we need people who have experienced how hard it is to deal with the morass of Federal regulations, with the fines that come from minor infractions. Sometimes our small businesspeople think that Government does not want them to succeed. They forget, people in Government, that the American dream is that you can work hard and do better. The Federal Government should not be there to tamp you down. It should be there to build you up, to let more people have access to the American dream. If we can have term limitations, Mr. President, we can get the balance back in our Government structure because we will have people who have come from the real world and who are going back to the real world.

Mr. President, our seniority system is a waiting game. The average number of years of a Senate committee chairman is about 22; a House committee chairman is about 25. So when we talk about all this free access that the voters have to vote somebody out of office, we are talking about giving up this seniority system, and it does become a dilemma because even if someone is out of touch, they are powerful. They are able to produce for their districts.

So it is a dilemma for someone going in the voting booth to say, ''I'm going to oust someone who has been there 25 years, who is high in the seniority system, who is a committee chairman,'' or whatever. It is very difficult. It happens when there is a real movement like happened in 1994. The people did rise above that seniority system. But it is very rare, Mr. President.

My distinguished colleague from West Virginia, who I admire greatly, talked about Winston Churchill serving in Parliament for 50 years. Yes, but back then and even to an extent now, Parliament was part time, except in the British system, of course. Members of Parliament are also the Cabinet officers, if they are in the front bench, but if they are back benchers, they do something else. Winston Churchill at the time he was a back bencher wrote, gave speeches. That was his vocation. Cicero, the Roman Senator, also wrote a little bit. I think many of us remember many of the things that he wrote.

We have had citizen legislators in our best Senates and Congresses through the ages. That is because it works best when the people who are trying to make this country what we want it to be are the people who decide to give a little time for public service and then go back out and live in the real world of business and commerce, working people that understand best what it takes to get this country going in the right direction. They are the people that have the values. They are the Sunday school teachers. They are the people that go to PTA meetings, that work with their children in their schools. They give back to their communities.

Those are the kind of people that we want in Congress. That is why we are trying to have term limitations, so that we can bring back the concept of a citizen legislator; so that we can meet a few months every year, go home and be in a real vocation, so that we will not have new laws with new regulations and new things that bureaucrats can dream up to do to tamp down the spirit of entrepreneurship that built this country.

That is why we are fighting so hard today. It is why we have to have a constitutional amendment, because we cannot do it by State law, because States have tried and the Supreme Court said last year that will not work. You have to amend the Constitution. This was not Senator THOMPSON'S first choice. He would love to have gotten 51 votes because we could pass it with 51 votes, but we will probably not be able to have the two-thirds vote required to amend the Constitution. That is why it is so important for the people of this country to understand that the fight is going to continue.

We will try to get cloture today. If we do not get cloture, I have a bill I have introduced that I will try to put on some other measure coming down. It is going to be a national referendum on this issue. Let the people speak. Let the Congress hear. Let people ask their Member of Congress that is running for reelection, or their Senator that is running for reelection how they feel on this issue, so that they get committed.

We are going to have to keep working at it. I hope I can get a national referendum, if we do not get cloture today, to do what we ought to do. That is, amend the Constitution. This is a basic tenet of the balance of powers in our Government. A citizen legislator is a basic part of the balance that is necessary to keep the Federal Government from getting so big and overblown that they start encroaching on States rights. The government that is closest to the people at the State level—this is part of the balance. It is part of reform that is necessary to get this country back on track, so that more people can realize the American dream, so that the immigrants who come to our country, because it is the beacon of opportunity anywhere in the world, they come to this country for the American dream, which is if you work hard and you start a small business you can keep the fruits of your labor. In America, success that is gotten from someone by the sweat of their brow or by their hands or by their brains—working, writing—we want those people to succeed. We do not look down on success. We want everyone to have that opportunity.

If we are going to keep the American dream, Mr. President, it is going to be with people who are understanding that the Federal Government is limited and those people are going to be citizen legislators, not career politicians.

Mr. President, I want to thank Senator THOMPSON and Senator ASHCROFT for bringing this to us. This is the first step in a very long march, Mr. President. This is not going to end today, but we are going to be there with the American people to fight for what we know will bring back the values and the dreams and the opportunity of this country through citizen legislators that will work with us to do it.

Mr. THOMPSON. Mr. President, I yield 10 minutes to the Senator from Idaho.

Mr. CRAIG. Mr. President, if I could indulge you for just a moment this morning, I would like to incorporate you in my discussion on term limits, because I want to tell a little story to my colleagues who are here and for the record.

A good number of years ago I engaged in a conversation with the former Senator from Wyoming, Malcolm Wallop, who you followed to the Senate. We were talking about the advantage of freshmen, new people, coming to the U.S. Congress. I alluded at that time that you can always tell the difference between a freshman and a more senior Member by this simple adage: Freshmen were always going around asking why Government did certain things, and more senior Members were going around saying ''because.''

In other words, what has often happened as a result of seniority and longevity of service in the U.S. Senate or the U.S. Congress in general is that Members of those bodies become advocates of Government, defenders of Government, instead of responsible citizen critics of their Government.

One of the things that I know the chairman, the President, and I have tried to do, and I mean the President of the Senate, the presiding Chair of the Senate and I have tried to do is be constant critics of Government, critics of Government.

Oftentimes we find out that the longer Members are here, while they may serve well, they become the advocates of an ever-increasing Government. It was under that belief in my years of service, while I think I remain a responsible critic, that I have grown to support term limits, because I believe they are a rejuvenator of the system. It creates, once again, the process that our Founding Fathers had intended. That was the citizen legislator coming to this Congress to direct the affairs of Government, not to be the advocate but to be the friendly critic.

Now that both the House and the Senate are under the control of a Republican Congress, we are going to have votes on this issue. We are going to be able to stand up and express our wishes, hopefully reflecting the will of the American people, that has been spoken to by the Senator from Tennessee, who has done such a fine job of bringing this issue to the floor, and the Senator from Missouri, that 77-plus percent of the American people believe that term limits are a responsible way of governing, and that those of us who seek to serve in public life at this level be limited to a certain number of years in our public service, and in doing so, hopefully, retaining those concerns or those issues that brought us to this Congress.

It is because of a Republican-controlled Congress that we will have the privilege to vote today on this important issue. Hopefully, we can take this issue to the American people. It is significantly important. We are asking the American people to change the way their Government has operated for well over 200 years.

That is why I am pleased that we are moving to the constitutional amendment approach. Yes, the courts have said we must strike uniformity in the terms of Federal officers, and that is what we all are who serve in this body, and that all States must be served and represented equally. Beyond that court edict and the responsibility that is being taken here today in the debating of and the voting on this constitutional amendment, remember our civics lesson, to understand that the Congress can only propose an amendment. That in proposing it, what we are really doing is sending it out to all 50 States for what will be a fundamentally important national debate on term limits.

Every State legislator, if this passes the Congress, will engage in a debate at the State level on the validity of term limits and the responsibility of those limits and how they ought to be carried out under the edicts of this constitutional amendment. That is what representative Government is all about. That is why I recognize these two Senators for the work they have put in in the leadership of this issue.

While I have been a strong and outspoken supporter of term limits, we have not had the opportunity to vote on them in previous years. Now we are guaranteed that opportunity. I am pleased to join with my colleagues in support of this amendment.

Thomas Jefferson and George Washington were ardent supporters of term limits. Maybe they saw something that some of our other Founding Fathers did not see. Maybe they recognized there could be a time when Government would grow to a point that those who served in it would ultimately become individuals who would seek a lifetime of service here.

While there are a tremendous number of dedicated Members of the U.S. House and the U.S. Senate who have served well beyond the limits that are proposed within this amendment, I believe the concept of term limits, as I have spoken to, serve as a phenomenally rejuvenating factor in what we believe to be the founding premises of this country, that States would not have lost as much control as they have lost over the last 200 years if we had term limits. Citizens who had served and would serve in Congress would find themselves much more subject to the laws they passed because they would not spend a lifetime here, a lifetime in an environment that was relatively sheltered, relatively protected from the citizen on the street of America, who had to live under the laws that the Congress had passed.

For 200-plus years, Congress has been exempt from all of those laws. It is only in the last few years, under phenomenal pressure from the citizens, that we are finally saying we are not special and we are not something different. Thank goodness we are saying

that. I have been pleased to support the fact that we now subject our offices to the same labor laws that the average employer must subject his work force to and the average worker must be subjected to.

Why should we be different? Why should we be special? We should not be. But it has been under a protected environment of continual service that that kind of situation existed. It is my guess that if term limits had been imposed some time ago, that would not have been allowed to happen. The Congress would not have become the special, unique haven that it was for so many years, while at that time it might have been observed as the right thing to do. In an America of today that wants to see a limited Government, to see a great deal more authority returned to the States, this amendment, and our debate on this amendment, fits that approach in a most important way.

I look forward to an opportunity to continue to work on this, and I hope we can get the vote this afternoon. But as the Senator from Tennessee admonished us when the debate began, this is an issue that will not go away. If we are not successful this time, I am confident we will be back, and I will be a supporter of that effort. If that cannot occur, you heard the Senator from Texas talking about the allowance of a national referendum that causes this debate and a vote of the people of this country on this type of an issue.

So while a Senator from Wyoming chose, a few years ago, to limit his terms, which gave opportunity for the Presiding Officer to be a new face in the U.S. Senate, bringing new debate and new ideas, I believe this is an issue that we ought to respond to in a representative way to the citizens of our country, who have spoken so clearly on it.

While the issue of rotation in office—term limits—for elected Federal officials has been around as long as our country itself, this current Congress will make history on the issue of term limits.

In prior Congresses, neither the House nor the Senate had voted on a congressional term limits amendment, despite the efforts of myself and others.

Finally those efforts have paid off. This Republican Congress has kept its promises, and is trying to pass a term limits constitutional amendment.

It is the first U.S. Congress ever which the House and the Senate will both have floor debates and recorded votes of all the Members on a constitutional amendment to limit congressional terms.

The term limits constitutional amendment that I am an original cosponsor of will impose a uniform, national term limit of 12 years in the House and 12 years in the Senate.

It is critical that if we impose term limit, we do it across the board, State by State. No State should be singled out to be disadvantaged by the loss of seniority in Congress.

My support of this grew out of my observation of how this business on Capitol Hill works—or does not work.

Why do I feel so strongly that congressional term limits are an important and fundamental step in restoring our Nation's political health?

The Governors of 40 States, including my State of Idaho, are subject to term limits. Why not Congress?

The State legislatures of 21 States, including Idaho, are subject to term limits. Why not Congress?

Thomas Jefferson and George Washington were two ardent supporters of term limits.

The issue of term limits for Members of Congress is favored by 77 percent of the American people, according to a national poll conducted in January.

Support for term limits never falls below 64 percent in any demographic group; white, black, Hispanic, male, female, young, old, Republican, Democrat, Independent, or geographic residence.

Term limits received more votes in the 14 States where it appeared on the ballot in 1992 than Ross Perot received in all 50 States in the 1992 Presidential election.

According to studies conducted by the National Taxpayers Union, the shorter the tenure of a Member of Congress, the more likely that Member of Congress is to vote against tax and spending increases for the Federal Government.

The bottom line is this: if we want to change the mindset in Washington, DC, we must change the players.

A limited central government and limited tenure in that government are essential elements on which our form of government is based.

We must embrace the principles articulated by the Founders of our country and supported today by an overwhelming number of American people.

To do otherwise is to forget our roots and responsibilities as representatives of the voters. We are not free agents doing whatever we want in Washington.

When I joined in the battle for term limits years ago, I knew it would not be a quick, easy process. My fight for a balanced budget amendment to the Constitution has showed me that.

But, like the balanced budget amendment, we must let the people of our country decide whether they wish to ratify the term limits amendment. If Congress passes the term limits amendment, it must still be ratified by 38 States.

That is my goal here today: to pass this legislation so that the people of Idaho and everywhere else will be able to let their State legislatures know whether or not to support this term limits amendment.

Let the people decide, not us. I will be proud to cast my vote in favor of term limits on behalf of the people of the great State of Idaho.

I strongly urge my colleagues to do the same.

Mr. HATFIELD. Mr. President, the Senate has before it today an issue that goes to the heart of our democratic system of government. Limiting congressional terms has been one of the most consistently visible issues in our Nation's political arena for the past 6 years. In addition to being a significant plank of congressional campaigns, several States have voted to limit the terms of those elected to Federal offices. The Supreme Court ruled last year in the Thornton case that statutory efforts by Congress or individual States to impose term limits on Federal officials are unconstitutional.

In lieu of this recent action by the Supreme Court, the only remaining option is a constitutional amendment limiting the number of terms a Member of Congress may serve. The Senate has before it and will soon vote on such a measure. I oppose amending the Constitution to limit the number of terms a Member of Congress may serve and will vote against this resolution. I will, however, vote in favor of cloture on this resolution so that debate on this important issue can be brought to a timely conclusion.

It should be recognized that, despite their recent visibility, proposals to limit congressional terms are not a new phenomenon. This is a debate that has been evolving for many years. Our Founding Fathers considered including term limits in the Constitution. They grappled with the question and rejected the idea, preferring to allow such authority to be exercised by the citizenry at the ballot box.

At the beginning of my career in the U.S. Senate, I introduced legislation to restrict Senators to no more than two terms. When this measure did not pass and my own second term came to an end, I decided I could be more effective for the people of Oregon by continuing my service in the Senate. My constituents agreed with me and, at the ballot box, chose to continue my term of service in this body.

During the years of debate over term limits, many have argued the only way to remove entrenched incumbents from Congress is to override the will of the voters by placing a mandatory limit on the number of terms a member may serve. However, the American voters currently have the authority to limit the terms of any member of Congress during each election. Voters in the 1992 election gave 110 new individuals the opportunity to serve in the House. In 1994 86 new Members were elected to the House of Representatives and 11 to the Senate. The 1996 cycle, at least for the Senate, has already achieved the distinction of having the most retirements of any cycle in this century. An analysis of our recent elections shows that over half of the Members of the House of Representatives and nearly a third of the Members of the Senate have been elected since 1990.

Mr. President, term limits are an important issue worthy of debate, but

they are not a panacea for reforming Congress or improving the public's perception of this institution. In fact, I believe they have the potential to cause significant damage by depriving voters and this institution of the best qualified candidates. Congressional turnover is something best left in the hands of the local voters.

The 1994 elections not only brought numerous new Members to Congress, but they also gave the Republican Party control of both Houses for the first time in over 40 years. This drastic change was accomplished by the American people exercising their constitutional right to vote for the candidate of their choice. It was not accomplished by imposing a structural change upon the electoral process so thoughtfully conceived by the Framers of the Constitution.

As the Nation deliberates the issue of term limits, I would encourage proponents of limitation to consider each candidate individually. The difficulty in setting arbitrary limits is, simply, that they are arbitrary. Citizens should not be denied the service of the effective, elected representative of their choice merely because that person had already served them well.

Candidates should not be judged by a constitutional provision that looks only at the length of their prior service. Rather, candidates should be judged by their constituents, who invariably look at the quality of the service provided in past terms and the likelihood of satisfactory representation over the next time-limited term.

Mr. HEFLIN. Mr. President, I rise in opposition to Senate Joint Resolution 21, which provides for a constitutional amendment to limit congressional terms.

Nearly 1 year ago, the U.S. Supreme Court ruled that State-imposed term limits on Federal legislators are unconstitutional. The only way to institute such limits is, therefore, through a U.S. constitutional amendment such as that embodied in Senate Joint Resolution 21. Altering our cherished Constitution in such a way would be a huge mistake in my opinion.

The idea of term limits for Members of Congress addresses the general disapproval voters seem to consistently have for Congress as an institution. However, they do not address the issue of losing good, productive leaders through arbitrary limits on their time of service. Many believe the experience gained from serving in Congress is a valuable resource for serving effectively as a legislator and as a questioner in an oversight role over agencies and departments of the executive branch of the Federal Government. This experience can only be gained over a period of years. Even those who support term limits acknowledge that the many years of service to our Nation by many long-time Members of Congress have made a meaningful difference in countless lives.

In this body, leaders such as Senator BYRD, Senator DOLE, Senator BIDEN, Senator STEVENS, Senator BUMPERS, Senator LEAHY, Senator SIMPSON, Senator HOLLINGS, Senator NUNN, Senator THURMOND, Senator KASSEBAUM, and Senator HATFIELD, to name only a few, would not be here if term limits were in effect today. This is not a partisan issue; term limits would deny the Nation the service of outstanding leaders on both sides of the aisle.

Term limits are an unwarranted restraint on democracy. I think the limit on Presidential terms passed in the wake of Franklin Roosevelt's long tenure in the Oval Office was a mistake. The most fundamental and basic right citizens of this country have is the right to vote for the candidates of their choice. This right should not be abridged just because some Government leaders are reelected with regularity and are labeled as being bad because of that. If they are reelected, common sense would suggest that the voters are generally happy with the job he or she is doing. If not, they can vote for the opposing candidate. They already have the right to limit the term of any officeholder they wish by voting.

In effect, term limits suggest that the ultimate judges in the political arena, the voters, are not competent to make decisions after a public servant has served for a few years. Voters should view term limits as a slap in the face that restricts their discretion and their right to be represented by those whom they so choose.

If term limits are instituted, what we will see is a Congress run by a staff of unelected bureaucrats with no limits on the time they can work in the legislative branch. Members will increasingly come to depend on staff as the institutional memory and precedent that guide much of the work here are eliminated. Term limits will also shift more power to the executive branch and its legions of unelected and unaccountable careerists.

Simply put, there is no reason to deny voters the right to elect an individual to Congress simply because of that person's previous service. In their wisdom, the Founders correctly chose not to incorporate term limits in the Constitution for Members of Congress or the President. Alexander Hamilton called them ''ill-founded,'' ''pernicious,'' and ''a diminution of the inducements to good behavior.'' The Constitution already provides a check on the power of Members of Congress by requiring that each Member of the House and one-third of the Members of the Senate be presented for reelection every 2 years.

The clamoring for term limits is a byproduct of the bumper sticker admonition to just ''throw the bums out!'' It is a populist slogan that in no way addresses the issue of making Congress more effective. This specious argument is based on the notion that anyone who has been in office for any length of time is automatically corrupt and incapable of being responsive to the views of their constituents. But, how responsive will they be when they do not have to face the voters for reelection? They will be free to simply ignore the wishes of the people.

The process of learning issues and policy takes time. Voters might prefer a long-distance runner over the sprinter, a representative for the long haul, not just for the short term. Voters should have the option of electing a person who will work in the long-run for the best interests of the district or State they represent and the Nation which they serve. Voters can make up their own minds about the effectiveness and worthiness of a candidate regardless of the length of service. There is no more effective or dependable means for applying term limits than election day, the second Tuesday of November every 2 years. All Americans should think carefully before this precious freedom is abridged by this amendment.

Mr. THOMPSON. Mr. President, how much time remains on our side?

The PRESIDING OFFICER. Approximately 8½ minutes.

Mr. THOMPSON. Does the Senator from North Carolina wish to be recognized?

Mr. FAIRCLOTH. Yes.

Mr. THOMPSON. I yield the Senator from North Carolina 8½ minutes.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. FAIRCLOTH. Mr. President, I am delighted and proud to join with Senator THOMPSON and cosponsor Senate Joint Resolution 21, which would provide for national term limits for 12 years for any Member of the U.S. House of Representatives or Senate.

In the past, Congress has avoided taking a vote on term limits. We have tried to have it both ways—to tell the people at home that we support term limits, but we have simply bottled it up in Washington.

Under Senator DOLE's leadership, with the support of many others, I want to thank them for bringing this resolution to the Senate floor. It will be the first-ever recorded vote, and it will be the right move. Regardless of the outcome of the vote, I think it is a historic moment that we will all be proud to have participated in.

There are many reasons for limiting the terms of all Members of Congress. First, the Founding Fathers, led by James Madison, intended that service in Congress would be that—a service, not a permanent job. We would not have so many burdensome, expensive, and often useless rules and regulations if we had more people in the Congress who had spent some time in the workplace in the private sector.

The President of the United States has term limits, and the country is better off for it. So why should not the Congress have term limits? The custom of voluntary rotation in office was once followed by the President and Congress alike. But it became necessary to pass a constitutional amendment to restore

the two-term limit on the Presidency, and it certainly is clear now that we need to do the same thing with the House and Senate to limit the tenure.

A second reason for term limits is that a governing elite is more likely to decide that what the citizens earn through their work belongs to the Government and not to the people that earned it. That is one of the dismal results of career bureaucrats in the National Capital. They are so caught up in government and its activities that they have lost sight of the fact that our system was founded on the spirit of free enterprise and individual rights.

Third, the people of North Carolina and the rest of America overwhelmingly support term limits. One national poll of registered voters in January 1996 found that 77 percent of the American people favor term limits, and only 17 percent oppose them. Further, 62 percent of the American people say they wanted their Congressmen and Senators to vote ''yes'' on a constitutional amendment for term limits that provides a 12-year limit.

Will term limits pass the Senate this time? Maybe not. I certainly hope so. As we all know, it is difficult to get a two-thirds vote, which will be necessary to adopt this. The Constitution was designed for it to be difficult to amend it. So for term limit supporters, we know that the upcoming vote is just the beginning of our efforts and not the end. We will stay with it until we do get it passed.

By committing ourselves to supporting term limits for as long as it takes to get the job done, we are committing ourselves to making the national Congress the model of citizen representation it was intended to be, and restoring our Federal Government to its proper role, and limited role, in our national life.

I strongly support this resolution and am delighted to be a cosponsor on it. I yield the remainder of my time.

Mr. THOMPSON. Mr. President, how much time remains?

The PRESIDING OFFICER (Mr. CAMPBELL). The Senator has 2 more minutes.

Mr. THOMPSON. I yield back the remainder of our time.

The PRESIDING OFFICER. All time is yielded.

HEALTH INSURANCE REFORM ACT

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of H.R. 3103, the health insurance reform bill, which the clerk will report.

The bill clerk read as follows:

A bill (H.R. 3103) to amend the Internal Revenue Code of 1986 to improve portability and continuation of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term-care services and coverage, to simplify the administration of health insurance, and for other purposes.

The Senate resumed consideration of the bill.

Mr. THOMPSON. Mr. President, to clarify, the term limits debate will resume again immediately after the health care vote, is that correct.

The PRESIDING OFFICER. The Senator it correct.

Mr. THOMPSON. We will have a vote on term limits at approximately 3:45.

The PRESIDING OFFICER. The Senator is correct.

Mr. SPECTER. Mr. President, I am pleased to support the Health Insurance Reform Act of 1995 and want to commend my colleagues, Senator KASSEBAUM and Senator KENNEDY, for their excellent work on this important subject. As a cosponsor of this bill, I believe that enactment of legislation improving health insurance coverage is long overdue. We owe it to the American people to pass this bill.

The Health Insurance Reform Act represents the type of incremental health care reform which I have long supported. It targets the problems with our current health care system while leaving in place a system that works well for most Americans.

Mr. President, in June 1993, I had my own health problem when a magnetic resonance imaging machine discovered an intercranial lesion in my head. I was the beneficiary of the greatest health care delivery system in the world—the American health care system. That experience made me ever more aware, knowledgeable of, and sensitive to the subject than I had been in the past.

There are some who believed health care reform was dead and declared as much in the fall of 1994 when Congress failed to enact comprehensive health care reform legislation. I am hopeful that they will be proven wrong by the enactment of this bill. President Clinton was in error when he proposed health care by Government mandate and massive bureaucracy. But anyone who read the repudiation of the Clinton bill as an excuse to do nothing is equally in error. We still have a great need to correct the problems in our health care system for the 15.2 percent or 39.7 million Americans, for whom the system does not work. In my own State of Pennsylvania, there is even a greater need, because the number of uninsured under the age of 65 has grown from 10.8 percent to 13.4 percent of the population while we in Congress have done little but debate the correct approach to take concerning health reform. It is high time that Congress takes a real step forward in health care reform, without big government and without turning the best health care system in the world on its head.

To be sure, health care reform remains a very complex issue for Congress to address. But it is not so complex that we cannot act on a bipartisan basis. This is something we should have done years ago. Sixty-five Democrats and Republicans have agreed to cosponsor a bill containing policy matters we all agree on, such as the need to limit exclusions for preexisting conditions and make health insurance more portable for workers changing jobs. Of course, more can and should be done. But this is what we can agree on now. We will be helping a great many people who desperately need these critical changes in law by acting now.

By way of background, I would note that the legislation before the Senate today, S. 1028, contains provisions very similar to those contained in title I of my own health care reform bill, the Health Assurance Act of 1995,—S. 18—which I introduced on January 4, 1995. I have heard for years from constituents, friends, and family on how important it is that we pass basic insurance market reforms to protect those who are not in perfect health but have some preexisting medical condition. We all are aware of people who are afraid to leave their jobs because they have a heart condition or another medical condition and therefore would be unable to obtain insurance for this problem outside of their present employer. Under the Kassebaum-Kennedy bill, a person can be assured that no preexisting condition exclusion can ever last more than 12 months for conditions discovered in the 6 months prior to coverage. Equally important, the bill enables those workers that were covered under a group health insurance plan to reduce this 12-month preexisting condition exclusion for each month they were covered by a plan. So if an employee with a medical problem is covered by a plan under her current job for more than 12 months, if she takes a job elsewhere, she will be covered under the plan of the new employer.

S. 1028 also contains language similar to my legislation which extends the COBRA health benefits options in a limited manner. S. 1028 specifically extends this option when a former employee or family member becomes disabled during the initial coverage period, and allows newborns and adopted children to be covered immediately under a parent's COBRA policy. Also, S. 1028 provides individuals access to affordable insurance through purchasing groups, which was also allowed under S. 18. This and the other elements of S. 1028 will give the 228 million workers who now have insurance the security of knowing that health coverage options exist if they change jobs, or become unemployed for a limited period of time.

Mr. President, as my colleagues are aware, I have been advocating incremental health care reform in one form or another throughout my 15 years in the Senate, and have introduced and cosponsored numerous bills concerning health care in our country since 1983. In my first term, I sponsored the Health Care Cost Containment Act of 1983, S. 2051, which would have granted a limited antitrust exemption to health insurers, permitting them to engage in certain activities aimed at curtailing then escalating health-care

costs. In 1985, I introduced the Community Based Disease Prevention and Health Promotion Projects Act of 1985, S. 1873, directed at reducing the human tragedy of low birthweight babies and infant mortality.

During the 102d Congress, I again pressed for Senate action on this issue. On July 29, 1992, I offered an amendment to legislation pending on the Senate floor that would have increased the deductibility for health care insurance purchased by self-employed persons from 25 to 100 percent, and would have made health coverage more affordable for small businesses through insurance market reforms. This amendment included provisions from legislation introduced by Senator CHAFEE, which I cosponsored, and which was previously proposed by Senators Bentsen and Durenberger. My amendment was defeated on a procedural motion by a vote of 35 to 60 along party lines, and the Senate did not consider comprehensive health care legislation during the balance of the 102d Congress. The substance of that amendment, however, was adopted later by the Senate on September 23, 1992 as an amendment to H.R. 11, the broader tax legislation introduced by Senators Bentsen and Durenberger and which I cosponsored. This latter amendment, which included substantially the same self-employed deductibility and small group reforms that I had proposed on July 29, passed the Senate by voice vote. Unfortunately, these provisions were later dropped from H.R. 11 in the House-Senate conference.

On August 12, 1992, I introduced legislation entitled the ''Health Care Affordability and Quality Improvement Act of 1992,'' S. 3176, that would have enhanced informed individual choice regarding health care services by providing certain information to health care recipients, lowered the cost of health care through use of the most appropriate provider, and improved the quality of health care.

On January 21, 1993, the first day of the 103d Congress, I introduced comprehensive health care legislation entitled the ''Comprehensive Health Care Act of 1993,'' S. 18. This legislation was comprised of reform initiatives that would have improved both access to and the affordability of insurance coverage, and would have implemented systemic changes to lower the escalating cost of care in this country.

On March 23, 1993, I introduced the Comprehensive Access and Affordability Health Care Act of 1993, S. 631, which was a composite of health care legislation introduced by Senators COHEN, KASSEBAUM, BOND, and MCCAIN, as well as my bill, S. 18. I introduced this legislation in an attempt to move ahead on the consideration of health care legislation and provide a critical mass as a starting point. On April 28, 1993, I proposed this bill as an amendment to the legislation then pending on the Senate floor, the Department of Environment Act, S. 171, in an attempt to urge the Senate to act on health care reform. My amendment was tabled by a vote of 65 to 33, largely along party lines.

As I mentioned earlier, on January 4, 1995, I introduced S. 18, the Health Assurance Act of 1995, which improved upon many provisions included in my health care legislation from the 103d Congress and provided a framework for targeted reform that could be built upon if needed. In addition to addressing the portability issue, S. 18 has three other important objectives: First, to provide affordable health insurance for the 40 million Americans now not covered; second, to reduce health care costs for all Americans; and third, to improve coverage for underinsured individuals and families. All of these objectives are accomplished through initiatives that our health care system could readily adopt without creating an enormous new bureaucracy.

In total, I have come to the Senate floor on 14 occasions over the past 4 years to urge the Senate to address health care reform. As early as June 26, 1984, I stated that the issue of health care is one of the most important matters facing the Nation today. That statement continues to ring true today, nearly 12 years later. According to the Health Care Financing Administration, national health expenditures totaled an estimated $949.4 billion in 1994, representing 13.7 percent of GDP. The Congressional Budget Office [CBO] projected that national health expenditures will total an estimated $1 trillion for 1995, or 14.1 percent of GDP. According to CBO, spending for health care grew about 6 percent in 1994, and was expected to grow about 7 percent in 1995.

I believe we have learned a great deal about our health care system and what the American people are willing to accept from the Federal Government as a result of debate over President Clinton's proposal in the fall of 1994. The message we heard loudest was that Congress was acting too hastily, and that Americans did not want a massive overhaul of the health care system. Instead, our constituents want Congress to proceed more slowly and to target what isn't working in the health care system while leaving in place what is working.

As I have said both publicly and privately, I was willing to cooperate with President Clinton in solving the problems facing the country. However, there were many important areas where I differed with the President's approach and I did so because I believed they were proposals that would have been deleterious to my fellow Pennsylvanians, to the American people, and to our health care system. Most importantly, I did not support creating a large new government bureaucracy because I believe that savings should go to health care services and not bureaucracies.

On this latter issue, I became concerned about the creation of such a bureaucracy, and asked my staff to review the President's 1,342-page Health Security Act when it was transmitted to Congress on October 27, 1993. My staff found an increase of 105 new agencies, boards, and commissions and 47 existing departments, programs, and agencies with new or expanded jobs. This chart received national attention after being used by Senator Bob DOLE in his response to the President's State of the Union address on January 24, 1994. The response to the chart was tremendous, with more than 12,000 people from across the country contacting my office for a copy. Numerous groups and associations, such as United We Stand America, the American Small Business Association, the National Federation of Republican Women, and the Christian Coalition, reprinted the chart in their publications amounting to hundreds of thousands more in distribution.

In addressing our health care problems, let me be clear: In creating solutions it is imperative that we do so without adversely affecting the many positive aspects of our health care system which works for 85 percent of all Americans. The pending legislation, the Health Insurance Reform Act, achieves this objective and should be viewed as the first step of an incremental approach to health care reform. It is my hope that we can accomplish some additional health care reforms that are equally necessary but would also not disrupt our system, such as increasing the deduction for the health care of the self-employed. Further, we should continue to pursue other initiatives to help reduce health care costs and increase the quality of health care that the majority of this body can agree upon.

The Health Insurance Reform Act of 1995 deserves our strong support and I urge my colleagues to enact this much-needed legislation.

Mr. KERRY. Mr. President, I want to thank Senators KASSEBAUM and KENNEDY for their leadership in putting together this bill which the General Accounting Office [GAO] estimates will help over 21 million people.

I also want to talk today about a woman from Florence, MA, who wrote me about her daughter. She supports this bill, she said, because her daughter has diabetes and the family had a terrible time finding health insurance that would cover her. In her letter she told me, ''I think it's immoral for health insurance companies to cut off coverage even while the people they cover are paying their premiums. No health insurance company should have the power to do this to their clients.''

Millions of Americans have medical histories or preexisting conditions that make it difficult to get comprehensive insurance coverage. As many as 81 million Americans have preexisting medical conditions that could affect their insurability. Many people are locked in their jobs because they fear they will be unable to obtain comprehensive insurance in new jobs. And many people

who work in small businesses often have trouble getting insurance especially if one employee has medical problems.

I am hopeful that this important bill will pass Congress and will be enacted into law this year. It is time that we help the American people get the health insurance they rightfully deserve.

This bill takes very important steps forward. But we must do more, so that ultimately we have coverage for all Americans. Currently, 40 million Americans live without health insurance, and 23 million of the 40 million are workers, according to a study by the Tulane University School of Public Health. Furthermore, an average of more than 1 million children a year have been losing private health insurance since 1987. In Massachusetts alone, there are more than 130,000 children—one-tenth of all the children in my State—who are without any health insurance, private or public, for the entire year. And many more children lack health insurance for part of the year. A recent study in the Journal of the American Medical Association reported that almost one-quarter of U.S. 3-year-olds in 1991 lacked health insurance for at least a month during their first three years, and almost 60 percent of those lacked insurance for 6 or more months.

Mr. President, this Congress has an unacceptable record when it comes to addressing the real needs of American workers and families. Political divisions and Presidential politics have become an everyday feature of Senate floor action, making it impossible for us to do much of the people's business. This bill still holds the promise of being a notable exception.

I applaud the vision, commitment, and political savvy of the distinguished chairman of the Labor and Human Resources Committee, Senator KASSEBAUM, whom I greatly admire, and the distinguished ranking member of that committee who is the senior Senator from my State. They have crafted a bill which will provide real help to meet the needs of real Americans, and have brought it to the Senate in a form that can become law. I urge all my colleagues to vote for this bill and the conferees to speedily send it to the President's desk for his signature. I will proudly vote for passage this afternoon.

Mr. HEFLIN. Mr. President, for the past 5 years, the issue of health care reform has been at the top of our national agenda. The need for an overhaul in our health care delivery system was a centerpiece of President Clinton's campaign, and our inability to enact comprehensive reform legislation 2 years ago was a profound disappointment.

The debate on the size and scope of the Federal budget and on various items within the so-called Contract With America have dominated congressional business for much of the last year and a half. Nevertheless, there remains a firm national consensus that something must be done to reform the health care system.

In light of all the money spent on the provision of health care in this Nation, it is surprising that we have not already found a way to deliver a sufficient level of care to the millions of citizens who do not have health insurance. The Department of Health and Human Services estimates that between 32 and 37 million Americans have no health insurance, and an additional 50 to 60 million are underinsured. As translated by the Office of Management and Budget, a total of 13 percent of all Americans are completely uninsured, with as many as 28 percent without insurance for 1 month or more. The Labor Department reports that each year, one million people lose their health insurance.

As currently structured, the private health insurance market provides an insufficient level of coverage for individuals and families with major health problems and makes it difficult for employers to obtain adequate coverage for their employees. This is especially true of small businesses.

The bill before us—S. 1028, The Health Insurance Reform Act—will reduce many of the existing barriers to obtaining insurance coverage by making it easier for people who change jobs or lose their jobs to maintain adequate coverage. It will also provide increased purchasing power to small businesses and individuals. I am proud to support this legislation, which is aimed at covering millions of those who do not have insurance or who have an inadequate level by addressing the issues of portability and preexisting conditions.

S. 1028 builds upon innovative and successful State reforms and enhances the private market by requiring health plans to compete based on quality, price, and service instead of refusing to offer coverage to those who are in poor health and need it the most. Passage of this measure is being called a relatively modest first step toward the kind of comprehensive reform legislation we tried to pass in 1994. I agree that it is only a first step, but feel instead that it is a rather major first step in that it goes a long way toward reaching the goal of universal health care.

The General Accounting Office estimates that enactment of S. 1028 would help at least 25 million Americans each year. This would be a major step in the right direction. It would also provide much-needed momentum for future reform efforts. Equally important, it would not increase Federal spending, impose new or expensive requirements on individuals, employers, or States, or create new Federal layers of bureaucracy.

This measure enjoys wide bipartisan support in Congress and from a host of organizations, including the National Association of Manufacturers, the U.S. Chamber of Commerce, the National Governors Association, the American Medical Association, the American Hospital Association, Independent Insurance Agents of America, and the Consortium for Citizens with Disabilities.

Specifically, the bill does the following: Limits exclusions for preexisting conditions; guarantees insurance availability; guarantees renewability; ensures portability; and allows small employers and individuals to increase their purchasing power by negotiating for more competitive rates with health plans and providers.

S. 1028 was passed unanimously by the Labor and Human Resources Committee under the leadership of Senators KASSEBAUM and KENNEDY. During this year's State-of-the-Union address, President Clinton challenged Congress to pass it quickly, and described it as the very least that can be done to help some of those 37 million with inadequate care or no care at all. It is a sound, targeted, market-based reform measure that will make it easier for millions of Americans to change jobs without the fear of losing their health coverage. It is a consensus-building approach that can lead to comprehensive reform down the road.

While it is true that this measure does not make all the necessary changes we need in the health care system, it does make a series of valuable reforms that will make a discernible difference in the lives of millions of our citizens. It does this without interfering with those parts of the system which work and without taking away the ability of States to implement their own reforms. I congratulate the bill's managers for their work and the majority leader for scheduling this debate, and urge its swift passage.

Mr. WARNER. Mr. President, it is a pleasure to rise as a cosponsor of H.R. 3103, the Health Insurance Reform Act of 1996. Over the last few years, the Senate has been on a long road on health care reform, and it is a matter of great satisfaction that we have finally reached this important milestone.

H.R. 3103, the so-called Kassebaum-Kennedy bill, represents the core of market-based health insurance reforms on which there has always been wide agreement. The provisions of H.R. 3103 were, in essence, the heart of the Republican Health Care Reform bill developed in 1994 as an alternative to the big-government top-down Clinton health plan.

The 1994 elections, which brought the first Republican majority to Congress in 40 years, provided a clear indication of the overwhelming rejection of President Clinton's plan by the American people. More than any other factor, it was the mandate of the 1994 election which shaped the policy that has guided this debate.

I cannot praise highly enough the remarkable leadership brought to this legislation by the chairman of the

Labor and Human Resources Committee, Senator NANCY KASSEBAUM of Kansas. Her careful management has been discreet, thoughtful, responsive, and thorough. With her partner for the minority in this endeavor, ranking member Senator EDWARD KENNEDY, they have shepherded a unique bipartisan measure—devoid of any real controversy—which could in itself extend health insurance access to an estimated 25 million Americans who, as we say, have fallen through the cracks of health insurance coverage.

This is not a universal coverage bill. Nor does it prescribe specific benefits. It does, however, provide the level playing field which the health insurance industry has long needed to eliminate the 50–State patchwork of different rules and standards for coverage of preexisting conditions, portability, and renewability. As insurance companies will no longer have broad discretion in excluding people from coverage, all companies will be accomodating the costs of high-risk employees.

When speaking of pre-existing condition problems, I always remember the case of the young father employed at a lumber mill in northern Virginia. His wife gave birth to a severely disabled child resulting in abnormally high costs for his employer's health insurance company. At the end of the year, that insurance company approached the mill owner with an impossible choice: If you retain coverage for the disabled child, your premiums will go up by 150 percent. If you exclude coverage for the disabled child, your premium will only go up by 12 percent. The mill owner absolutely could not afford the higher premium and was forced to drop the young family with the disabled child.

So, here you had a case in which an employee wished to stay with his company but had to seek coverage elsewhere. Ironically, current insurance coverage in this country may also cause the reverse: Individuals who wish to move on to another employer but cannot because a preexisting condition can preclude future coverage. They are essentially locked in their jobs for fear of losing their health insurance.

These examples of discriminatory treatment are precisely what we are trying to remedy with the Kassebaum-Kennedy bill. The legislation is good medicine for American health care.

For preexisting conditions, American workers would be required to comply with a maximum 1 year waiting period for coverage by their insurance plan. Were there no waiting period, individuals would be tempted to only purchase health insurance when they or their family members were ill—a practice which would understandably substantially undermine the fiscal strength of the insurance industry.

Once the preexisting condition waiting period has been met, and as long as health insurance premiums are paid up, there should not be a lapse in coverage if you remain with covered employers.

If you should be required to seek individual rather than group coverage, the legislation includes important safeguards for the individual market from the costs of preexisting conditions. One must first have been in group coverage for a minimum of 18 months and then fully used and paid for an additional 18 months of COBRA coverage.

Upon meeting these conditions, the individual health insurance market will be required to offer full benefits without a preexisting condition clause.

I commend the managers of the bill for their efforts to keep the legislation as uncluttered as possible with unrelated or controversial amendments. With the exception of the Dole-Roth Finance Committee amendment, which I was pleased to cosponsor, the bill has the best chance of reaching the President's desk if it remains clean.

I regret that the Medical Savings Account [MSA] provision of the Finance amendment was not retained, but I understand that it might have prompted a Presidential veto. I did support and have cosponsored in the past Senator DOMENICI's successful mental health parity amendment. I sincerely hope that it too will be retained.

Above all, this legislation must pass. We can not allow this opportunity to pass us by. These are the vital health insurance reforms we first learned of in the historic health care debate of the 103d Congress, and it is our job in the 104th to see the job through.

Mr. President, in closing, I must state that this bill is extremely significant to me on a personal level.

My father was a physician who cared deeply about his patients, regardless of their ability to pay. He died when I was only a young man, but I have always revered his legacy of caring for others. If, with this bill, we can extend health insurance coverage to 25 million Americans who now are being denied benefits, my father would be the first to urge its swift passage.

Mr. BIDEN. Mr. President, when comprehensive health care reform went down to defeat in 1994, many of us in the Senate were frustrated because we had let yet another opportunity for reforming the health care system slip away.

At that time, there was wide agreement on some elements of health care reform. I, for one, wanted to go forward with those items—even if they fell short of addressing all of the problems in the health care system. Unfortunately, political considerations on both sides of the aisle and at both ends of Pennsylvania Avenue prevented us from passing even those things we all agreed on.

Today, it appears that cooler heads will prevail. Today, it appears that the Senate will pass—and I will proudly vote for—the Kassebaum-Kennedy health insurance reform bill.

Who would have believed less than 2 years ago that we would be on the verge of passing a bipartisan health care bill. And, who would have believed that the bill would provide real reform by addressing the most pressing problem faced by middle-class Americans—the possibility that they will lose their health insurance just because they change jobs or get sick.

Four years ago, a national survey showed that nearly one-third of all Americans had at some time in their lives been the victim of ''job lock.'' Fearing the loss of health insurance, they stayed in a job they did not want and did not like. Two years ago, I asked Delawareans that same question—and in responding to my questionnaire, 21 percent of Delawareans said they had experienced job lock. Addressing this problem is long overdue. But, it may finally happen.

With the bipartisan Kassebaum-Kennedy bill, no longer will insurance companies be able to deny coverage for most pre-existing conditions. No longer will Americans be locked in jobs they do not want because changing jobs means losing health insurance. And, no longer will insurance companies be able to cancel a person's policy just because they get sick.

Last year, a General Accounting Office study showed that nearly 25 million Americans could benefit from legislation similar to what we are considering today. It will provide security and peace-of-mind to millions of middle-class Americans and their families.

Mr. President, the Kassebaum-Kennedy bill also provides some important help to small businesses—those who have been most devastated by the rapidly rising costs of health care. First, the bill would increase the self-employed health insurance tax deduction to 80 percent. I am a cosponsor of legislation to increase the deduction to a full 100 percent. This bill falls short of that goal, but it continues to move us in the right direction.

Second, the bill would make it easier for small businesses to join together to purchase health insurance. By pooling their employees, small businesses can spread the health risks among a large number of people and get cheaper insurance rates as a result.

And, third, the bill guarantees that all small businesses will have health insurance available to them. It prohibits insurance companies from cherry picking the businesses with the healthiest employees and refusing to sell to all other businesses. It says, if an insurance company sells to small businesses, it must sell to all small businesses. This sounds simple—even unnecessary. But, in the real world, it is crucial. When just one employee in a small business has a problem pregnancy, or has a disabled child, or suffers from some other medical condition, it often means that no one that works in that small business can get health insurance.

Finally, Mr. President, I want to address the provisions in the bill regarding health care fraud. This is something I have worked on for 4 years now. In 1992, I introduced legislation to

crack down on the small number of health care providers who engage in fraud against their patients, insurance companies, and the American taxpayers.

Those who perpetrate fraud are few in number, but their crimes are large in dollars. During a hearing I held in the Judiciary Committee in 1992, it was reported that up to 10 percent of total health care spending in this country is fraudulent. That is over $100 billion in health care fraud this year alone.

My bill would have cracked down on these cynical manipulators of the system by increasing the number of Federal investigators and prosecutors going after health care fraud; doubling the penalties for those found guilty; providing rewards for patients and health care workers who come forward with information about fraud; and making sure that the guilty make restitution to the victims. My legislation passed the Senate in 1992 but was never taken up in the House.

A year later, with the leadership of Senator COHEN, health care fraud provisions were included in the Biden crime bill. But, again, the House would not go along, and they were dropped during the conference.

Now, they are back again. And, the fraud provisions in the Kassebaum-Kennedy bill are very similar to the legislation I first introduced in 1992. I want to commend Senator COHEN for his diligence in this area. But, I wish to note that while the House health care bill also contains fraud provisions, some of those provisions would actually weaken the anti-fraud laws. I urge the Senate to insist that they be stripped during the conference.

Mr. President, despite all of the good about this bill—protecting Americans from losing their health insurance, helping small businesses, and cracking down on health care fraud—it will not solve all of America's health care problems. And, it is not intended to.

The fact that it does not address a whole host of problems—including comprehensive cost control and the nearly 40 million uninsured Americans, including 100,000 in Delaware—does not mean these problems do not exist and should not be addressed. Failing to deal with these matters may be a weakness of the legislation. But, ironically, it is also the bill's strength.

Precisely because the bill deals only with the most pressing health care problems, we have a very real chance of passing a health care reform bill for the first time in my nearly 24 years in the Senate. We are on the verge of breaking the gridlock on health care reform.

The fact that it is an incremental—not comprehensive—bill is not a reason to vote against it. In fact, Mr. President, I would argue that it is a reason to vote for the bill. By passing the Kassebaum-Kennedy legislation, we will have made a downpayment on health care reform—addressing some important problems and helping meet real needs of the American people. If we show that responsible Government action can work—and work well—we will have opened the door to possible future bipartisan agreements to solve other health care issues.

I hope that we will be back to address those issues. But, in the meantime, I hope that we will not let another opportunity slip away. I hope that we will pass the Kassebaum-Kennedy bill.

Mr. SMITH. Mr. President, I rise in support of S. 1028, the Health Insurance Reform Act. This is a good bill that will help millions of Americans obtain health care.

Today, I would like to discuss four provisions that I believe are central to meaningful health care reform. For years, I have said that Congress should pass targeted reforms that take care of these core issues, and this bill does address three of them. They are: health insurance portability, full tax deductibility for long term care insurance, and deductibility of health insurance for the self-employed.

Let me just say for now that we missed a tremendous opportunity to enact tax deductions for medical savings accounts, or MSA's. I will go into that issue in more depth later, but I am very disappointed about its removal from this bill. I can only hope it will prevail in conference.

Health care reform is a very complicated and sensitive issue. Before we start restructuring one of the most important sectors of our economy, we need to study the issue thoroughly. We must make sure we approach it in the proper manner, and listen to all concerns.

In 1994, I was host to a statewide health care conference that featured leading policy experts from every facet of the health care system. I invited doctors, providers, nurses, patients—everyone who would be impacted by health care reform. From this, everyone who participated gained a greater understanding of the complexities of our health care system.

Since that time, I have held citizens' forums to discuss the issue in each of the 10 counties in New Hampshire. In addition to this outreach, I also met privately with every interested group to discuss their specific concerns more deeply.

This is the way to approach this issue—open, public forums, where all of the interested parties get to voice their concerns and share their views. I think the lesson of the White House Task Force, which produced the Clinton reform proposal, is that secret meetings and back room deals are not the way to approach a critical issue like this. Congress must act from a position of genuine consideration and understanding.

The very best part about open forums is that you get a very good sense of what people want, and don't want. In my experience, I hear overwhelming opposition to a Clinton-style government-run health care system. At the same time, I also hear avid support for the four reforms that I will now discuss.

The first concern is that health insurance should be ''portable.'' I feel very strongly about this issue, as I know the rest of my colleagues do. It is of particular concern to individuals who have preexisting conditions. These are people who are terrified of leaving their jobs, being fired or laid off, changing their jobs, or starting their own businesses—because of the risk of becoming uninsured.

The freedom to change jobs, or even to become self-employed, is one of the cornerstones of our free market economy. When we picture the America dream, we think of a family, a home, children, a college education. But, I think a big part of the American dream is finding a job that you enjoy, one that fits your interests and skills, and working your way up the ladder of success.

This is not always easy. Some people get lucky early in life. They find a good employer and work their way up the company ladder. This was the predominant trend years ago. But for most of us today, the ladder does not go straight up. An individual works at a job for a while and finds that it does not suit him. He may not get along with his boss. Or, maybe he wants to move. Perhaps he wants a larger salary. There are countless reasons why people change jobs these days, and it is a very healthy process. In fact, it has been reported that individuals today hold an average of seven jobs over the course of a lifetime.

I have held a number of different jobs throughout my career: teacher, real estate broker, public servant. As I think back, I don't know whether I would have been as comfortable making some of the career decisions I did if I had to risk losing health coverage for myself and my family.

The greatest fear that most Americans have in changing jobs is the fear of losing their health coverage. There is a term for it now: ''Job Lock.'' It is the one concern that I hear about over and over again at my citizen forums and constituent meetings.

And, it is a concern that applies to the people in our society who are the most vulnerable—people who have chronic health problems, disabilities, injuries, or illnesses. For many of these Americans, finding and holding a job that fits their abilities and interests is not an easy task. For many of these people, there are additional issues related to daily living, caring for children, maintaining a home, transportation, paying the bills, that are particularly challenging for them. The last thing they need, on top of all that, is to be denied health insurance. Most of them have been paying into insurance plans for their whole lives. Now, because they have left their employer, they risk losing everything. It is unfair.

Mr. President, it isn't just the worker who benefits from portability reform. In the same way that an employee can become unhappy with his job, sometimes the employer has reasons to let one of his workers go. These employers face tough decisions. It might be a small business owner who finds that he can't balance his books without making some reductions. It is always a tough situation to face, but these are the economic realities of the business world.

But what if this same small business owner knows that an employee, perhaps a close friend, has a pre-existing condition of a family member with one? This employer has a terribly difficult decision on his hands. He can keep his employee on, just so that the employee can maintain his health coverage—perhaps risking bankrupting the business—or he can lay him off and let him go without insurance. Health portability is probusiness, because it would allow a small business to make those tough decisions while having the peace-of-mind in knowing that the employee and his family would not lose their health coverage.

I have said publicly for years that Congress should do something about portability, and that we do not need socialized medicine to do it. This bill proves that. My State already has an extensive guarantee issue law, so the group-to-individual portability provisions would be superseded by the New Hampshire law. But, frankly, the Kassebaum-Kennedy portability provisions are much more modest than those enacted in my State of New Hampshire.

Next, I would like to address the important provision in the bill that provides for an 80 percent tax deduction for health insurance for the self-employed.

Mr. President, in discussing the portability provisions, I briefly touched on the issue of individuals who, for one reason or another, choose to be a self-employed. Whether it is running a corner store, or even a family farm, many Americans rely on self-employment for their survival. Additionally, these are many Americans who, for a variety of reasons, from physical disability to spending time with their children, find working at home to be the most appropriate and fulfilling way to earn their income.

For these self-employed Americans, health insurance can be a very expensive proposition—so expensive that many choose to go without coverage. There are three main reasons for this.

The first and most obvious reason is that the self-employed have to pick up the full cost of the premiums. Most Americans get insurance through their employer. They pay a portion of the premium, but the best is paid by their employers. For these Americans, there is a big incentive to take advantage of this benefit. But the self-employed are forced to pick up the entire premium. This just goes with the territory. The reason I am pointing it out is to highlight the fact that tax deductibility is particularly important for these Americans.

The second reason it is so expensive is that individual insurance is much more expensive than group insurance. When I say group insurance, I am generally talking about employer-based insurance.

The reason that group plans are cheaper is because the risk is spread over a broad group of people, sick people and healthy people. But, due to the costly nature of individual insurance and the unfavorable tax situation, healthy individuals are less inclined to buy individual plans. Many of them simply choose to go uninsured. Consequently, because there are fewer healthy individuals to spread the risk, individual insurance is very expensive.

But the primary reason is the tax situation. And this is very easy to fix. Employers get a 100-percent tax deduction for their contribution to an employee's health premiums. Earlier their year, we did raise the self-employed tax deduction to 30 percent. But, I believe that this is still unfair. It ought to be 100 percent for everyone—employers, self-employed, and the individual policy buyer whose employer does not offer health insurance.

This bill raises the deduction for the self-employed insurance premiums to 80 percent. This will go a long way toward eliminating the powerful disincentives for self-employed Americans to buy insurance. It phases the deduction in over 10 years. While I still wish it were 100 percent, and I would like to see it changed right away, this is indeed progress.

In addition to helping the self-employed, this bill has a provision that is of great concern to Americans who wish to purchase long-term care insurance. Just today, I had a constituent visit my office from the Alzheimer's Association. Among her primary concerns was this provision to amend the tax code to make long-term care insurance and expenses tax deductible. I know this disease very well, because my father-in-law had Alzheimer's, and I know how expensive long-term care can be.

Health care is important, but for many, such as those with Alzheimer's disease, it is activities related to daily living that are the problem. The bill specifically defines these activities to include ''eating, toileting, transferring, bathing, dressing, and continence.''

Under current law, health insurance is tax deductible. But long-term care insurance gets taxed. This bill would provide the same deductibility for long-term care that is currently afforded to health care.

Mr. President, the final provision that I would like to discuss is not in this bill, and that is the tax deductibility for Medical Savings Accounts. It was in the Senate Finance Committee's amendment, and it was in the House bill. Unfortunately, this vital provision was defeated on the Senate floor by a vote of 52 to 46.

I have discussed the important provisions for self-employed Americans, and employer-based benefits. But, there is another group of people who are in desperate need of help, and that is individuals who are not self-employed, but whose employers do not offer an insurance plan. Many of them are restaurant workers, farm workers, or other people who work for a small employer who cannot offer or chooses not to offer an insurance package.

Under current law, these workers get no tax deduction whatsoever. Not 100 percent, not 30 percent—nothing. It is the same for Americans who are unemployed.

Huge corporations get a 100-percent tax deduction to subsidize their employees' insurance premiums—from the CEO on down. But someone living paycheck to paycheck whose employer can not provide them with insurance—or someone who is unemployed—gets taxed on the full premium.

There are provisions in both the House and Senate bills to allow small businesses join together and form purchasing pools in order to buy insurance at lower rates. The House provisions were somewhat stronger than those in the Senate bill. I am confident that the conferees will work to produce a final version that would greatly increase the number of small businesses that offer insurance to their employees.

As helpful as these provisions will be in increasing access to insurance, there will still be millions of Americans whose employers don't offer insurance, or who are unemployed. For these Americans, there is only one provision that would have helped them—and that is the full tax deductibility for Medical Savings Accounts, or MSA's.

I can't understand why my colleagues would have voted against it. It will obviously be an important issue in Conference, and I am hopeful that it will make it into the final package.

Some have suggested that if we include MSA's in the conference report that it will provoke opposition or even a filibuster by the Democrats. I find it very hard to accept the proposition that Senators would filibuster health care portability reform solely on the basis that we give tax relief for Americans to put money in a savings account for health expenses.

I believe that MSA's are vital to true health care portability. By definition, MSA's are the very essence of portability. When we talk about insurance ''portability'' as it pertains to the underlying Kassebaum-Kennedy bill, we are using the term figuratively. The employee isn't really bringing his insurance with him, we are just providing him the freedom to shift from one plan to another without being denied coverage.

So, lets take the example of an individual who works for a company for 20 years, and becomes disabled or ill, and must leave his job and give up his employer-based health insurance. Under

the bill, he would be able to buy an individual insurance policy. The insurers would have to take him. But it says nothing about how much the insurer could charge.

So, when he goes to the individual insurance company, the company is going to evaluate him in terms of the health risk that he poses to the plan. It does not matter if he was insured for 3 years or 30 years, the insurance company would consider only his current health status in determining the premium he would pay. Those 30 years of payments mean nothing to the new insurance company.

The only provision that would allow him to transport at least a portion of his coverage is the medical savings account [MSA]. MSA's allow individuals to supplement their insurance policy by investing a certain amount into a tax-free savings account and using that account to pay for their predeductible medical expenses. Any money that the patient has not spent at the end of the year would remain in his account.

It is portability in its most pure form. Because it stays with the employee if he change jobs, because it is his account. If he gets fired, and cannot find a job, he still has the MSA. He could even use the MSA to pay his insurance premiums while he tries to find a job. If he moves to a plan that provides a lower level of coverage, he would still have his MSA money to pay for the uncovered expenses. I feel that he should get a tax deduction for this account, just like Americans get for their individual retirement accounts, mortgages, charitable contributions, and health insurance.

But, there is another reason that MSA's are important to real health care reform, and that is the increased use of preventive health services. I really believe that preventive health care is the solution to many of our health problems.

Most insurance plans have a deductible that people need to meet before their insurance company pays for coverage. This acts as a built-in disincentive for individuals to use preventive health services, and I believe it needs to be at the center of health care reform.

For example, let us say a person has an illness such as diabetes. In order to avoid major health problems, they need to maintain an adequate insulin balance, appropriate diet, and so forth. This can become very costly when the patient must pay for needles, insulin, monitoring devices, perhaps dietitian services, and other costs. If these services are not covered, the individual must pay out of pocket. This discourages the use of preventive health care.

The unfortunate result is major health problems for these people. For diabetes patients, it might even mean a foot or leg amputation—major short term and long term costs to the insurer, the individual, and his family. Of course, add to that the years of pain and hardship that result from this perhaps preventable situation.

Let me explain why MSA's encourage preventive health care. The three major issues that result in individuals not getting preventive health care are: deductibles, copayments, and uncovered or partially covered services. In these three situations, the individual is forced to come up with the money on their own, without help from the insurer. In some cases, this forces the individual to choose between the expenses of daily life—food, rent, heating bill—and paying for the preventive health services. Not surprisingly, it is the preventive services that are often pushed aside.

Millions of Americans believe that managed care, so-called health maintenance organizations [HMO's], are the solution to cost control and preventive health care. I would concede that HMO's have done some great things in controlling health care costs in our country. But HMO's still leave the issue of uncovered expenses. There is also the problem where many Americans do not want to join the HMO because they might not be able to keep going to their family doctor, if the doctor does not belong to the HMO.

With an MSA, there are no predeductible expenses, no uncovered health expenses, no copayment as long as the individual still has money in his MSA. So the disincentives that discourage individuals from obtaining preventive health care are greatly diminished.

A March 14, 1995, policy analysis done by the Cato Institute addressed the successes of MSA's in the current system. Even without the favorable tax treatment, the paper states that in its experience with MSA's under the current system, Golden Rule Insurance Co.'s employees increased their use of preventive care.

> About 20 percent of the workers with MSAs reported that they used their MSA funds to pay for a medical service they would not have bought under the traditional health insurance policy. That is because the MSA provided the funds at hand that they could use to pay for such services, whereas the traditional policy imposed deductible and coinsurance fees that actually discouraged the use of such services. Moreover, the traditional policy might not cover some services, and the uncertainty alone discouraged workers from obtaining preventive care. But workers know that MSA funds can be used for whatever services they choose.

So we can philosophize all we want about why it happens, but I like to look at the hard evidence. When we look at the facts, MSA's increase the use of preventive care.

Mr. President, recently this issue has somehow become a partisan issue. Some Democrats have put themselves in the awkward position of saying that people should have to pay taxes on their predeductible health care expenses, copayments, prescription drugs, and other uncovered expenses. They can try to explain that to the voters when the election comes around.

But, I think it is worthwhile to briefly review the record here, because historically, this has been a very bipartisan issue, and my colleagues on the other side should be aware of this before they fall on their swords over this so-called controversial provision.

I have a series of letters and a television transcript here from House and Senate Democrats in support of MSA's, including Representatives ANDREW JACOBS, ROBERT TORRICELLI, and House Minority Leader DICK GEPHARDT, as well as Senators JOHN BREAUX, SAM NUNN, and the distinguished Senate Democratic leader, Senator DASCHLE. I also have a letter from the National Mineworkers.

These materials clearly show that MSA's have enjoyed broad bipartisan support in the past, and I ask unanimous consent that they be printed in the RECORD at the conclusion of my remarks.

Mr. President, this bill is not perfect. I am sure all of us have changes we would make. I know there are a number of provisions that I would like to see added to the bill. But I am going to vote for it, because I believe it is a big step in the right direction. After the failure of the Clinton socialized medicine plan, Republicans said that we needed a change. We promised Americans that if they gave us a chance, we would give them a real health reform bill—without Big Brother, without the ''standard benefits package,'' without rationing care. We promised them portability and tax relief for the self-employed, and long-term care. We have made good on our promise to the American people and I urge my colleagues to support this legislation.

I ask unanimous consent that letters and a television transcript to which I earlier referred be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CONGRESS OF THE UNITED STATES,
Washington, DC, April 17, 1996.

Hon. WILLIAM J. CLINTON,
President, The White House, Washington, DC.

DEAR PRESIDENT CLINTON: As original cosponsors of Medical Savings Accounts (MSA) legislation in the House of Representatives, we urge your review of and your public support for this wonderfully innovative idea.

The recent vote on the House Republican plan should not be used to judge the Democratic Party's position on MSAs. As you know, MSAs have become a major plank in Congressman Torricelli's health care platform in his Senate race.

We cannot think of a more Democratic idea than MSAs. In fact, it *was* originally our idea. We want Democrats to get the credit for it. In the Senate, Democrats John Breaux, Tom Daschle, Sam Nunn and David Boren initiated the idea.

Dick Gephardt included MSA's in the House Democratic Leadership bill in 1994. There were 28 House Democrats who cosponsored our initial MSA legislation. There are currently three Democratic U.S. Senate candidates who have supported MSA legislation: Dick Durbin, Tim Johnson and, of course, Bob Torricelli.

You also should know that the current contract of the United Mine Workers provides its members with MSAs. We do not believe the UMW qualifies as healthier and

wealthier than the general population—a charge leveled by uninformed MSA opponents.

MSAs will hold down health costs and be a boon to lower income employees, single working mothers, as well as the lower and middle income employees all across America. With MSAs, people are rewarded for shopping around and can, in many cases, for the first time spend first dollar health insurance dollars (there are no deductibles or copayments) on dental care, vision, mammograms, alternative medical therapies, etc.

Mr. President, we believe MSAs will be a huge benefit to the American public. MSAs are not a partisan issue. Democrats supported MSAs in the 102nd and 103rd Congresses and we support them in this Congress because they are a good idea that increases access, controls costs and extends options.

Sincerely,

ROBERT G. TORRICELLI,
Member of Congress.
ANDREW JACOBS, Jr.,
Member of Congress.

CONGRESS OF THE UNITED STATES,
Washington, DC, March 27, 1996.

Medical Savings Accounts

DEAR DEMOCRATIC COLLEAGUE: Many interest groups are posturing on the health insurance reform issue. A few are to draw an imaginary line in the sand on Medical Savings Accounts. Medical Savings Accounts should not be a partisan issue.

Please note:

1. Democrats were the initial sponsors of MSAs.
2. MSAs passed the House Ways & Means Committee unanimously in May 1994—when Democrats were in control. Obviously, in 1994, we believed it was part of the solution.
3. MSAs are included as the ''sense of the committee'' in the Kassebaum-Kennedy bill.
4. MSAs do not favor the young and healthy any more than optional conventional health insurance in the workplace. MSA funds can be used for diabetic maintenance testing and other procedures not generally covered by traditional health insurance. MSA funds can be used for orthodontia care which is also not generally covered.

Health insurance reform is too important to allow the posturing of a few to kill it.

Sincerely,

ANDY JACOBS, JR.
BILL LIPINSKI.
GLENN POSHARD.

U.S. SENATE,
Washington, DC, September 8, 1992.

DEAR COLLEAGUE: The United States is faced with a crisis in health care on two fronts: access and cost control. So far, most of the proposals before Congress attempt to deal with access but do not adequately address the more important factor—cost control. We have introduced legislation that will begin to get medical spending under control by giving individual consumers a larger stake in spending decisions.

We have introduced a bill, the Medical Cost Containment Act of 1992 (S. 2873), which would allow employers to provide their employees with an annual allowance in a ''Medical Care Savings Account'' to pay for routine health care needs. This allowance would not be subject to income tax if used for qualified medical expenses. Any money not spent out of a given year's allowance could be kept by the employee in an account for future medical needs during times of unemployment or for long term care. In order to protect employees and their families from catastrophic health care expenses above the amount in the Medical Care Savings Account, an employer would be required to purchase a high-deductible catastrophic insurance policy.

Unlike many standard third party health care coverage plans, Medical Care Savings Accounts would give consumers in incentive to monitor spending carefully because to do otherwise would be wasting their ''own'' money. That is, money that they would otherwise be able to save in their account for future needs.

Once a Medical Care Savings Account is established for an employee, it is fully portable. Money in the account can be used to continue insurance while an employee is between jobs or on strike. Recent studies show that at least 50% of the uninsured are uninsured for four months or less.

Today, even commonly required small dollar deductible (typically $250 to $500) create a hardship for the financially stressed individual or family seeking regular, preventive care services. With Medical Care Savings Accounts, however, that same individual or family would have this critical money in their account to pay for the needed services.

We feel that, while the Medical Care Savings Account concept does not provide the total solution to the crisis in health care access, it does begin to address the critical aspects of increasing costs and utilization by consumers.

We hope that you will join us as cosponsors of this legislation. If you have any questions please contact us or have your staff contact Laird Burnett of Senator Breaux's staff at 4–4623.

Sincerely,

JOHN BREAUX.
DAVID BOREN.
TOM DASCHLE.
RICHARD LUGAR.
DAN COATS.
SAM NUNN.

[From CNBC's ''Equal Time''—Aug. 2, 1994]

MARY MATALIN. You think the Medical Savings Accounts are going to make it through conference?

DICK GEPHARDT. Absolutely. This is an idea the Ways and Means Committee has worked on for three or four years. It's very popular. A lot of people like that option and I think it will be in the final bill. I think it's a great option.

JULY 29, 1994.

Hon. PAUL SIMON,
U.S. Senate, Dirksen Building, Washington, DC.

DEAR SENATOR SIMON: An amendment to the Health Care Package has been offered to add a medical care savings account provision. The United Mine Workers have a similar provision in our current contract that is anticipated to produce a significant savings to our previous insurance. If the amendment offered is consistent with the objectives of our contractual health care provisions, the United Mine Workers in Illinois would support it. The options of utilizing a medical care savings account may assist in solving the Health Care problems in this country.

Another concern of our members is the possible taxation of benefits. Any provisions that allow for taxation of health care benefits would be totally unacceptable. Over the years, the United Mine Workers have negotiated a total package for our members. Advances in wages and other fringe benefits have suffered because of the high cost of health insurance. Taxation of health care benefits would be a slap in the face to the miners in Illinois who agreed to maintaining their health care in lieu of other benefit increases.

I appreciate your efforts on behalf of our members as well as all Americans during the health care debate. I believe that everyone in the United States must be afforded quality comprehensive health benefits without the fear of losing these benefits through job loss.

Sincerely,

DAN REITZ,
COMPAC Coordinator, District 12, U.M.W.A.

Mr. KEMPTHORNE. Mr. President, I support the Health Insurance Reform Act, for the simple reason it will help provide more accessible and affordable health insurance to more Americans.

The Health Insurance Reform Act helps those who are now unable, for reasons beyond their control, to buy health insurance. It prevents insurance companies from denying coverage to individuals with preexisting conditions, while ensuring that individuals are not able to take unfair advantage of the system by only purchasing coverage when it is actually needed. It prevents job-lock by guaranteeing that individuals who are covered by an employer-sponsored policy will not lose their coverage by changing jobs. It also allows individuals and small businesses to join together to purchase insurance, thereby leveraging their negotiating power to gain better rates and/or benefits. In addition, the bill makes health care more affordable by gradually increasing the deductibility of premium costs for the self-employed to 80 percent—a move which will be of great benefit to the more than 56,000 self-employed Idahoans. I am also pleased to note the bill allows for the cost of long-term care insurance and expenses to be deductible—another of the reforms I have supported since before I joined the Senate. And the Health Insurance Reform Act achieves all these goals without unnecessary Federal intrusion into the health care system.

This bill is the result of the heated and controversial debate over health care policy 2 years ago. You will recall Congress and the American public rejected the proposed Government takeover of health care, but recognized that targeted reforms were needed in health insurance.

The crisis in health care is that too many people are being denied health insurance. That is why, 2 years ago I introduced legislation to address those market reforms on which I knew there was broad agreement. While the details of my bill differ in many ways from the bill we passed, I am pleased to note many of the concepts I embraced then—increasing access to health insurance, portability, renewability, and an end to preexisting conditions exclusions—are found in the Health Insurance Reform Act. The American public said they wanted us to keep the Government out of health care, and to target our health insurance reforms to the market. With this bill, I can say the Congress listened.

I just had a clear example of why this legislation is needed. An Idahoan contacted my office last week asking if the Health Insurance Reform Act would help him. He is currently receiving disability benefits but would rather be working. His American dream is to start his own business. But he fears that becoming more productive will

cause him to lose the Federal benefits which now provide him with his only access to adequate health care. If he knew that his disability, his preexisting condition, would not prevent him from gaining access to health insurance, he could start that business, to provide for himself and his family without the Federal assistance he does not really want, anyway.

During the previous Congress many of us had the opportunity to learn a great deal about the way health care is provided in this Nation. We saw aspects of the system which worked, and I would point out that the overwhelming majority of the system works very well, providing most Americans with the best health care in the world. We also learned about those aspects which needed some adjustments. And that is what we are trying to do—not rebuild health care in the United States, but make appropriate corrections to specific aspects of the system to make it work even better. Most importantly, we are achieving more affordable and accessible health care through private sector reforms.

I must, however, express my disappointment with the vote to exclude medical savings accounts MSA's from this bill. MSA's allow people to save money, tax free, to cover medical expenses. In cases where an employer provides health insurance, the employer contributes to the MSA and, again, these funds are not taxable provided they are used for medical expenses. When combined with a high-deductible, catastrophic insurance policy, MSA's provide individuals with low-cost health care coverage which provides the maximum level of consumer choice and eases many of the financial concerns which face those who need health care services. MSA's are the responsible way to increase both accessibility and affordability in health care coverage.

States are the proving ground for many innovative ideas. Idaho is one of many States to have enacted MSA legislation in recent years and numerous Idahoans have expressed their support for MSA's as a health insurance option. While I believe Idaho, among other States, should be commended for its efforts on this issue, regrettably, the full benefits of MSA's will not be discovered until they are recognized by the Federal Government and given appropriate treatment under the Tax Code. Once again, the States have shown initiative and it is time for the Federal Government to get out of the way and give our citizens the options for which they have asked. As a recent editorial in the Idaho Statesman noted, The nation loses if medical savings accounts are stripped out of the final legislation.

The bill is not perfect. Small insurers have shared their views with me that the provisions related to small group and individual coverage will actually increase the cost of individual policies, thus adding to one of the current insurance problems we face—the lack of affordability. As premium costs increase people will drop out of the system, leaving us with more uninsured and, with a shrinking market, even fewer options for those who continue to purchase health insurance coverage. Obviously, this is not the result for which we are aiming and addressing these questions should be a priority.

That said, I support the Health Insurance Reform Act because I believe it steps in the right direction toward increasing accessibility to health care insurance. Allowing those with preexisting conditions to get and keep health insurance will help ensure coverage for Americans unfairly denied access to health insurance. Providing for portability of health care coverage will help end job-lock and will ensure that those who have faithfully paid into the system will not suddenly be dropped from it. And providing for more favorable tax treatment of insurance premiums for the self-employed, and for long-term care insurance, will make insurance more affordable for numerous other Americans. These are significant reforms which I believe all of us should support, and I urge my colleagues to pass this bill.

Mr. LEVIN. Mr. President, many Americans today, particularly middle-income working families face the declining purchasing power of their wages. They are saddled with the high cost of child care, are trying to get a college education for their children, working to reach the traditional American dream of home ownership and some security for their own retirement years. But perhaps most difficult is the struggle to keep up with the sky-rocketing costs of health care which many are forced to face without adequate health insurance.

Americans want health insurance which covers all Americans, which is affordable, protects the quality of their health care, and can never be taken away. Today, the Senate, I hope, will take a first step in that direction. This legislation does not address the costs, but takes a very important step in protecting the availability of health insurance for many Americans.

I support the legislation before the Senate today. I am pleased to be a cosponsor of this health insurance reform measure, along with 55 of my colleagues in the Senate. Although it does not solve and does not attempt to solve all of the problems of the present system, it does address some of the most pressing concerns that middle-income Americans have expressed about the diminishing availability and portability of health coverage for themselves and their families.

This bill makes important changes that will protect those who currently lose their insurance coverage because they lose their job or change jobs. And, it protects those who are unable to attain health insurance because of a preexisting medical condition, or who now lose it when they get sick.

One of the consequences of the present health insurance system is that it creates what is often called ''job lock''; that is workers who want to change jobs to improve their careers are forced to give up the opportunity because it means losing their health insurance. A quarter of all Americans say they have been forced to stay in a job they otherwise would have left, because they were afraid of losing their health insurance. This bill ends job lock.

Under the Kennedy-Kassebaum reform bill, exclusion of a preexisting condition will be limited. Employer-provided health plans will not be able to limit or deny coverage for new employees for more than a year because of a medical condition that was diagnosed or treated during the previous 6 months for employees changing plans. No new limit on preexisting conditions may then ever be imposed on those who maintain their coverage, even if they change jobs or their employer changes insurance companies. Cancellation of policies for employees who continue to pay their premiums will be prohibited. Employees coverage can no longer be terminated because they become sick. No employers who want to buy policies can be turned down because of the health of their employees.

Mr. President, I am especially pleased with significant improvements in coverage for pregnant women and newborn children. Under the bill, pregnancy can no longer be considered a preexisting medical condition as is presently the case with some health plans. In some such situations, the mother has no prenatal coverage for pregnancy related services.

The bill also contains a special enrollment period for change in family composition. Under this provision, newborns whose parents wish to enroll them in their group health plan within 30 days of birth may not be excluded from coverage under a group or individual health plan during the child's first 12 months of life.

Additionally, as is the case with individuals who are previously enrolled, children cannot be subject to a preexisting condition exclusion once the condition has been diagnosed, if the condition was previously covered. This provision is intended to ensure that children under the age of 1 are not subjected to new preexisting condition exclusions when their parents change jobs or health plans simply because of their age.

Mr. President, this legislation helps real people. It will help Mike and Elizabeth Gregory of Gains Township, MI. When Mike Gregory was left jobless due to his company's downsizing, his wife Elizabeth and their two daughters lost their health coverage. This situation primarily impacted their youngest child, Danielle, who has cerebral palsy. Only one of the three plans at Mike's new place of employment offers insurance that will not limit coverage for Danielle's preexisting condition, thereby limiting their choice and therefore their selection of benefits.

Barbara Barton of Grand Rapids suffers from MS. She was forced to leave her job in order to reduce the stress that worsened her symptoms, which included temporary blindness and difficulty walking. Ms. Barton was forced to wait 6 months to get health coverage, since MS is classified as a preexisting condition. Under this bill, she would have been eligible to move to an individual health insurance plan immediately.

Fear of losing health coverage for Mr. Al Miller's preexisting condition prevents his wife from seeking a higher-paying job. The Millers are from Charlotte, MI. Mr. Miller has MS.

Mr. Michael Peel of Flint recently changed jobs and is covered under COBRA has a 2-year-old son with a number of physical ailments. He and his wife are expecting their second child and fear they will not be able to get coverage under Mr. Peel's new job that does not exclude his preexisting condition.

Steven West of Nashville, MI, spoke to me about problems he and his wife Lori have experienced in attaining health insurance coverage for their son, Jacob. Jacob has multiple birth defects. Steven has been able to negotiate coverage at his current job, but fears that he is trapped there by Jacob's needs. Steven has an opportunity to move to a better job, but has been unable to do so because the health coverage would not take care of Jacob.

Mr. President, these are just a few real people in my home State of Michigan who stand to benefit from this legislation, there are thousands like them. I want to commend my colleagues Senator KASSEBAUM and Senator KENNEDY for forging a bipartisan approach to addressing this critical issue. While I would prefer for the Senate to be passing more far-reaching health reform today, perhaps covering all American children, for example, I believe this bill is an important step forward and I urge its enactment.

Mr. MACK. Mr. President, I would like to thank my colleagues for postponing final passage of the Health Insurance Reform Act until my return. The legislation which we will pass today is the straightforward health insurance reform which my constituents have been telling me they want for many years.

The American people rejected the big-government, big-bureaucracy social experiment which the Clinton administration developed—in secrecy, I might add—in 1994. People don't want a one-size-fits-all, government-controlled health insurance system. Americans won't tolerate having a Government board deciding for them which procedures are medically necessary and appropriate. And we know from leading economists that price controls produce shortages, black markets, and reduced quality. Therefore, most Americans and those of us who serve them in Congress rejected the Clinton health care plan.

Two years later, under Republican leadership, we are addressing the aspects of health insurance reform which most people outside the beltway want us to address. We will provide portability of health insurance, which will help put an end to job lock. Insurers will no longer be able to deny coverage due to preexisting conditions. As a cancer survivor, I know personally how important this provision of health insurance reform is to patients.

The legislation ensures guaranteed renewability of policies, with the exceptions of fraud and nonpayment of premiums. It will help the self-employed by increasing the deductibility of health insurance premiums. It facilitates the establishment of voluntary coalitions of small businesses and individuals to negotiate and purchase health insurance. Finally, the legislation provides tax incentives for the purchase of long-term care insurance, and tax-free treatment of accelerated life insurance benefits for those with chronic or terminal illnesses.

I am especially grateful to Senators KASSEBAUM and KENNEDY for agreeing to include genetic information in this important legislation.

I cochaired a hearing with Senator FEINSTEIN last September to examine the issue of genetic information and health insurance. We listened to patients, researchers, biomedical ethics experts, consumer advocates, and others who made the case that Congress must address this complex issue now.

Why now? Because the scientific data and technology for genetic testing are here; but the social, ethical, and legal ramifications have only begun to resonate beyond the scientific community. Put another way: The science of human genetics research is on the Concorde. Yet the legal, social, and ethical debate about how to handle the information in our society has been stuck at Kitty Hawk trying to get off the ground.

This legislation takes an important first step by clarifying that employer-based plans cannot deny coverage, or charge higher premiums, to individual employees based upon their health status, including health status based upon genetic information. While this may not have significant implications today, it certainly will by the end of the decade when international scientists complete the mapping of the entire human genome.

There is still more which needs to be accomplished in this area, such as ensuring the privacy of medical records and prohibiting employment discrimination based upon an applicant's genetic information. Senator HATFIELD, Senator FEINSTEIN, and I look forward to working with our colleagues to enact our legislation to address these concerns.

Today is an historic moment in our Nation's history. We will ensure that all Americans have access to health insurance coverage while maintaining the freedom to choose providers and benefits. We will preserve our system with the highest quality of care and continue to foster research, innovation, and competition. We will provide employers with the positive incentives to provide health insurance coverage for their employees, and provide tax equity for the self-employed to acquire insurance for themselves and their families.

All of this will be accomplished under the system which has served as the bedrock of every great stride our Nation has made—not through higher taxes, more Government, and more bureaucracy, but rather through free markets and free choice.

Mr. THOMPSON. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. INHOFE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. INHOFE. Mr. President, I ask unanimous consent I be allowed to speak briefly as if in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

TERM LIMITS

Mr. INHOFE. Mr. President, I have been watching and listening with a great deal of interest to the debate on term limits. I think there are a lot of us who believe that, regardless of the arguments that come forth on term limits, there are not many minds that will be changed in this Chamber. But many of us have been concerned about the term limits issue long before we got to Congress. I know I became interested in it back in the 1970's, long before I was a Member of Congress.

I think a lot of the reason is that you look and you see the things that are going on in this country, and you see that there is a necessity to change the way we have been doing business.

One argument that has not been used during the course of this debate, that I have heard anyway, is the argument that if we had term limits, it would deter a lot of people from getting into a legislative position for perhaps the wrong reasons. I think quite often people with whom I have served who came here to Congress directly out of college never really had a real job in terms of the real world and did not have any idea of how tough it was out there.

I look at a lot of the things that passed, such as the deficit that has piled up over the years. Certainly, in my position, I look at this as if this is a moral issue, and it is not going to be changed until we are able to change the type of individuals that serve here.

We have excellent people serving here in Congress, but the thing that has always been a problem with me is that people who come to Congress, never having been exposed to the real

world, have a different set of values and have a different outlook on life than we have.

I would agree with some of the previous speakers that we ought to have a situation in America where Members of Congress should all have to go out and make a living under the laws that they pass, and we would not have these problems.

Someone not too long ago said that we have an overregulated society here. We certainly do. It is overregulation which mostly came about by people who have been in Congress for their entire adult life. This is something that can be changed.

I am not optimistic that anything is going to happen with this today. But I will say this. There is going to be a record that will be established so that people who are running for office will know that the public will know how they stand on this very contentious issue. Over in the other body, in the House of Representatives, there is a Contract With America; 9 of the 10 items were passed over there. The tenth one that was not passed was term limitation.

I believe it is something that is very healthy for our system, something that we all need to get on the record, and I think we will have that opportunity today. I believe that is in the best interest of this country.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

HEALTH INSURANCE REFORM ACT

The Senate continued with the consideration of the bill.

Mrs. KASSEBAUM. Mr. President, first before we go to the closing statements on the health insurance reform bill, I would like to yield the floor 5 minutes to the Senator from Minnesota.

The PRESIDING OFFICER. The Senator from Minnesota, [Mr. GRAMS] is recognized for 5 minutes.

Mr. GRAMS. Thank you very much, Mr. President.

Mr. President, I rise today to offer my strong support for the Health Insurance Reform Act, and I commend the distinguished chairman from Kansas and the Senator from Massachusetts for drafting legislation which seeks to ensure affordable, accessible health insurance for all Americans.

In September of 1993, President Clinton and the First Lady presented a sweeping health care reform proposal which they believed would resolve the health care problems facing many in our country. They said we needed to make insurance portable . . . they said we needed to protect individuals with pre-existing conditions . . . and they said we needed to bring down the rising costs of health insurance. I agreed with the problems identified by the President, however, I strongly disagreed with the solutions he proposed.

Crafted during a year of closed-door meetings by the White House's Health Care Task Force, the Clinton plan set in place global budgets, price controls, tax increases, reduced choice and rationing—all housed within a massive, new layer of Federal bureaucracy. Fortunately, Americans recognized the President's plan for what it really was—a government takeover of the Nation's health care system, and they had the good sense to reject it.

Mr. President, I believe government-controlled health care failed in 1994 because the President underestimated the ability and desire of Americans to make their own health care choices, free from government intrusion or control. Only by empowering consumers, rather than the Government, will we allow the marketplace to evolve into a quality, cost-effective, and responsive health care provider, able to offer affordable insurance to all Americans.

While socialized medicine failed in 1994, Americans did embrace four important concepts which emerged from the health care debate: health insurance should be accessible, it should be affordable, it should be portable, and pre-existing conditions shouldn't disqualify anyone from obtaining health insurance. Those principles lie at the heart of the Health Insurance Reform Act.

It is estimated that 43 million Americans went without health insurance in 1995. According to the Minnesota Health Care Commission, the number of uninsured Minnesotans has remained stable for the last 5 years at approximately 400,000 individuals, or nearly 9 percent of the State's population. That is below the national average of close to 15 percent uninsured but still too high.

Mr. President, what keeps health insurance out of the reach of so many? The two main barriers are access and affordability.

A majority of Americans under the age of 65 are insured through their workplace. Many job providers, however—small employers in particular—find themselves shut out of the health insurance market when it comes to obtaining affordable coverage for their employees.

And even insurance obtained through a job doesn't last forever, because few Americans stay with a single employer throughout their entire work career. Each year, 18 million Americans change insurance when a family member moves between jobs, often stranding them without insurance and usually forcing them to find new coverage. Many who are unwilling or unable to risk going without insurance just stay put. A Washington Post/CBS News survey found that one quarter of all American workers experience ''job lock''—they are staying in jobs they would otherwise leave because they are afraid of losing their health coverage.

Another flaw of our insurance system is that it offers little protection to individuals or their family members suffering from major health disorders. Because they are victims of what are known as ''preexisting conditions,'' these Americans are denied insurance because of the cost they represent to the system.

Americans who play by the rules, who buy health insurance when they are healthy, should be allowed to keep it when they get sick. This is why I supported Senator JEFFORDS' amendment which would have raised the lifetime cap on insurance policies.

Individuals buy health insurance to not only ensure treatment for relatively minor medical problems—strep throat and the occasional broken bone, for example—but also to protect themselves against crippling accidents or catastrophic illness. It is important that these individuals continue to be covered by their private insurance company. If they are dropped, their only alternative is to spend-down their assets in order to qualify for Medicaid.

This moves more patients into the Medicaid program, overloading the taxpayers and a system that is already buckling under heavy costs.

This is unfair to those individuals who have played by the rules, and I will continue to work with the Senator from Vermont to address this issue.

Expanding access to insurance, allowing individuals to move between jobs with insurance policies that can move with them, and preventing insurance companies from denying coverage based on a preexisting condition, is precisely what the Health Insurance Reform Act attempts to provide.

The Federal Government's General Accounting Office estimates this legislation would open the door to health insurance for 25 million more Americans.

Americans will no longer be forced to decide between taking a new job or losing their medical coverage—the Health Insurance Reform Act guarantees health care that is always there, regardless of where an employee works or even if they work at all.

My own State of Minnesota embarked on reforming its health care delivery system long before most of the rest of the country.

For three decades, we have debated these very same issues and worked long and hard to achieve portability, renewability, and the elimination of preexisting condition exclusions, thereby increasing the number of insured.

Minnesotans have been innovative and progressive in reform of our health care marketplace.

We have celebrated success and we have endured failure.

While our system is far from perfect, our legislators, our health care community, and our constituents continue

to work to improve the delivery of quality health care and guarantee its affordability in Minnesota.

One of this bill's most beneficial aspects is the flexibility it gives States to create and administer their own health insurance reform programs—away from Washington's control.

Under this legislation, States such as Minnesota, which have already implemented reforms, are exempted from any changes established by the Kassebaum-Kennedy bill.

Furthermore, Minnesota has already enacted laws in the large group, small group, and individual markets which go beyond what is laid out in the Kassebaum-Kennedy legislation.

That includes guarantee issue, guaranteed renewability, limits on pre-existing condition exclusions, a State risk pool for uninsurable individuals, and reforms to enhance and encourage the bargaining power of small businesses.

The Kassebaum bill will have minimal effect on most of my constituents, but it will provide new portability and access protections for Minnesota employees and their dependents.

It does so by requiring insurers to guarantee issue coverage to plans with 50 or more employees, which includes self-insured plans not currently providing these protections.

I am disappointed that medical savings accounts are not part of the Senate bill.

I am encouraged, however, by the large number of my colleagues who share the majority leader's commitment to including MSA's in the conference report. I believe MSA's would substantially enhance the legislation before us.

While this legislation will go a long way toward expanding access to health insurance, I am still concerned that the bill does not provide enough affordable access. Keep in mind that health insurance which is accessible yet unaffordable will not improve the current problems in our marketplace.

The inclusion of MSA's in this legislation is not a Republican issue or a Democrat issue—it is a Main Street issue. MSA's enhance portability and promote consumer choice, while they empower individuals with the same tax equity large corporations receive under our Tax Code.

I am deeply concerned that many of those who claim to be advocates for the so-called little guy want to deny lower income Americans the choice of medical savings accounts.

I believe MSA's are the best way we can put low-income wage earners on an equal footing with their corporate cousins in the health care marketplace.

I received a letter last week from a coalition of rural Minnesotans based in Fergus Falls called Communicating for Agriculture.

Comprised of farmers, ranchers, and agribusinesses, and boasting a national membership of 80,000, Communicating for Agriculture has been advocating an MSA-type plan since 1978.

They write;

> Managed care is not an option to hold down health care costs since [rural Minnesota] has little or no competition in health care. Without competition, you can't have managed care. MSA's allow us to spend our medical dollars where it is most convenient.
>
> It also eliminates a great amount of administrative expense which is a major contributor to health inflation over the years.

A recent study by Blue Cross and Blue Shield revealed that 43 percent of employees would definitely or probably switch to an MSA if given the opportunity. In light of this broad, public support for MSA's, we should at the very least allow individuals this choice. While the Kassebaum legislation is good and worth passing on its own merits, I certainly hope that the conference committee will adopt MSA's as part of the final version of our health insurance reform efforts this year.

As I conclude, I want to assure my colleagues and my constituents that my position on the issues before us has not wavered since I first ran for public office in 1992:

I strongly support legislation ensuring portability.

I strongly support legislation ensuring limiting preexisting condition exclusions.

I strongly support legislation providing tax equity for all Americans through medical savings accounts, and increasing deductibility to 100 percent.

And I strongly support the efforts of this Congress to deliver these desperately needed reforms to the American people.

As Congress prepares a final bill to send to the President, I will be working to ensure that provisions promoting greater access and affordability are incorporated into the final bill.

Only through such comprehensive reforms will we encourage more Americans to purchase health insurance, thereby expanding the ranks of those with coverage and eventually making health insurance more accessible and affordable for all.

Again, Mr. President, I strongly support this bill. I thank the Chair.

The PRESIDING OFFICER (Mr. CAMPBELL). Who yields time?

Mrs. KASSEBAUM addressed the Chair.

The PRESIDING OFFICER. The Senator from Kansas, [Mrs. KASSEBAUM].

Mrs. KASSEBAUM. I thank the Senator from Minnesota for his support on this legislation.

If I may speak for a few moments in closing before our vote this afternoon on the health insurance legislation. For a bill that is a very modest bill with a broad consensus of support, the Health Insurance Reform Act certainly has attracted a lot of controversy. It is not a Trojan pony. It is a bill that was carefully put together, learning from the mistakes of the past and building together in the Labor and Human Resources Committee legislation that we believed could garner the broadest possible support and yet represent a meaningful step forward in health care legislation.

During the debate in the last Congress on health care, there were many questions raised of particular concern to most people. One was portability, a sense of insecurity where many Americans found they were not able to maintain health insurance if they lost their job or changed jobs. That is what we started with—something that is clearly, I believe, a small but important step forward. It is what I believe will be very valuable to many people in this country. We recognized we were only going to be able to achieve success if the bill had the broadest support possible. And indeed, the legislation has garnered over 60 cosponsors. From there, of course, the legislation has grown to be more expansive than what we initially started with.

It has been our goal all along, Senator KENNEDY as the ranking member of the Labor and Human Resources Committee and myself, to say that amendments which did not have broad-based support—amendments which were controversial—were ones that we would have to object to, whether we favored them individually or opposed them individually. And that is what we have tried to do throughout this debate.

This legislation now reflects, I think, two very positive amendments that had unanimous support here on the Senate floor and that were offered by the chairman of the Finance Committee, Senator ROTH, and Senator DOLE, who has been a long supporter of these two initiatives. One was to increase the percentage of deduction that would be allowed to those who are self-employed from 30 to 80 percent. The second was to provide tax deductions for long-term care coverage, an issue which many of us have believed was very important and of which Senator DOLE has long been a leader. Those were valuable additions to the underlying bill.

As my colleagues know, Senator KENNEDY has for many years in his legislative career in the Senate, both as chairman of the Labor Committee and as ranking member, been a strong advocate of improving the health care system. This bill certainly does not go as far as Senator KENNEDY would like it to go, but he was realistic about the possibilities of what we could achieve with a more limited bill.

Whether this legislation helps 25 million people, as has been estimated by the General Accounting Office, or whether it only helps 10 million people or if it helps 50 million people, the important fact is that the Health Insurance Reform Act does provide some peace of mind for those who desperately want to have some assurance that they will not be excluded from coverage because of a preexisting medical condition if they lose their job or change their job.

That is an important sense of security for many Americans, and I believe one of the main reasons this legislation has garnered such strong support.

It is my hope, Mr. President, that out of this bipartisan effort we can go to conference and we can come through conference with a bill that will be acceptable to everyone, because what we can accomplish with this more limited legislation will be of value and far better to have accomplished than to try for too much and to fail again.

Other aspects that have been added as amendments in both the House and the Senate, may have some value. But because they are extremely controversial, I would suggest that they need to be debated on their own merits at another time. The clear danger is that if we add too much, we will again fail to deliver real reform for the American people.

Mr. President, this is an effort that has had a great deal of help along the way from all sides—from consumers, from the medical community, from the insurance community, from employers, and certainly from colleagues in the Senate and in the House of Representatives. I particularly thank staff members who have worked tirelessly on this effort, certainly on my own staff, Dean Rosen, who has spent months and months trying to pull together a consensus of support, as well as Susan Hattan, Rebecca Jones, and Ann Rufo, and all of the staff of the Republican members of the Labor and Human Resources Committee. I also thank David Nexon and Lauren Ewers of Senator KENNEDY's staff for their hard work and dedication on this issue as well.

I do not think today's vote would have been possible without the efforts of Senator KENNEDY, who has championed this legislation even though, as I said earlier, his own interests would have been more expansive than what we would have been able to achieve. It also would not have been possible without the support of those on my side of the aisle, as well, who have been willing to settle for what is possible and of greatest value to most people.

So it has been a collaborative effort. It has been an effort that garnered unanimous support when it came out of the committee in August, and I believe will have if not unanimous support here in the U.S. Senate, close to that. I think it will be an important moment in advancing health care efforts on the part of the U.S. Government today.

I want to thank the staff who worked countless hours on this legislation. I want to thank Susan Hattan, Dean Rosen, Rebecca Jones, and Anne Rufo of my staff for their contributions and persistence in helping to make this legislation a reality. I want to thank David Nexon and Lauren Ewers of Senator KENNEDY's staff for their hard work and dedication. And I want to commend the Republican staff of the Senate Labor and Human Resources Committee: Elaina Goldstein of Senator JEFFORD's staff, Vince Ventimiglia of Senator COAT's staff, Kimberly Spaulding with Senator GREGG, Susan Ramthun with Senator FRIST, Saira Sultan of Senator DEWINE's staff, Annie Billings of Senator ASHCROFT's staff. Greg Willhauck with Senator ABRAHAM, and Tammi Brueske with Senator GORTON. I also want to thank Bill Baird with legislative counsel for his patience and hard work, and Beth Fuchs of the Congressional Research Service for her invaluable guidance. Finally, I would like thank Michael Gutowski and Mark Nadel of the General Accounting Office for their analysis of the impact of S. 1028.

I yield the floor.

Mr. KENNEDY addressed the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts has 10 minutes 30 seconds.

Mr. KENNEDY. Mr. President, I ask unanimous consent that Senator PRYOR be able to speak for not to exceed 10 minutes at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, first of all, I would like to express my appreciation to a number of our colleagues. I start with our chairman of the Labor and Human Resources Committee, the leading sponsor of the bill, Senator KASSEBAUM. I think that when this legislation becomes law—and I believe that it will become law—the American people will owe her a debt of gratitude. I am proud to have joined her in recommending to the Senate this legislation and to join her in recommending the passage of the legislation, as well.

I think the entire Senate understands the extraordinary leadership that she has provided on this legislation, and it is important, I believe, that the American people do as well.

When the Senate votes on the Health Insurance Reform Act today, the bill will pass overwhelmingly for many reasons. It will pass because it is broadly bipartisan. It will pass because it is solidly supported by over 200 organizations and a coalition of consumer groups, business and labor and responsible insurance companies. It will pass because the Senate acted responsibly last week in rejecting a killer amendment that would serve special interests rather than the public interest.

Senators have made important contributions to the construction of this legislation, and I would like to mention several of my colleagues. This is not a complete list, but those who I have had the chance to work with most closely.

First of all, Senator HARKIN, who was a leader in the effort to protect people against health insurance discrimination based on genetic information.

Senator WELLSTONE worked hard to assure similar protections for victims of domestic violence.

Senator JEFFORDS was a key leader on the provisions of the bill enabling small business to create purchasing pools to increase their bargaining power.

Senator FRIST contributed key ideas to address the special needs of the disabled.

Senator DODD worked with the responsible insurance companies to see that their concerns were addressed while protecting the interests of consumers and gathering considerable support within the insurance industry for this proposal on the basis of its merits.

Senator ABRAHAM contributed to the State flexibility provisions which was a matter of considerable concern and interest to many different Members of this body.

Senator ROCKEFELLER was an early supporter of this effort and provided enormous assistance during the floor debate.

Senator BENNETT worked hard to bring this bill to the floor and to build a consensus behind it.

Others contributed as well.

We are grateful for the additions that were made by Senator DOLE and Senator ROTH focusing on making the availability of insurance more attractive to small businesses, that provided the support for extended care for many of our seniors, which is the great gap in the Medicare system today, and also for the initiatives for terminally ill patients to permit them greater flexibility to deal with some of their particular financial interests.

So we are grateful for all of their support and for many others. For Senator DOMENICI and Senator WELLSTONE who offered their amendment dealing with mental health, that was accepted by the Senate. Senator KASSEBAUM and I resisted that amendment on the basis of our earlier understandings and agreements that we would resist all amendments. But, nonetheless, I think there is great value of that particular provision as well.

The Kassebaum-Kennedy bill will end many of the most serious health insurance abuses and provide greater protections to millions of families. It is an opportunity that we cannot afford to miss.

Before some final brief remarks about the legislation, I want to recognize some of our very good staff people for their hard work.

On our side, my staff, Nick Littlefield, Dave Nexon, and Lauren Ewers were particularly active; Susan Castleberry, Sara Thom, Brian Moran, Ron Weich, and Melody Barnes.

For Senator HARKIN: Peter Reineke and Anne Ford.

For Senator WELLSTONE: Alex Clyde.

For Senator DODD: Jane Lowenson.

For Senator PRYOR: Bonnie Hoque.

For Senator ROCKEFELLER: Ellen Doneski and also Mary Ella Payne.

For Senator DASCHLE: Rima Cohen and Cybele Bjorklund. All of them were involved and helpful.

Senator KASSEBAUM has mentioned those Republican staff who have been involved and worked very closely with us. But in this instance, as in many others, some of them worked very closely with all of us, the Members of the Senate, as well as our staffs: Susan Hattan; Dean Rosen, Anne Rufo, and Rebecca Jones.

For Senator JEFFORDS: Elaine Goldstein.

And for Senator FRIST: Sue Ramthun.

We are grateful to all of them. They have a remarkable sense of knowledge and awareness in very special segments of this legislation, and their experience and knowledge and understanding of these nuances were valuable to all of us. We are grateful for their help.

Finally, Mr. President, briefly, the abusive practices addressed by this bill create endless, unnecessary suffering. It was our attempt to address that unnecessary suffering by focusing on language to provide millions of Americans with a new sense of hope in the workplace, Americans who are today forced to pass up jobs that would improve their standard of living or offer greater opportunities because they are afraid they will lose their health insurance.

Many others have to abandon the goal of starting their own business because health insurance would be unavailable to them or members of their families. We have tried to provide ways in which they can come together to provide coverage for their families and for the families of those who work in many of the mom-and-pop stores and smaller businesses of this country.

Children who ''age out'' of their parents policies often find themselves unable to obtain their own insurance if they have significant health problems. We have addressed that.

Early retirees can find themselves uninsured just when they are entering the years of highest health risks. We tried to address those issues.

Many other Americans lose their health insurance because they become sick or lose their job or change their job, even when they have faithfully paid their insurance premiums for many years. This is perhaps the most difficult concept for people to understand, where they have paid their premiums for 20, 25 years, suddenly have an illness and they are either dropped from coverage or their premiums go up extraordinarily to the point where they cannot effectively afford it. We have really provided some important reassurances to families.

More than half of all insurance policies impose exclusions for preexisting conditions and, as a result, insurance is often denied for the very illness most likely to require medical care. The purpose of such exclusions is reasonable, to prevent people from gaming the system by purchasing coverage only when they get sick. But current practices are indefensible, and no matter how faithfully people pay their premiums, they have to start all over again with new exclusions if they change jobs or lose their coverage.

The Health Insurance Reform Act is a modest, responsible bipartisan solution to many of the most obvious abuses in the health insurance market today. In fact, the only active opposition to the legislation comes from those who profit from the abuses in the current system. In his State of the Union Address last January, President Clinton challenged the Congress to pass this bill. Now the Senate is poised to fulfill that pledge.

Mr. President, the only thing that stands between this bill and the President's signature are controversial provisions added in the House of Representatives. These objectionable provisions include the medical savings accounts which we have debated——

Mr. President, I ask for 3 more minutes.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. KENNEDY. The federalization of multiple employer welfare arrangements. A number of years ago we provided the States the power regulate these arrangements. It is rather strange now that those provisions which permit the States to enforce these regulations are effectively being preempted so that the Federal Government will regulate them.

Repeal of the MediGap rules protecting senior citizens against profiteers. That is a very dangerous provision. Up until 1984, we found that many elderly people would buy 2, 3, 4, 5, 10 different programs which people thought would cover various gaps in their insurance—instead the policies duplicated one another with no additional benefit to the individual. We found all kinds of abuses. We passed legislation to protect seniors against these abuses. It has been effective. We should not go back to the earlier period.

The provisions making it more difficult to combat waste, fraud, and abuse in the current Medicare-Medicaid programs. I think that issue is one that is not going to go away. There are many concerns that some of the provisions that have been made in the House bill will lower the standard, make it more difficult to prove the abuse and waste and fraud. I am not sure we want to go in those directions.

The malpractice issues were debated earlier in the Congress. I think they ought to be addressed outside of this legislation.

We go to conference in a bipartisan spirit, committed to trying to get this legislation passed—obviously they have a right to pass their bills and we have a responsibility to work through the differences—but we hope that, given the spirit with which this legislation started, both in the House and the Senate, that we will be able to do it. Every day that is delayed, there are millions of our fellow citizens who are denied the kinds of protections that this legislation will provide for them. It is an extremely important piece of legislation, in many respects I think maybe the most important piece of legislation that we will pass in this Congress.

When the Senate votes on the Health Insurance Reform Act today, the bill will pass overwhelmingly for many reasons. It will pass because it is broadly bipartisan. It will pass because it is solidly supported by over 200 organizations in a coalition of consumer groups, business and labor, and responsible insurance companies. It will pass because the Senate acted responsibly last week in rejecting killer amendments that serve special interests rather than the public interest.

I commend the chairman of the Labor Committee and the leading sponsor of the bill, Senator KASSEBAUM. She worked long and well to make this day a reality. Her leadership resulted in a unanimous vote for this bill in our committee. Her courage and commitment made it possible for this bill to pass the Senate without crippling amendments. The American people owe her a debt of gratitude, and I am proud to serve with her and join her and recommend passage of this legislation.

Other Senators have also made important contributions. Senator HARKIN was a leader in the effort to protect people against health insurance discrimination based on genetic information. Senator WELLSTONE worked hard to assure similar protection for victims of domestic violence. Senator JEFFORDS was a key leader on the provisions of the bill enabling small businesses to create purchasing pools to increase their bargaining power. Senator FRIST contributed key ideas to address the special needs of the disabled. Senator DODD worked with the responsible insurance companies to see that their concerns were addressed while protecting the interests of consumers.

Senator ABRAHAM contributed to the State flexibility provisions. Senator ROCKEFELLER was an early supporter of this effort and provided enormous assistance during the floor debate. Senator BENNETT worked hard to bring this bill to the floor and to build consensus behind it. Others contributed as well.

The Kassebaum-Kennedy bill will end many of the most serious health insurance abuses and provide greater protection to millions of families. It is an opportunity we cannot afford to miss.

The abusive practices addressed by this bill create endless unnecessary suffering:

Millions of Americans are forced to pass up jobs that would improve their standard of living or offer greater opportunities because they are afraid they will lose their health insurance.

Many others have to abandon the goal of starting their own business, because health insurance would be unavailable to them or members of their families.

Children who age out of their parent's policies often find themselves unable to obtain their own insurance if they have any significant health problems.

Early retirees can find themselves uninsured just when they are entering the years of highest health risks.

Many other Americans lose their health insurance because they become sick, or lose their job, or change their job—even when they have faithfully

paid their insurance premiums for many years.

Each year, the flaws in the private health insurance market become more serious. More than half of all insurance policies impose exclusions for preexisting conditions. As a result, insurance is often denied for the very illnesses most likely to require medical care. The purpose of such exclusions is reasonable—to prevent people from gaming the system by purchasing coverage only when they get sick. But current practices are indefensible. No matter how faithfully people pay their premiums, they often have to start over again with a new exclusion period if they change jobs or lose their coverage.

Eighty-one million Americans have conditions that could subject them to such exclusions if they lose their current coverage. Sometimes, the exclusions make them completely uninsurable.

Insurers impose exclusions for preexisting conditions on people who don't deserve to be excluded from the coverage they need. Sometimes, insurers deny coverage to entire firms if one employee of the firm is in poor health, or at least exclude that employee from coverage. In other cases, entire categories of businesses, with millions of employees, are redlined out of coverage.

Even if people are fortunate enough to gain coverage and have no pre-existing condition, their insurance can be canceled if they have the misfortune to become sick—even after paying premiums for years.

One of the most serious consequences of the current system is job lock. Workers who want to change jobs must often give up the opportunity because it means losing their health insurance. A quarter of all American workers say they are forced to stay in a job they otherwise would have left, because they are afraid of losing their health insurance.

During the debate on this legislation, we have heard from Americans who have been victimized by the abuses in the current system.

Robert Frasher, of Mansfield, OH, works for an employer who offers health coverage to employees, but the insurance company won't cover him. Why? Because he has Crohn's disease.

Jean Meredith of Harriman TN, and her husband Tom owned Fruitland USA, a mom and pop convenience store. They had insurance through their small business for 8 years, until Tom was diagnosed with non-Hodgkin's lymphoma and their insurance company dropped them. When the Merediths asked why, they were told they were no longer profitable insurance risks. Without health insurance, Tom Meredith had to wait a year to get the surgery he needed. After spending $60,000 of his own funds, his cancer recurred and he died about a year ago. Tom Meredith might still be alive today if he had not been forced to wait that year.

Diane Bratten, of Grove Heights, MN, and her family have insurance through Diane's employer. Because of a history of breast cancer now in remission, Diane and her family would not be able to get decent coverage if she decided to change jobs or was laid off.

Nancy Cummins, of Louisville, KY, lost her health insurance when her husband's employer went bankrupt. When their COBRA coverage expired, they were uninsured for 3 years, until they qualified for Medicare. During this period, she suffered three heart attacks, which left their family with $80,000 in debts.

Jennifer Waldrup, of Massachusetts, was covered by her husband's health insurance until his employer went out of business. When she applied for coverage under her own employer, she was turned down because she had multiple sclerosis. Her employer tried to help, but could not find an insurer who would offer coverage. Her husband had to cash in his life insurance to pay her medical bills.

Tom Hall, of Oklahoma City, faithfully paid his premiums for 30 years under the group insurance policy of the construction business that he co-owned. When the company dissolved and he became self-employed, the insurer refused to give him coverage because he had a heart condition. He lives in fear that his life savings will be wiped out.

The legislation we will pass this afternoon will address these problems effectively. The Health Insurance Reform Act is a health insurance bill of rights for every American, and for every business as well.

The legislation contains many of the provisions from the 1994 health reform debate which received broad bi-partisan support—such as increased access to health insurance, increased portability, protection of health benefits for those who lose their jobs or want to start their own business, and greater purchasing power for small businesses.

Those who have insurance deserve the security of knowing that their coverage cannot be canceled, especially when they need it the most. They deserve the security of knowing that if they pay their insurance premiums for years, they cannot be denied coverage or be subjected to a new exclusion for a preexisting condition when they change jobs and join another group policy, or when they need to purchase coverage in the individual market. Businesses—especially small businesses—deserve the right to purchase health insurance for their employees at a reasonable price.

Our Health Insurance Reform Act addresses these fundamental flaws in the private insurance system. The bill limits the ability of insurance companies to impose exclusions for preexisting conditions. Under the legislation, no such exclusion can last for more than 12 months. Once someone has been covered for 12 months, no new exclusion can be imposed as long there is no gap in coverage—even if someone changes jobs, loses their job, or changes insurance companies.

The bill requires insurers to sell and renew group health policies for all employers who want coverage for their employees. It guarantees renewability of individual policies. It prohibits insurers from denying insurance to those moving from group coverage to individual coverage. It prohibits group health plans from excluding any employee based on health status.

The portability provisions of the bill mean that individuals with coverage under a group plan will not be locked into their job for fear that they will be denied coverage or face a new exclusion for a preexisting condition. These provisions will benefit at least 25 million Americans annually, according to the General Accounting Office. In addition, the provisions will provide greater security for the 131 million Americans currently covered under group health plans.

The bill will also help small businesses provide better and less expensive coverage for their employees. Purchasing cooperatives will enable small groups and individuals to join together to negotiate better rates in the market. As a result, they can obtain the kind of clout in the marketplace currently available only to large employers.

The bill also provides great flexibility for States to meet the objective of access to affordable health care for individuals who leave their group health plans.

The bottom line is that this legislation guarantees that those who faithfully pay their premiums will not have their insurance taken away or preexisting conditions imposed, even if they change jobs or lose their job.

The Health Insurance Reform Act is a modest, responsible, bipartisan solution to many of the most obvious abuses in the health insurance marketplace today. The bill was approved by the Senate Labor and Human Resources Committee last August by a unanimous vote of 16 to 0. It is similar to proposals made by President Clinton in his recent balanced budget plan.

In fact, the only opposition to this legislation comes from those who profit from the abuses in the current system.

In his State of the Union Address last January, President Clinton challenged Congress to pass this bill. Now the Senate is poised to fulfill that pledge.

The only thing that stands between this bill and the President's signature are controversial and harmful provisions added by the Republican majority in the House of Representatives to their version of the bill. These objectionable provisions include medical savings accounts, federalization of multiple employer welfare arrangements, Federal caps on malpractice awards, repeal of MediGap rules protecting senior citizens against profiteers, and provisions making it more

difficult to combat the waste, fraud, and abuse in the current Medicare and Medicaid programs. Almost all of the 200 groups that support the legislation have urged Congress to pass a clean bill, without these controversial amendments.

Each of these provisions represents a special interest agenda that has no place in this legislation. Medical savings accounts are a $3.2 billion Federal giveaway that provides special tax breaks for the healthy and the wealthy at the expense of the average taxpayer. They raise premiums for the vast majority of Americans, by siphoning the healthiest people out of the insurance pool. As premiums rise for those remaining in the pool, the number of the uninsured grows.

In fact, in the words of the Congressional Budget Office, medical savings accounts ''could threaten the existence of standard health insurance.'' They discourage the use of preventive care and raise health costs in this way as well. The House provision is also the first step toward similar accounts for Medicare—a key part of the Republican plan to undermine Medicare by privatizing it.

Impartial health analysts agree that medical savings accounts are a bad idea. They have nothing to do with genuine insurance reform or health security for American families. They are in the House bill as a reward to Golden Rule Insurance Co. and other insurance companies that profit from the worst abuses of the current system. Golden Rule alone has made over $1.6 million in political contributions over the last 5 years. Medical savings accounts should be dropped in conference, so that this bill can be quickly signed into law.

Several other special interest provisions in the House bill also jeopardize the hopes of American families for genuine insurance reform. The House provision to exempt multiple employer welfare plans, or MEWA's from State regulation will turn back the clock to a time when these arrangements were rife with fraud and abuse and millions of workers and their employers were victimized. Inclusion of this provision would seriously weaken the constructive small business insurance reforms enacted by many States in recent years.

The other House provisions, such as those imposing Federal caps on malpractice awards, opening new opportunities to defraud senior citizens by unscrupulous insurance companies, and weakening Medicare protections against fraud and abuse are equally counterproductive and controversial, and they have no place in this consensus bill.

Because of the importance of enacting the broad-based insurance reforms included in this bill, Senator KASSEBAUM and I announced early in the process that we would oppose all controversial amendments to our legislation. Along with almost all of the more than 200 groups supporting the legislation, we urge our colleagues in the House to support this approach.

The Senate has acted responsibility. None of these controversial amendments are included in the bill that we will pass later this afternoon. Some were rejected but most were never even offered.

If the Republican majority in the House insists on including these controversial provisions they will kill this bill, and destroy the hopes of millions of Americans for the kind of modest but effective reform that is now well within our grasp, and that leaders and member of both parties have supported in the past. This measure is a test of the Congress' seriousness and its ability to put the interests of the American people ahead of the special interests.

Finally, this legislation is not comprehensive health reform. It will not solve all the problems in the current system. But it is a constructive step forward—a step that will help millions of Americans. Above all, it is proof positive that progress is again possible on health reform, and that the ghosts of gridlock for the 1994 debate no longer haunt our work on health care.

I urge the Senate to pass this bill by the largest margin possible. The larger the margin, the louder the message, and the more likely the Senate-House conferees will send this bill to the President expeditiously, without controversial amendments, and ready for his signature. On this issue, every day we delay is a day that brings unnecessary misery to large numbers of our fellow citizens.

Mr. President, I would like to discuss with the Senator from Kansas how H.R. 3103 treats association plans which arrange to provide their members the option to buy group health insurance. These association plans frequently are made up of self-employed individuals or small businesses. Is it not correct that our legislation imposes no new regulatory requirements on association plans, other than the general requirements affecting other health plans?

Mrs. KASSEBAUM. The bill establishes standards regarding portability, renewability, and pre-existing conditions, but does not otherwise disturb the association plan world. States will still regulate and certify insured plans, and the Secretary of Labor will continue to regulate self-insured plans that are currently exempt from State regulation.

Mr. KENNEDY. It is my understanding that the bill authorizes creation of health plan purchasing cooperatives, a concept discussed frequently in Congress over the past few years. The purpose of these cooperative provisions is to provide clear statutory authorization and guidance to groups of small employers and individuals who want to join together to buy health insurance at a lower cost. Is there any provision that requires these groups to join or create mandatory purchasing cooperatives?

Mrs. KASSEBAUM. No. Health purchasing cooperatives are purely voluntary. Subtitle D is intended to create special benefits for cooperatives that meet the standards in the bill. Congress does not intend that these provisions in any way affect the legal status or rights of purchasing cooperatives, employer coalitions, multiemployer plans, MEWA's, association plans, or other similar arrangements that do not meet the standards of this subtitle. The statute clearly states this intent.

Mr. KENNEDY. For example, could association plans sponsored by professional organizations or local chambers of commerce be forced to form or join a purchasing cooperative as the result of this bill?

Mrs. KASSEBAUM. No. The bill does not require groups to form or join a purchasing cooperative. Nor does the legislation preclude any other type of groups purchasing arrangements from existing.

Mr. KENNEDY. So aside from having to meet the insurance reforms contained in the bill and standards like portability, renewability, and preexisting conditions, your bill does not disturb association plans at all?

Mrs. KASSEBAUM. That is correct. Congress intends that association plans may continue to do business as they always have, except that they must meet the same insurance reform standards as other health plans under the bill.

Mr. KENNEDY. An additional matter that I would like to discuss is the provisions under the bill forbidding discrimination in the provision of health insurance in the group market. Section 101(a)(1)(B) forbids an employee health benefit plan or a health plan issuer from conditioning eligibility, enrollment, or premium contributions for individual participants or beneficiaries on health status, medical condition, claims experience, receipt of health care, medical history, evidence of insurability, genetic information, or disability. The purpose of this provision is to prevent health plans from denying coverage to individuals or charging them higher premiums because the plan believes they may have higher than average health costs. Is this correct?

Mrs. KASSEBAUM. Yes. This provision is meant to prohibit insurers or employers from excluding employees in a group from coverage or charging them higher premiums based on their health status and other related factors that could lead to higher health costs. This does not mean that an entire group cannot be charged more. But it does preclude health plans from singling out individuals in the group for higher premiums or dropping them from coverage altogether.

Mr. KENNEDY. We intend the words ''health status, medical condition, claims experience, receipt of health care, medical history, evidence of insurability, genetic information, or disability'' to have a broad meaning, do we not?

Mrs. KASSEBAUM. Yes. These words are meant to broadly preclude the use of any of the categories insurance companies have historically used to deny people coverage based on health status and related factors—that reasonably could lead a health plan to believe that an individual would incur high health costs or be uninsurable. They are meant to preclude use of any of the categories insurance companies have historically used to deny people coverage based on their expected health costs—not only medical history or the presence of preexisting conditions, but also including such factors as family history, likelihood of experiencing domestic violence—or actual experience of domestic violence, genetic predispositions or other genetic information, or residence in a low-income neighborhood.

I want to just mention a few measures that we will have to address in the conference. The Health Insurance Reform Act is a modest, responsible bipartisan solution to many of the most obvious abuses in the health insurance market today. In fact, the only active opposition to the legislation comes from those who profit from the abuses in the current system. In his State of the Union Address last January, President Clinton challenged the Congress to pass this bill. Now the Senate is poised to fulfill that pledge.

Mr. President, the only thing that stands between this bill and the President's signature are controversial provisions added in the House of Representatives. These objectionable provisions include, again, the medical savings accounts which we have debated, the federalization of multiple employer welfare arrangements—Mr. President, I ask for 3 more minutes.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. KENNEDY. The federalization of multiple employer welfare arrangements. A number of years ago we provided the States the power for the enforcement of those arrangements. It is rather strange now that those provisions which permit the States to enforce it are effectively being preempted so that the Federal Government will support it.

Repeal of the MediGap rules protecting senior citizens against profiteers. That is a very dangerous provision. Up to 1984 we found that many elderly people would buy 2, 3, 4, 5, 10 different programs to cover various gaps in their insurance. We found all kinds of abuses. We passed legislation to deal with that. It has been effective. I am not sure that we ought to go back to the earlier period.

The provisions making it more difficult to combat waste, fraud and abuse in the current Medicare-Medicaid programs, I think that issue is one that is not going to go away. There are many concerns that the provisions that have been made in the House bill will lower the standard, make it more difficult to prove the abuse and waste and fraud. I am not sure we want to go in those directions.

I think the malpractice issues have been debated earlier in the Congress. I think they ought to be addressed outside of this legislation.

We go to that conference in a bipartisan spirit, committed to trying to get this legislation—obviously they have a right to pass their bills and we have a responsibility to work through the differences—but we hope that, given the spirit with which this legislation started, both in the House and the Senate, that we will be able to do it. Every day that is delayed, there are millions of our fellow citizens who are denied the kinds of protections that this legislation will provide for them. It is an extremely important piece of legislation, in many respects I think maybe the most important piece of legislation that we will pass in this Congress.

Mr. President, I urge the passage of the legislation when the Senate votes on it this afternoon.

The PRESIDING OFFICER. Under the previous order, a vote on passage of H.R. 3103, as amended, will occur at 2:15. All time has expired.

Mrs. KASSEBAUM. Mr. President, I ask for the yeas and nays on final passage of H.R. 3103.

The yeas and nays were ordered.

Mr. PRYOR addressed the Chair.

The PRESIDING OFFICER. The Senator from Arkansas is recognized for 10 minutes.

Mr. PRYOR. Mr. President, I thank the Chair for recognizing me.

Before I speak, Mr. President, on the subject that I have chosen here for the next few minutes, I compliment my colleagues from Massachusetts and Kansas for the tremendously fine work they have done in this whole field of health care over a long period of time. This, today, I think is the culmination of their sincere effort, their tedious effort, and certainly demonstrates their commitment to improving the health care available in our country. So, Mr. President, this Senator certainly congratulates these two fine Senators for their commitment and their work.

AT WHAT COST?

Mr. PRYOR. Mr. President, the Senate special Whitewater committee resumes its hearings tomorrow. The committee's tentative schedule is, as I understand—I am not on the committee—to have a hearing on every Tuesday, Wednesday, and Thursday of each week until the authorization of the committee expires on June 17, 1996. As I have said before, the time and money being spent by this special committee could be better spent on other issues of greater importance and magnitude to this country of ours.

Mr. President, I will take just a moment to discuss, if I might, the amount of money and the time and the resources being spent on the Whitewater investigation, both here and in my home State of Arkansas. The Senate has called 121 witnesses during its 47 days of its special committee review. In an earlier statement, Mr. President, I mentioned the fact that in 1995 alone the Senate held 34 hearings on Whitewater, while we held only six hearings on Medicaid funding and only one hearing—only one hearing—on Medicare reform. After all the time we have already spent on Whitewater, these types of issues are far more deserving of our attention in the remainder of this session of the Congress.

However, Mr. President, it is not just the amount of time and money that the Senate has spent on the Whitewater review that concerns me. There is another side of this discussion, and it is the amount of money, the amount of resources, that our Government has spent on the issue of Whitewater.

The Senate has spent roughly $1.35 million on its Whitewater investigation in the 104th Congress. That is just the amount that the Senate has specifically appropriated to the Whitewater review panel. This does not include, Mr. President, the money spent by the Senate Banking Committee on its Whitewater efforts. It does not include the amount of money spent by the House of Representatives in its Whitewater review.

Of course, it does not even begin to take into consideration the amount of money spent by our special counsels. In addition to the congressional efforts in this issue, I would also like to discuss the independent counsel review. According to the General Accounting Office, Robert Fiske, the special counsel originally named to investigate the Whitewater issue, spent $2,498,744 from January 22, 1994, through September 30, 1995, which was the latest date which the GAO had this information. I am sure more tallies will be coming in soon. On his investigation alone, almost $2.5 million was spent. Then he was fired from the case. The GAO also points out that Kenneth Starr, the independent counsel appointed to replace Mr. Fiske, has spent $4,512,065 from August 5, 1994, through September 30, of 1995. We have no more recent figures, Mr. President, since September 30 of last year.

But today's Washington Post had an article, I must say, Mr. President, that caught my attention. It is an article which illustrates where some of this money is going. Sam Dash, the Watergate chief counsel, famed, well known, well respected, is now being paid $3,200 a week for his service as ethics adviser to Mr. Starr. I am going to repeat that, Mr. President. Sam Dash, the Watergate chief counsel, is now being paid $3,200 each week for his service as ethics adviser to Mr. Kenneth Starr.

Mr. Starr is the first independent counsel in the history of our Republic to see the need to hire an independent counsel that advises him on ethics.

I think I echo, Mr. President, the statement made by Stephen Gillers, a

legal ethics professor and scholar at New York University, who recently said in a Baltimore Sun article:

When the public hears that the independent counsel—who is there supposedly because of his distance from the traditional prosecutorial office—needs an independent counsel for ethics advice [at a substantial cost] it's almost impossible to explain how that can be so. The perception is that something's amiss.

Mr. President, that was Stephen Gillers, a legal ethics scholar from New York University, who made that particular statement.

Mr. President, I have other concerns as well. I have recently asked the Federal Bureau of Investigation to share with me the five top cases currently being investigated by the Federal Bureau of Investigation. Mr. President, here are the top five cases. One is the Oklahoma City bombing. That makes sense. Second, the Unabomber. That makes sense. Thriftcon—a national bank fraud and embezzlement case. Fourth, Mr. President, is Whitewater. Fifth is the World Trade Center bombing.

Now, this is based upon the number of personnel, the amount of resources, the number of dollars, and the establishment of priorities of our own Federal Bureau of Investigation. Whitewater, today, comes right after Thriftcon, Unabomber, Oklahoma City bombing, and before resources and dollars that the Federal Bureau of Investigation have used to investigate the World Trade Center bombing in the city of New York. Mr. President, I do not know how in the world we could go home and explain such a poor allocation of priorities as the one demonstrated by this particular chart.

Mr. President, the money spent by the independent counsel does not tell the whole story. Those numbers do not even include the moneys spent by the FBI and other agencies to support the independent counsels.

Under the statute authorizing the independent counsel, each independent counsel is able to request and receive assistance from Federal agencies. Mr. President, most of the independent counsels are using the talents of the Federal employees and the resources of the Federal Government available to them. According to the figures supplied by GAO, the IRS has spent over $1 million to support the Fiske-Starr Whitewater investigation. The Justice Department, apart from the FBI, has spent $86,000 on the investigation. However, Mr. President, the FBI has spent far and away the most money of any agency working for Mr. Fiske, the former independent counsel, and Mr. Starr, the present independent counsel.

According to the numbers reported by the GAO, the FBI spent $3,473,000 in support of Mr. Fiske's investigation, and already has surpassed $8,064,000 supplying staff for Mr. Starr's investigation. To get a sense of what these figures mean, Mr. President, I asked the FBI how many people that number represents. They told me that the $11.5 million represents 41 special agents and 81 support staff.

Thus far, I know I have thrown around a lot of numbers and my time has expired. When we add everything together, the Whitewater independent counsels have spent $19,673,809, Mr. President, almost $20 million, in less than a year and a half, has been spent on the Whitewater investigation. That, Mr. President, is why I continue to have grave concerns about appropriating any more money to start up the second phase of the Whitewater investigation.

Mr. President, I ask unanimous consent to have printed in the RECORD a story in this morning's Washington Post, dated April 23, 1996, and I ask unanimous consent to have printed in the RECORD an article of April 15, 1996, as published in the Baltimore Sun.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Apr. 23, 1996]

SAY IT AGAIN, SAM

(By Lloyd Grove)

He's the brilliant chief counsel of Senate Watergate Committee fame and a drafter of the independent counsel statute. He's an arbiter of professional conduct for the American Bar Association and an oracle of criminal law, an internationally acclaimed advocate for human rights and a widely revered guru of legal ethics.

But it seems to have come to this for the distinguished Samuel Dash:

''I don't want to be in a situation where you're asking me a lot of questions and I'm not commenting, and the story makes me look like a Mafia figure who's pleading the Fifth Amendment,'' says Dash, 71. He is beginning an interview about his role as the highly paid ethics adviser to Kenneth Starr, the Whitewater special prosecutor whose own legal ethics come under searing attack.

''Mafia figure''?

Surely Sam Dash not has not worked so hard, for so long, to take a swift tumble from wise man to wiseguy. He has spent much of his time in recent weeks mounting pained public defenses of Starr's simultaneous work as a government prosecutor—investigating President Clinton & Co.—and as a private lawyer for an array of corporate clients opposed to the president's policies. But Dash certainly hasn't cultivated his envirable reputation to sell his birthright for a mess of pottage—in this case, a consulting fee of $3,200 a week.

In his memo-strewn office at the Georgetown University Law Center, where he has been a full professor for the last three decades, Dash expresses himself in bursts of nervous energy, interrupting his questioner—and frequently himself—to spray fusillades of self-protective verbiage and twist his winding sentences into word-pretzels.

''Once again, I do not want to do an interview,'' he protests. ''It isn't that I haven't been available for interviews. I have. I've helped set a policy now—not because there's anything to hide. I think [Starr's] office has become very visible as a result of these issues, and they have so much important work to do, it's all distracting the work to always—even when they to read about what I may be saying—it distracts the work and calls for [phone] calls and things like that, but I don't want, I really don't want to be distracting anymore.''

Dash, whose regular public statements about the work of the special prosecutor have made him something of a de facto spokesman for the press-averse Starr, is providing more than his share of distractions. In the past few weeks, he has been forced to justify his recently revealed consulting fee-astronomical by government standards. And he has been caught defending Starr's behavior while, at the same time, appearing to criticize it in publications ranging from the New York Observer (with which he has tangled over the accuracy of damaging quotes) to the New Yorker.

He may have had enough of the hot seat. Dash says he'll suspend his Starr consultancy as of May 23, to spend two months on a long-planned teaching vacation in Europe. He won't commit himself to returning to Starr's employ. ''If Ken asks me, I'll consider it,'' is as far as he'll go.

Dash presents himself as a man who wants, in so many words, to have and eat his cake.

He was cited by the New Yorker's Jane Mayer as giving his seal of approval to Starr's pursuit of a million-dollar private practice—even though he wished Starr wouldn't to it: ''If I had my own preferences, I'd hope he'd be a full-time independent counsel. . . . What he's doing is proper. . . . But it does have an odor to it.''

Dash explains that what he actually meant to say is that others, but not he, might detect an ordor—as though recusing his sense of smell. Trying to move away from another published statement, he says, with an insistence on precision: ''I didn't use the word 'proper.' 'Proper' is a weasel word. I think what I tried to say—and maybe I misstated—is everything he's doing is 'legal' and 'ethical' and 'lawful'—not 'proper.'''

On the issue of whether he wants Starr to be a full-time prosecutor, Dash is equally microscopic. ''I didn't say, 'I wish he would be.' I say: 'I prefer he would be.' No, no, no: 'My preference is . . .'''

Why the hair-splitting? Isn't it all the same thing?

''It is essentially the same thing,'' he concedes with a deep breath. ''I'm not trying to split hairs. All I'm saying is, I am expressing myself as an independent person. I'm not saying I would do the same thing he would do.'' Yet a moment later Dash draws another fine distinction. ''I'm not passing on his judgment. I don't think I have the right to. If I were a private independent professor . . . I could speak freely my mind. But—''

Wait a minute. So he's not independent?

''I may be constrained, but I'm only constrained because when I speak I can't speak as Sam Dash, private [citizen]. I am speaking as Sam Dash in the role of ethics counsel to Ken Starr and the office. Therefore, I don't have a right . . to express judgments which I could have as an independent person. I don't even know why it's relevant.''

Does Dash at least know the identity of all Starr's private clients?

''I'm not sure,'' he says. ''The relationship isn't one in which, like coming to Mommy, he has to tell me. 'Can I do this? Can I do that? . . . He has to bring to my attention any situation that he feels could possibly be considered a problem. I would think as a lawyer, and he's been a federal judge, he's been a solicitor general, with his reputation for integrity—and he does have it—that he doesn't have to come to me initially. His first screen is himself.''

In the New Yorker, Dash bemoaned the dismissal of Robert Fiske, Starr's predecessor as Whitewater prosecutor. (Dash went to work for Starr in the fall of 1994, initially for a weekly fee of $1,600, long after Fiske was gone.) ''Should Fiske have been reappointed? My answer is probably yes,'' Dash mused to the magazine. ''It may have been a mistake'' to remove him. ''But that's not Ken's fault.''

A month after signing him up, Starr doubled Dash's compensation (billed as eight

hours of work a week at $400 per hour). And he broadened his role from simply ethics to advising on prosecutorial strategy and a host of other issues. The money is clearly a sore spot for Dash.

''I'm putting in not eight hours, I'm putting in 20 to 30 hours,'' he says. ''If one were to take what I'm being paid and divided it into the hours I'm working, I'm being paid at what a paralegal earns in most law firms''—a debatable claim, to be sure.

Last Wednesday, Dash had the novel (for him) experience of receiving a hard editorial slap from the New York Times. The paper demanded that Starr give up the ''major national responsibility'' of Whitewater prosecutor because of his ''conspicuously fastpaced and politically freighted private practice,'' and added sharply: ''Mr. Dash is right about the odor, but wrong about the propriety.''

''I'll just say this to that,'' Dash says dismissively. ''I testify all over the country as an expert [on legal ethics], and judges ask me about the law and I answer. I don't recall a single time when any judge of a federal court or a state court ever asked me: 'What does the New York Times think?' ''

He displays less equanimity when it comes to other critics, such as Democratic spinmeister James Carvell—the public voice of the White House's energetic campaign to undermine Starr's integrity as the Whitewater special prosecutor.

''If Sam Dash was my doctor, I'd be happy,'' Carville says. ''If you wanna smoke, fine. High blood pressure? Fine. Eat a lot of steaks and drink some whiskey! Go ahead, I'm not worried. He's the Alfred E. Neuman of ethics counselors. he doesn't worry about anything.''

''What does he know?'' Dash demands with a frown. ''He doesn't know what I'm doing, he doesn't know who I am. Maybe he does know who I am. But he actually should be very grateful that I am in this position—that at least somebody like me is doing this. . . . But by challenging my independence and the professional role I play, he in effect is harming his own partisan interests. And I'm not a partisan and my role is not to protect anybody, but it certainly is to see that this prosecution is conducted fairly and objectively without any political overtones to it.''

But that is quite impossible. The Starr matter has become intensely political—for Rep. Martin Meehan (D–Mass.), a harsh critic of Starr, the political overtones are all but deafening. ''I thought it was a good political move by Starr to pick Sam Dash, with his outstanding reputation. . . . Clearly his role is to provide advice to Mr. Starr, and that advice is interpreting technically the basis upon which Starr can justify his representing a tobacco company and other clients. And Mr. Dash makes statements giving technical, legal interpretations on why it's okay.''

New York University Law School Professor Stephen Gillers agrees.

''I think Starr was wise, even brilliant, to choose Sam Dash, because of Sam's prestige and credibility with the media. That has given Starr some cover, which actually worked for a while to stave off criticism. But Sam Dash has no cover. Sam is exposed in ways that I don't think he fully could have anticipated.''

Harvard Law School Professor Lawrence Tribe is also concerned about Dash's exposure. ''I would not have agreed to play that role,'' he says. ''I would feel ethically compromised. Providing legal consultation and trying to make legal arguments on behalf of the independent counsel is one thing. But I wouldn't want in effect to be allowing my reputation to be used as a shield for someone whose circumstances, in the end, I don't have the ability to influence. That would make me feel extremely uncomfortable.''

Dash insists that such worries are misplaced.

''I'm not giving Ken Starr my reputation,'' he says. ''I'm giving him my expertise.''

He adds that Starr and others in the prosecutor's office are following his advice. And Washington lawyer Abbe Lowell, a longtime acquaintance, finds this claim persuasive.

''Sam Dash isn't a shrinking violet,'' Lowell says. ''He wouldn't have gotten involved in this if he didn't think he could have an important impact. To say he's a fig leaf for Ken Starr does an injustice to Sam Dash.''

For his part, Dash sees his current preoccupation as a fitting capstone to a career in which he has been, by turns, the district attorney in Philadelphia, a hero of Watergate, a legal theoretician and international human rights activist, the first American citizen to visit Nelson Mandela in a South African jail.

''I'm not a stranger to controversy,'' Dash says. ''And I don't want to look like I run away from it. I think Harry Truman's statement was correct: If you can't stand the heat, get out of the kitchen. I like being in the kitchen.''

But the Cuisinart?

[From the Baltimore Sun, Apr. 15, 1996]

ETHICS INSURANCE AT $3,200 A WEEK; WHITEWATER COUNSEL'S ADVISER ASSUMES A LARGER ROLE IN PROBE

(By Susan Baer)

WASHINGTON—Samuel Dash, the celebrated lawyer who was hired by Whitewater independent counsel Kenneth W. Starr in 1994 to advise him on ethics issues, is now playing a much broader role in the investigation—and collecting a sizable government-paid fee for his services.

Mr. Dash said that while Mr. Starr hired him to work on ethics questions, he is now weighing in on everything from prosecutorial strategy to dealing with witnesses.

''He's asked me to go beyond ethics issues,'' said Mr. Dash, a 71-year-old full-time law professor at Georgetown University who gained fame as chief counsel to the Senate Watergate Committee.

For his part-time services—which include advising Mr. Starr on how much of his $1 million-a-year private law practice he may retain while leading the government's Whitewater investigation—Mr. Dash is paid a flat fee of $3,200 a week.

The professor, whose pay was raised by Mr. Starr from $1,600 a week in July, said he works an average of 20 hours a week, sometimes up to 30 hours, for the Whitewater prosecutor, but is charging Mr. Starr for only eight hours a week, at his regular consulting rate of $400 an hour.

''This is pro bono,'' Mr. Dash said with a laugh, referring to the public-interest work lawyers do for no pay.

When it was suggested to him that only by superlawyer standards would $3,200 a week be considered ''pro bono,'' he said, with apologies for immodesty, ''People of my stature charge way more than I do.''

Mr. Dash, whose Whitewater pay was disclosed recently by the Arkansas Times, was hired by Mr. Starr in October 1994, two months after Mr. Starr was chosen to head the inquiry, which reaches up to the Clinton presidency.

A highly respected lawyer and a Democrat, Mr. Dash was retained to calm concerns about Mr. Starr's impartiality, given his background as an active and partisan Republican, and his selection by judges with ties to conservative Republicans.

In the 1970s, Mr. Dash assisted Chief Justice Warren E. Burger in devising the American Bar Association's ethical standards for prosecutors and criminal defense lawyers.

Mr. Dash, who also helped draft the law that established the independent counsel's office, noted that he is the first person to be an outside ethics adviser to an independent counsel.

''This is somewhat unique,'' Mr. Dash said. ''Starr felt when he was appointed, fairly or unfairly, there was quite a bit of criticism because he was a partisan Republican. There was some concern, at the White House and other places, that he may not be objective.

''My personal belief is he didn't need me. But he was thinking of perception problems. He thought it was proper, to preserve public confidence, to bring someone like me in. He felt he needed somebody to assure the public that his decisions are being made on the basis of the right judgments.''

Mr. Dash's weekly fee would amount to an annual rate of about $160,000 a year. But officials with Mr. Starr's office have said he won't receive that much because they are applying to Mr. Dash, an independent contractor, the same salary cap of $115,700 that applies to employees of the independent counsel's office. So far, Mr. Dash has been paid $147,200 for the 16 months he has worked for Mr. Starr.

Many lawyers believe the hiring of Mr. Dash was a masterful strategic move by Mr. Starr, insulating him from political-bias charges by having a prominent Democrat look over his shoulder each step of the way.

But some have questioned the need for such a sizable expense, given that an independent counsel is hired precisely because of his or her ostensible impartiality.

Lawrence E. Walsh, the independent counsel in the Iran-contra case, said he thought it was ''regrettable'' that such an expense must be incurred to ensure the perception of objectivity.

A DEFENSIVE MEASURE

''It's really a defensive measure,'' said Mr. Walsh, a Republican former federal judge. ''But the question is, why do you get in a position where you have to defend yourself? The real thing [an independent counsel] brings that nobody else can bring is his independence. That's the excuse for this very expensive procedure.''

Mr. Walsh said that during the Iran-contra investigation, he sought the help of Laurence Tribe, a Harvard law professor, for ethics concerns about the publication of his final report. But, he said, Mr. Tribe did not accept a fee.

Stephen Gillers, a professor of legal ethics at New York University who was critical of Mr. Starr's appointment because of his history as an outspoken Republican, said he thought such a six-figure expense could be damaging.

''When the public hears that the independent counsel—who is there supposedly because of his distance from the traditional prosecutorial office—needs an independent counsel for ethics advice [at a substantial cost], it's almost impossible to explain how that can be so,'' Mr. Gillers said. ''The perception is that something's amiss.''

Mr. Starr did not respond to questions, submitted to him in writing, regarding Mr. Dash's role and pay.

Terry Eastland, author of a book on independent counsels, said he did not consider the expense for an ethics consultant unreasonable. ''Lawyers are expensive,'' he said.

And other ethics consultants say $400 an hour is reasonable for top-level experts, although they also say they bill far less—and occasionally, nothing—if the government is the client.

Geoffrey C. Hazard Jr., a University of Pennsylvania law professor and ethics consultant, called Mr. Dash's fee as a part-time adviser ''pretty high pay.'' But, he added,

''The value of having somebody just a little bit more credible is very high.''

So far, the independent counsel's Whitewater inquiry has cost about $26 million. Mr. Starr is spending about $1 million a month on the investigation.

Mr. Dash said he may suspend has involvement this summer, when he plans to serve as a visiting professor at the University of Heidelberg Law School in Germany.

For now, Mr. Dash said, his work for the Whitewater office includes such activities as advising Mr. Starr on whether there is enough evidence to sustain a charge, reviewing all cases referred to the grand jury, and consulting on issues of fairness.

For example, when false reports surfaced that Gov. Jim Guy Tucker of Arkansas had sought a plea bargain after being indicted, Mr. Starr asked Mr. Dash for advice on whether the usual policy of issuing a ''no comment'' to questions about the case should be followed, according to Mr. Dash.

The ethics counselor advised Mr. Starr that the more proper response, in fairness to Mr. Tucker, was to issue a statement denying the accuracy of the reports.

Mr. Dash has also been advising Mr. Starr on the propriety of the private work he has continued to do. Critics have charged that Mr. Starr, who earned $1.1 million in private practice in 1994, is spending too much time on lucrative high-profile cases for his firm, some of which could compromise—or appear to compromise—his independence as special counsel.

For instance, Mr. Starr has argued a federal appeals case on behalf of the Brown & Williamson Tobacco Corp., and has represented Gov. Tommy G. Thompson of Wisconsin, a potential Republican vice presidential nominee, in school-voucher case before the Wisconsin Supreme Court.

CONFLICT OF INTEREST ALLEGED

Rep. Martin Meehan, a Massachusetts Democrat, wrote to Mr. Starr last week, imploring him to end his representation of the tobacco company on the ground that it created a conflict of interest because President Clinton has been an opponent of big tobacco.

A potential problem area—cited by those who believe Mr. Starr should have taken a leave from his law firm, the Chicago-based Kirkland & Ellis—is a lawsuit filed against the firm by the Resolution Trust Corp., a federal agency that figures prominently in the Whitewater affair.

Defending his private work, Mr. Starr, in an address last week in San Antonio, said: ''My ethics counselor is Professor Sam Dash of Georgetown University, legend of Watergate fame, and he has affirmed that it's completely appropriate.''

Mr. Dash said that while he has advised Mr. Starr that there is nothing wrong, legally or ethically, with his outside work, his own ''preference''—''because of questions reasonable people ask'' about conflicts—is that Mr. Starr not take on as much.

''I have discussed with him that he should take heed, and I think he will take heed,'' Mr. Dash said. ''He is concerned. But he doesn't think he's doing anything wrong. I tell him he's not doing anything wrong.''

Richard Ben-Veniste, the Democratic counsel for the Senate Whitewater Committee who was an assistant to the Watergate special prosecutor, said Mr. Starr's full plate of outside work illustrates the need for Mr. Dash's services.

''Given the list of things Mr. Starr is engaged in outside of his job as independent counsel, he's kept Mr. Dash pretty busy,'' Mr. Ben-Veniste said.

''I think Sam's earning his money.''

Mr. LEAHY. Will the Senator yield?

Mr. PRYOR. I am happy to yield to the Senator.

Mr. LEAHY. Mr. President, I heard the distinguished Senator from Arkansas say something that struck me. All this money that is being spent is taxpayers' money?

Mr. PRYOR. Every bit is taxpayers' money.

Mr. LEAHY. I have been reading a number of articles in the national press raising some very serious questions about the appearance of conflict of interest on the part of Mr. Starr, the special prosecutor. As a former prosecutor myself, I feel strongly that there is at the very least an appearance of a conflict of interest. But notwithstanding what appears to be conflict of interest, are you telling me that he is paying somebody out of tax money, on a part-time basis, the equivalent of about $160,000 a year to give him ethical advice?

Mr. PRYOR. This is the first time, I answer my friend from Vermont, in the history of all of the legal independent counsels that we have had, that an independent counsel has felt the necessity of retaining an ethics attorney or an ethics adviser. In this one, the taxpayers are paying $3,200 each week. I imagine that is more than a member—I do not know what a member of the Supreme Court gets.

Mr. LEAHY. A member of a Supreme Court who works full time is paid less. The attorney retained as the ethics adviser is, I realize, a wonderful man and a good friend of mine, but this is extraordinary—this ethics adviser is paid on a part-time basis with taxpayer money?

Mr. PRYOR. That is correct. He is a fine law professor. Mr. Starr gave him this job in order to advise Mr. Starr on ethics. I do not know one time yet that Mr. Dash has not told Mr. Starr what he was doing was OK, including making $1.3 million last year.

RECESS

The PRESIDING OFFICER. Under the previous order, vote on passage of H.R. 3103 will occur at 2:15.

Under the previous order, the Senate will now stand in recess until the hour of 2:15 p.m.

Thereupon, the Senate, at 12:47 p.m., recessed until 2:15 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer [Ms. SNOWE].

HEALTH INSURANCE REFORM ACT

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. Under the previous order, the Senate will now vote on H.R. 3103. The yeas and nays have been ordered.

The clerk will call the roll.

The legislative clerk called the roll.

The result was announced—yeas 100, nays 0, as follows:

[Rollcall Vote No. 78 Leg.]

YEAS—100

Abraham	Feinstein	Mack
Akaka	Ford	McCain
Ashcroft	Frist	McConnell
Baucus	Glenn	Mikulski
Bennett	Gorton	Moseley-Braun
Biden	Graham	Moynihan
Bingaman	Gramm	Murkowski
Bond	Grams	Murray
Boxer	Grassley	Nickles
Bradley	Gregg	Nunn
Breaux	Harkin	Pell
Brown	Hatch	Pressler
Bryan	Hatfield	Pryor
Bumpers	Heflin	Reid
Burns	Helms	Robb
Byrd	Hollings	Rockefeller
Campbell	Hutchison	Roth
Chafee	Inhofe	Santorum
Coats	Inouye	Sarbanes
Cochran	Jeffords	Shelby
Cohen	Johnston	Simon
Conrad	Kassebaum	Simpson
Coverdell	Kempthorne	Smith
Craig	Kennedy	Snowe
D'Amato	Kerrey	Specter
Daschle	Kerry	Stevens
DeWine	Kohl	Thomas
Dodd	Kyl	Thompson
Dole	Lautenberg	Thurmond
Domenici	Leahy	Warner
Dorgan	Levin	Wellstone
Exon	Lieberman	Wyden
Faircloth	Lott	
Feingold	Lugar	

So the bill (H.R. 3103), as amended, was passed, as follows:

Resolved, That the bill from the House of Representatives (H.R. 3103) entitled ''An Act to amend the Internal Revenue Code of 1986 to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes'', do pass with the following amendment:

Strike out all after the enacting clause and insert:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Health Insurance Reform Act of 1996''.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.

TITLE I—HEALTH CARE ACCESS, PORTABILITY, AND RENEWABILITY

Subtitle A—Group Market Rules

Sec. 101. Guaranteed availability of health coverage.
Sec. 102. Guaranteed renewability of health coverage.
Sec. 103. Portability of health coverage and limitation on preexisting condition exclusions.
Sec. 104. Special enrollment periods.
Sec. 105. Disclosure of information.

Subtitle B—Individual Market Rules

Sec. 110. Individual health plan portability.
Sec. 111. Guaranteed renewability of individual health coverage.
Sec. 112. State flexibility in individual market reforms.
Sec. 113. Definition.

Subtitle C—COBRA Clarifications

Sec. 121. COBRA clarifications.

Subtitle D—Private Health Plan Purchasing Cooperatives

Sec. 131. Private health plan purchasing cooperatives.

TITLE II—APPLICATION AND ENFORCEMENT OF STANDARDS

Sec. 201. Applicability.
Sec. 202. Enforcement of standards.

TITLE III—MISCELLANEOUS PROVISIONS
Sec. 301. HMOs allowed to offer plans with deductibles to individuals with medical savings accounts.
Sec. 302. Health coverage availability study.
Sec. 303. Reimbursement of telemedicine.
Sec. 304. Sense of the Committee concerning medicare.
Sec. 305. Parity for mental health services.
Sec. 306. Waiver of foreign country residence requirement with respect to international medical graduates.
Sec. 307. Organ and tissue donation information included with income tax refund payments.
Sec. 308. Sense of the Senate regarding adequate health care coverage for all children and pregnant women.
Sec. 309. Sense of the Senate regarding available treatments.
Sec. 310. Medical volunteers.
Sec. 311. Effective date.
Sec. 312. Severability.
TITLE IV—TAX-RELATED HEALTH PROVISIONS
Sec. 400. Short title; amendment of 1986 Code.
Subtitle A—Increase in Deduction for Health Insurance Costs of Self-Employed Individuals
Sec. 401. Increase in self-employed individuals' deduction for health insurance costs.
Subtitle B—Long-Term Care Provisions
CHAPTER 1—LONG-TERM CARE SERVICES AND CONTRACTS
SUBCHAPTER A—GENERAL PROVISIONS
Sec. 411. Treatment of long-term care insurance.
Sec. 412. Qualified long-term care services treated as medical care.
Sec. 413. Certain exchanges of life insurance contracts for qualified long-term care insurance contracts not taxable.
Sec. 414. Exception from penalty tax for amounts withdrawn from certain retirement plans for qualified long-term care insurance.
Sec. 415. Reporting requirements.
SUBCHAPTER B—CONSUMER PROTECTION PROVISIONS
Sec. 421. Policy requirements.
Sec. 422. Requirements for issuers of long-term care insurance policies.
Sec. 423. Coordination with State requirements.
Sec. 424. Effective dates.
CHAPTER 2—TREATMENT OF ACCELERATED DEATH BENEFITS
Sec. 431. Treatment of accelerated death benefits by recipient.
Sec. 432. Tax treatment of companies issuing qualified accelerated death benefit riders.
Subtitle C—High-Risk Pools
Sec. 451. Exemption from income tax for State-sponsored organizations providing health coverage for high-risk individuals.
Subtitle D—Penalty-Free IRA Distributions
Sec. 461. Distributions from certain plans may be used without penalty to pay financially devastating medical expenses.
Subtitle E—Revenue Offsets
CHAPTER 1—TREATMENT OF INDIVIDUALS WHO EXPATRIATE
Sec. 471. Revision of tax rules on expatriation.
Sec. 472. Information on individuals expatriating.
Sec. 473. Report on tax compliance by United States citizens and residents living abroad.
CHAPTER 2—COMPANY-OWNED INSURANCE
Sec. 495. Denial of deduction for interest on loans with respect to company-owned insurance.
TITLE V—HEALTH CARE FRAUD AND ABUSE PREVENTION
Sec. 500. Amendments.
Subtitle A—Fraud and Abuse Control Program
Sec. 501. Fraud and abuse control program.
Sec. 502. Medicare integrity program.
Sec. 503. Beneficiary incentive programs.
Sec. 504. Application of certain health anti-fraud and abuse sanctions to fraud and abuse against Federal health care programs.
Sec. 505. Guidance regarding application of health care fraud and abuse sanctions.
Subtitle B—Revisions to Current Sanctions for Fraud and Abuse
Sec. 511. Mandatory exclusion from participation in medicare and State health care programs.
Sec. 512. Establishment of minimum period of exclusion for certain individuals and entities subject to permissive exclusion from medicare and State health care programs.
Sec. 513. Permissive exclusion of individuals with ownership or control interest in sanctioned entities.
Sec. 514. Sanctions against practitioners and persons for failure to comply with statutory obligations.
Sec. 515. Intermediate sanctions for medicare health maintenance organizations.
Sec. 516. Additional exceptions to anti-kickback penalties for risk-sharing arrangements.
Sec. 517. Effective date.
Subtitle C—Data Collection and Miscellaneous Provisions
Sec. 521. Establishment of the health care fraud and abuse data collection program.
Subtitle D—Civil Monetary Penalties
Sec. 531. Social Security Act civil monetary penalties.
Subtitle E—Amendments to Criminal Law
Sec. 541. Health care fraud.
Sec. 542. Forfeitures for Federal health care offenses.
Sec. 543. Injunctive relief relating to Federal health care offenses.
Sec. 544. False statements.
Sec. 545. Obstruction of criminal investigations of Federal health care offenses.
Sec. 546. Theft or embezzlement.
Sec. 547. Laundering of monetary instruments.
Sec. 548. Authorized investigative demand procedures.
TITLE VI—INTERNAL REVENUE CODE AND OTHER PROVISIONS
Sec. 600. References.
Subtitle A—Foreign Trust Tax Compliance
Sec. 601. Improved information reporting on foreign trusts.
Sec. 602. Modifications of rules relating to foreign trusts having one or more United States beneficiaries.
Sec. 603. Foreign persons not to be treated as owners under grantor trust rules.
Sec. 604. Information reporting regarding foreign gifts.
Sec. 605. Modification of rules relating to foreign trusts which are not grantor trusts.
Sec. 606. Residence of estates and trusts, etc.
Subtitle B—Repeal of Bad Debt Reserve Method for Thrift Savings Associations
Sec. 611. Repeal of bad debt reserve method for Thrift Savings Associations.
Subtitle C—Other Provisions
Sec. 621. Extension of medicare secondary payor provisions.
Sec. 622. Annual adjustment factors for operating costs only; restraint on rent increases.
Sec. 623. Foreclosure avoidance and borrower assistance.

SEC. 2. DEFINITIONS.

As used in this Act:

(1) BENEFICIARY.—The term ''beneficiary'' has the meaning given such term under section 3(8) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(8)).

(2) EMPLOYEE.—The term ''employee'' has the meaning given such term under section 3(6) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(6)).

(3) EMPLOYER.—The term ''employer'' has the meaning given such term under section 3(5) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(5)), except that such term shall include only employers of two or more employees.

(4) EMPLOYEE HEALTH BENEFIT PLAN.—

(A) IN GENERAL.—The term ''employee health benefit plan'' means any employee welfare benefit plan, governmental plan, or church plan (as defined under paragraphs (1), (32), and (33) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002 (1), (32), and (33))), or any health benefit plan under section 5(e) of the Peace Corps Act (22 U.S.C. 2504(e)), that provides or pays for health benefits (such as provider and hospital benefits) for participants and beneficiaries whether—

(i) directly;

(ii) through a group health plan offered by a health plan issuer as defined in paragraph (8); or

(iii) otherwise.

(B) RULE OF CONSTRUCTION.—An employee health benefit plan shall not be construed to be a group health plan, an individual health plan, or a health plan issuer.

(C) ARRANGEMENTS NOT INCLUDED.—Such term does not include the following, or any combination thereof:

(i) Coverage only for accident, or disability income insurance, or any combination thereof.

(ii) Medicare supplemental health insurance (as defined under section 1882(g)(1) of the Social Security Act).

(iii) Coverage issued as a supplement to liability insurance.

(iv) Liability insurance, including general liability insurance and automobile liability insurance.

(v) Workers compensation or similar insurance.

(vi) Automobile medical payment insurance.

(vii) Coverage for a specified disease or illness.

(viii) Hospital or fixed indemnity insurance.

(ix) Short-term limited duration insurance.

(x) Credit-only, dental-only, or vision-only insurance.

(xi) A health insurance policy providing benefits only for long-term care, nursing home care, home health care, community-based care, or any combination thereof.

(5) FAMILY.—

(A) IN GENERAL.—The term ''family'' means an individual, the individual's spouse, and the child of the individual (if any).

(B) CHILD.—For purposes of subparagraph (A), the term ''child'' means any individual who is a child within the meaning of section 151(c)(3) of the Internal Revenue Code of 1986.

(6) GROUP HEALTH PLAN.—

(A) IN GENERAL.—The term ''group health plan'' means any contract, policy, certificate or other arrangement offered by a health plan issuer to a group purchaser that provides or pays for health benefits (such as provider and hospital benefits) in connection with an employee health benefit plan.

(B) ARRANGEMENTS NOT INCLUDED.—Such term does not include the following, or any combination thereof:

(i) Coverage only for accident, or disability income insurance, or any combination thereof.

(ii) Medicare supplemental health insurance (as defined under section 1882(g)(1) of the Social Security Act).

(iii) Coverage issued as a supplement to liability insurance.

(iv) Liability insurance, including general liability insurance and automobile liability insurance.

(v) Workers compensation or similar insurance.

(vi) Automobile medical payment insurance.

(vii) Coverage for a specified disease or illness.

(viii) Hospital or fixed indemnity insurance.

(ix) Short-term limited duration insurance.

(x) Credit-only, dental-only, or vision-only insurance.

(xi) A health insurance policy providing benefits only for long-term care, nursing home care, home health care, community-based care, or any combination thereof.

(7) GROUP PURCHASER.—The term ''group purchaser'' means any person (as defined under paragraph (9) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(9)) or entity that purchases or pays for health benefits (such as provider or hospital benefits) on behalf of two or more participants or beneficiaries in connection with an employee health benefit plan. A health plan purchasing cooperative established under section 131 shall not be considered to be a group purchaser.

(8) HEALTH PLAN ISSUER.—The term ''health plan issuer'' means any entity that is licensed (prior to or after the date of enactment of this Act) by a State to offer a group health plan or an individual health plan.

(9) PARTICIPANT.—The term ''participant'' has the meaning given such term under section 3(7) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(7)).

(10) PLAN SPONSOR.—The term ''plan sponsor'' has the meaning given such term under section 3(16)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(16)(B)).

(11) SECRETARY.—The term ''Secretary'', unless specifically provided otherwise, means the Secretary of Labor.

(12) STATE.—The term ''State'' means each of the several States, the District of Columbia, Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

TITLE I—HEALTH CARE ACCESS, PORTABILITY, AND RENEWABILITY

Subtitle A—Group Market Rules

SEC. 101. GUARANTEED AVAILABILITY OF HEALTH COVERAGE.

(a) IN GENERAL.—

(1) NONDISCRIMINATION.—Except as provided in subsection (b), section 102 and section 103—

(A) a health plan issuer offering a group health plan may not decline to offer whole group coverage to a group purchaser desiring to purchase such coverage; and

(B) an employee health benefit plan or a health plan issuer offering a group health plan may establish, under the terms of such plan, eligibility, enrollment, or premium contribution requirements for individual participants or beneficiaries, except that such requirements shall not be based on health status, medical condition, claims experience, receipt of health care, medical history, evidence of insurability (including conditions arising out of acts of domestic violence), genetic information, or disability.

(2) HEALTH PROMOTION AND DISEASE PREVENTION.—Nothing in this subsection shall prevent an employee health benefit plan or a health plan issuer from establishing premium discounts or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention.

(b) APPLICATION OF CAPACITY LIMITS.—

(1) IN GENERAL.—Subject to paragraph (2), a health plan issuer offering a group health plan may cease offering coverage to group purchasers under the plan if—

(A) the health plan issuer ceases to offer coverage to any additional group purchasers; and

(B) the health plan issuer can demonstrate to the applicable certifying authority (as defined in section 202(d)), if required, that its financial or provider capacity to serve previously covered participants and beneficiaries (and additional participants and beneficiaries who will be expected to enroll because of their affiliation with a group purchaser or such previously covered participants or beneficiaries) will be impaired if the health plan issuer is required to offer coverage to additional group purchasers.

Such health plan issuer shall be prohibited from offering coverage after a cessation in offering coverage under this paragraph for a 6-month period or until the health plan issuer can demonstrate to the applicable certifying authority (as defined in section 202(d)) that the health plan issuer has adequate capacity, whichever is later.

(2) FIRST-COME-FIRST-SERVED.—A health plan issuer offering a group health plan is only eligible to exercise the limitations provided for in paragraph (1) if the health plan issuer offers coverage to group purchasers under such plan on a first-come-first-served basis or other basis established by a State to ensure a fair opportunity to enroll in the plan and avoid risk selection.

(c) CONSTRUCTION.—

(1) MARKETING OF GROUP HEALTH PLANS.—Nothing in this section shall be construed to prevent a State from requiring health plan issuers offering group health plans to actively market such plans.

(2) INVOLUNTARY OFFERING OF GROUP HEALTH PLANS.—Nothing in this section shall be construed to require a health plan issuer to involuntarily offer group health plans in a particular market or to require a health plan issuer to involuntarily issue a group health plan to a group health plan purchaser in a particular market if the group health plan was specifically designed for a different market. For the purposes of this paragraph, the term ''market'' means either the large employer market or the small employer market (as defined under applicable State law, or if not so defined, an employer with more than one employee and not more than 50 employees).

SEC. 102. GUARANTEED RENEWABILITY OF HEALTH COVERAGE.

(a) IN GENERAL.—

(1) GROUP PURCHASER.—Subject to subsections (b) and (c), a group health plan shall be renewed or continued in force by a health plan issuer at the option of the group purchaser, except that the requirement of this subparagraph shall not apply in the case of—

(A) the nonpayment of premiums or contributions by the group purchaser in accordance with the terms of the group health plan or where the health plan issuer has not received timely premium payments;

(B) fraud or misrepresentation of material fact on the part of the group purchaser;

(C) the termination of the group health plan in accordance with subsection (b); or

(D) the failure of the group purchaser to meet contribution or participation requirements in accordance with paragraph (3).

(2) PARTICIPANT.—Subject to subsections (b) and (c), coverage under an employee health benefit plan or group health plan shall be renewed or continued in force, if the group purchaser elects to continue to provide coverage under such plan, at the option of the participant (or beneficiary where such right exists under the terms of the plan or under applicable law), except that the requirement of this paragraph shall not apply in the case of—

(A) the nonpayment of premiums or contributions by the participant or beneficiary in accordance with the terms of the employee health benefit plan or group health plan or where such plan has not received timely premium payments;

(B) fraud or misrepresentation of material fact on the part of the participant or beneficiary relating to an application for coverage or claim for benefits;

(C) the termination of the employee health benefit plan or group health plan;

(D) loss of eligibility for continuation coverage as described in part 6 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1161 et seq.); or

(E) failure of a participant or beneficiary to meet requirements for eligibility for coverage under an employee health benefit plan or group health plan that are not prohibited by this Act.

(3) RULES OF CONSTRUCTION.—Nothing in this subsection, nor in section 101(a), shall be construed to—

(A) preclude a health plan issuer from establishing employer contribution rules or group participation rules for group health plans as allowed under applicable State law;

(B) preclude a plan defined in section 3(37) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1102(37)) from establishing employer contribution rules or group participation rules; or

(C) permit individuals to decline coverage under an employee health benefit plan if such right is not otherwise available under such plan.

(b) TERMINATION OF GROUP HEALTH PLANS.—

(1) PARTICULAR TYPE OF GROUP HEALTH PLAN NOT OFFERED.—In any case in which a health plan issuer decides to discontinue offering a particular type of group health plan, a group health plan of such type may be discontinued by the health plan issuer only if—

(A) the health plan issuer provides notice to each group purchaser covered under a group health plan of this type (and participants and beneficiaries covered under such group health plan) of such discontinuation at least 90 days prior to the date of the discontinuation of such plan;

(B) the health plan issuer offers to each group purchaser covered under a group health plan of this type, the option to purchase any other group health plan currently being offered by the health plan issuer; and

(C) in exercising the option to discontinue a group health plan of this type and in offering one or more replacement plans, the health plan issuer acts uniformly without regard to the health status or insurability of participants or beneficiaries covered under the group health plan, or new participants or beneficiaries who may become eligible for coverage under the group health plan.

(2) DISCONTINUANCE OF ALL GROUP HEALTH PLANS.—

(A) IN GENERAL.—In any case in which a health plan issuer elects to discontinue offering all group health plans in a State, a group health plan may be discontinued by the health plan issuer only if—

(i) the health plan issuer provides notice to the applicable certifying authority (as defined in section 202(d)) and to each group purchaser (and participants and beneficiaries covered under such group health plan) of such discontinuation at least 180 days prior to the date of the expiration of such plan; and

(ii) all group health plans issued or delivered for issuance in the State are discontinued and coverage under such plans is not renewed.

(B) APPLICATION OF PROVISIONS.—The provisions of this paragraph and paragraph (3) may be applied separately by a health plan issuer—

(i) to all group health plans offered to small employers (as defined under applicable State law, or if not so defined, an employer with not more than 50 employees); or

(ii) to all other group health plans offered by the health plan issuer in the State.

(3) PROHIBITION ON MARKET REENTRY.—In the case of a discontinuation under paragraph (2), the health plan issuer may not provide for the issuance of any group health plan in the market sector (as described in paragraph (2)(B)) in which issuance of such group health plan was discontinued in the State involved during the 5-year period beginning on the date of the discontinuation of the last group health plan not so renewed.

(c) TREATMENT OF NETWORK PLANS.—

(1) GEOGRAPHIC LIMITATIONS.—A network plan (as defined in paragraph (2)) may deny continued participation under such plan to participants or beneficiaries who neither live, reside, nor work in an area in which such network plan is offered, but only if such denial is applied uniformly, without regard to health status or the insurability of particular participants or beneficiaries.

(2) NETWORK PLAN.—As used in paragraph (1), the term ''network plan'' means an employee health benefit plan or a group health plan that arranges for the financing and delivery of health care services to participants or beneficiaries covered under such plan, in whole or in part, through arrangements with providers.

(d) COBRA COVERAGE.—Nothing in subsection (a)(2)(E) or subsection (c) shall be construed to affect any right to COBRA continuation coverage as described in part 6 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1161 et seq.).

SEC. 103. PORTABILITY OF HEALTH COVERAGE AND LIMITATION ON PREEXISTING CONDITION EXCLUSIONS.

(a) IN GENERAL.—An employee health benefit plan or a health plan issuer offering a group health plan may, with respect to a participant or beneficiary, impose a limitation or exclusion of benefits, otherwise available under the terms of the plan only if—

(1) such limitation or exclusion is a limitation or exclusion of benefits relating to the treatment of a preexisting condition; and

(2) such limitation or exclusion extends for a period of not more than 12 months after the date of enrollment in the plan.

(b) CREDITING OF PREVIOUS QUALIFYING COVERAGE.—

(1) IN GENERAL.—Subject to paragraph (4), an employee health benefit plan or a health plan issuer offering a group health plan shall provide that if a participant or beneficiary is in a period of previous qualifying coverage as of the date of enrollment under such plan, any period of exclusion or limitation of coverage with respect to a preexisting condition shall be reduced by 1 month for each month in which the participant or beneficiary was in the period of previous qualifying coverage. With respect to a participant or beneficiary described in subsection (e)(2)(A) who maintains continuous coverage, no limitation or exclusion of benefits relating to treatment of a preexisting condition may be applied to a child within the child's first 12 months of life or within 12 months after the placement of a child for adoption.

(2) DISCHARGE OF DUTY.—An employee health benefit plan shall provide documentation of coverage to participants and beneficiaries whose coverage is terminated under the plan. Pursuant to regulations promulgated by the Secretary, the duty of an employee health benefit plan to verify previous qualifying coverage with respect to a participant or beneficiary is effectively discharged when such employee health benefit plan provides documentation to a participant or beneficiary that includes the following information:

(A) the dates that the participant or beneficiary was covered under the plan; and

(B) the benefits and cost-sharing arrangement available to the participant or beneficiary under such plan.

An employee health benefit plan shall retain the documentation provided to a participant or beneficiary under subparagraphs (A) and (B) for at least the 12-month period following the date on which the participant or beneficiary ceases to be covered under the plan. Upon request, an employee health benefit plan shall provide a second copy of such documentation to such participant or beneficiary within the 12-month period following the date of such ineligibility.

(3) DEFINITIONS.—As used in this section:

(A) PREVIOUS QUALIFYING COVERAGE.—The term ''previous qualifying coverage'' means the period beginning on the date—

(i) a participant or beneficiary is enrolled under an employee health benefit plan or a group health plan, and ending on the date the participant or beneficiary is not so enrolled; or

(ii) an individual is enrolled under an individual health plan (as defined in section 113) or under a public or private health plan established under Federal or State law, and ending on the date the individual is not so enrolled;

for a continuous period of more than 30 days (without regard to any waiting period).

(B) LIMITATION OR EXCLUSION OF BENEFITS RELATING TO TREATMENT OF A PREEXISTING CONDITION.—The term ''limitation or exclusion of benefits relating to treatment of a preexisting condition'' means a limitation or exclusion of benefits imposed on an individual based on a preexisting condition of such individual.

(4) EFFECT OF PREVIOUS COVERAGE.—An employee health benefit plan or a health plan issuer offering a group health plan may impose a limitation or exclusion of benefits relating to the treatment of a preexisting condition, subject to the limits in subsection (a), only to the extent that such service or benefit was not previously covered under the group health plan, employee health benefit plan, or individual health plan in which the participant or beneficiary was enrolled immediately prior to enrollment in the plan involved.

(c) LATE ENROLLEES.—Except as provided in section 104, with respect to a participant or beneficiary enrolling in an employee health benefit plan or a group health plan during a time that is other than the first opportunity to enroll during an enrollment period of at least 30 days, coverage with respect to benefits or services relating to the treatment of a preexisting condition in accordance with subsections (a) and (b) may be excluded, except the period of such exclusion may not exceed 18 months beginning on the date of coverage under the plan.

(d) AFFILIATION PERIODS.—With respect to a participant or beneficiary who would otherwise be eligible to receive benefits under an employee health benefit plan or a group health plan but for the operation of a preexisting condition limitation or exclusion, if such plan does not utilize a limitation or exclusion of benefits relating to the treatment of a preexisting condition, such plan may impose an affiliation period on such participant or beneficiary not to exceed 60 days (or in the case of a late participant or beneficiary described in subsection (c), 90 days) from the date on which the participant or beneficiary would otherwise be eligible to receive benefits under the plan. An employee health benefit plan or a health plan issuer offering a group health plan may also use alternative methods to address adverse selection as approved by the applicable certifying authority (as defined in section 202(d)). During such an affiliation period, the plan may not be required to provide health care services or benefits and no premium shall be charged to the participant or beneficiary.

(e) PREEXISTING CONDITION.—

(1) IN GENERAL.—For purposes of this section, the term ''preexisting condition'' means a condition, regardless of the cause of the condition, for which medical advice, diagnosis, care, or treatment was recommended or received within the 6-month period ending on the day before the effective date of the coverage (without regard to any waiting period).

(2) BIRTH, ADOPTION AND PREGNANCY EXCLUDED.—The term ''preexisting condition'' does not apply to—

(A) an individual who, within 30 days of the date of the birth or placement for adoption of a child (as determined under section 609(c)(3)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1169(c)(3)(B)), was covered under the plan; or

(B) pregnancy.

(f) STATE FLEXIBILITY.—Nothing in this section shall be construed to preempt State laws that—

(1) require health plan issuers to impose a limitation or exclusion of benefits relating to the treatment of a preexisting condition for periods that are shorter than those provided for under this section; or

(2) allow individuals, participants, and beneficiaries to be considered to be in a period of previous qualifying coverage if such individual, participant, or beneficiary experiences a lapse in coverage that is greater than the 30-day period provided for under subsection (b)(3); or

(3) require health plan issuers to have a lookback period that is shorter than the period described in subsection (e)(1);

unless such laws are preempted by section 514 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144).

SEC. 104. SPECIAL ENROLLMENT PERIODS.

In the case of a participant, beneficiary or family member who—

(1) through marriage, separation, divorce, death, birth or placement of a child for adoption, experiences a change in family composition affecting eligibility under a group health plan, individual health plan, or employee health benefit plan;

(2) experiences a change in employment status, as described in section 603(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1163(2)), that causes the loss of eligibility for coverage, other than COBRA continuation coverage under a group health plan, individual health plan, or employee health benefit plan; or

(3) experiences a loss of eligibility under a group health plan, individual health plan, or employee health benefit plan because of a change in the employment status of a family member;

each employee health benefit plan and each group health plan shall provide for a special enrollment period extending for a reasonable time after such event that would permit the participant to change the individual or family basis of coverage or to enroll in the plan if coverage would have been available to such individual, participant, or beneficiary but for failure to enroll during a previous enrollment period. Such a special enrollment period shall ensure that a child born or placed for adoption shall be deemed to be covered under the plan as of the date of such birth or placement for adoption if such child is enrolled within 30 days of the date of such birth or placement for adoption.

SEC. 105. DISCLOSURE OF INFORMATION.

(a) DISCLOSURE OF INFORMATION BY HEALTH PLAN ISSUERS.—

(1) IN GENERAL.—In connection with the offering of any group health plan to a small employer (as defined under applicable State law, or if not so defined, an employer with not more than 50 employees), a health plan issuer shall make a reasonable disclosure to such employer, as part of its solicitation and sales materials, of—

(A) the provisions of such group health plan concerning the health plan issuer's right to change premium rates and the factors that may affect changes in premium rates;

(B) the provisions of such group health plan relating to renewability of coverage;

(C) the provisions of such group health plan relating to any preexisting condition provision; and

(D) descriptive information about the benefits and premiums available under all group health plans for which the employer is qualified.

Information shall be provided to small employers under this paragraph in a manner determined to be understandable by the average small employer, and shall be sufficiently accurate and comprehensive to reasonably inform small employers, participants and beneficiaries of their

rights and obligations under the group health plan.

(2) EXCEPTION.—With respect to the requirement of paragraph (1), any information that is proprietary and trade secret information under applicable law shall not be subject to the disclosure requirements of such paragraph.

(3) CONSTRUCTION.—Nothing in this subsection shall be construed to preempt State reporting and disclosure requirements to the extent that such requirements are not preempted under section 514 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144).

(b) DISCLOSURE OF INFORMATION TO PARTICIPANTS AND BENEFICIARIES.—

(1) IN GENERAL.—Section 104(b)(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1024(b)(1)) is amended in the matter following subparagraph (B)—

(A) by striking ''102(a)(1),'' and inserting ''102(a)(1) that is not a material reduction in covered services or benefits provided,''; and

(B) by adding at the end thereof the following new sentences: ''If there is a modification or change described in section 102(a)(1) that is a material reduction in covered services or benefits provided, a summary description of such modification or change shall be furnished to participants not later than 60 days after the date of the adoption of the modification or change. In the alternative, the plan sponsors may provide such description at regular intervals of not more than 90 days. The Secretary shall issue regulations within 180 days after the date of enactment of the Health Insurance Reform Act of 1996, providing alternative mechanisms to delivery by mail through which employee health benefit plans may notify participants of material reductions in covered services or benefits.''.

(2) PLAN DESCRIPTION AND SUMMARY.—Section 102(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1022(b)) is amended—

(A) by inserting ''including the office or title of the individual who is responsible for approving or denying claims for coverage of benefits'' after ''type of administration of the plan'';

(B) by inserting ''including the name of the organization responsible for financing claims'' after ''source of financing of the plan''; and

(C) by inserting ''including the office, contact, or title of the individual at the Department of Labor through which participants may seek assistance or information regarding their rights under this Act and the Health Insurance Reform Act of 1996 with respect to health benefits that are not offered through a group health plan.'' after ''benefits under the plan''.

Subtitle B—Individual Market Rules

SEC. 110. INDIVIDUAL HEALTH PLAN PORTABILITY.

(a) LIMITATION ON REQUIREMENTS.—

(1) IN GENERAL.—Except as provided in subsections (c) and (d), a health plan issuer described in paragraph (3) may not, with respect to an eligible individual (described in subsection (b)) desiring to enroll in an individual health plan—

(A) decline to offer coverage to, or deny enrollment of, such individual; or

(B) impose a limitation or exclusion of benefits, otherwise available under such plan, for which coverage was available under the group health plan or employee health benefit plan in which the individual was previously enrolled.

(2) HEALTH PROMOTION AND DISEASE PREVENTION.—Nothing in this subsection shall be construed to prevent a health plan issuer offering an individual health plan from establishing premium discounts or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion or disease prevention.

(3) HEALTH PLAN ISSUER.—A health plan issuer described in this paragraph is a health plan issuer that issues or renews individual health plans.

(4) PREMIUMS.—Nothing in this subsection shall be construed to affect the determination of a health plan issuer as to the amount of the premium payable under an individual health plan under applicable State law.

(b) DEFINITION OF ELIGIBLE INDIVIDUAL.—As used in subsection (a)(1), the term ''eligible individual'' means an individual who—

(1) was a participant or beneficiary enrolled under one or more group health plans or employee health benefit plans for not less than 18 months (without a lapse of more than 30 days) immediately prior to the date on which such individual applies for enrollment in the individual health plan;

(2) is not eligible for coverage under a group health plan or an employee health benefit plan;

(3) has not had coverage terminated under a group health plan or employee health benefit plan for failure to make required premium payments or contributions, or for fraud or misrepresentation of material fact; and

(4) has, if applicable, elected coverage and exhausted the maximum period of coverage as described in section 602(2)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1162(2)(A)) or under a State program providing an extension of such coverage.

(c) APPLICATION OF CAPACITY LIMITS.—

(1) IN GENERAL.—Subject to paragraph (2), a health plan issuer offering coverage to individuals under an individual health plan may cease enrolling individuals under the plan if—

(A) the health plan issuer ceases to enroll any new individuals; and

(B) the health plan issuer can demonstrate to the applicable certifying authority (as defined in section 202(d)), if required, that its financial or provider capacity to serve previously covered individuals will be impaired if the health plan issuer is required to enroll additional individuals.

Such a health plan issuer shall be prohibited from offering coverage after a cessation in offering coverage under this paragraph for a 6-month period or until the health plan issuer can demonstrate to the applicable certifying authority (as defined in section 202(d)) that the health plan issuer has adequate capacity, whichever is later.

(2) FIRST-COME-FIRST-SERVED.—A health plan issuer offering coverage to individuals under an individual health plan is only eligible to exercise the limitations provided for in paragraph (1) if the health plan issuer provides for enrollment of individuals under such plan on a first-come-first-served basis or other basis established by a State to ensure a fair opportunity to enroll in the plan and avoid risk selection.

(d) MARKET REQUIREMENTS.—

(1) IN GENERAL.—The provisions of subsection (a) shall not be construed to require that a health plan issuer offering group health plans to group purchasers offer individual health plans to individuals.

(2) CONVERSION POLICIES.—A health plan issuer offering group health plans to group purchasers under this Act shall not be deemed to be a health plan issuer offering an individual health plan solely because such health plan issuer offers a conversion policy.

(3) MARKETING OF PLANS.—Nothing in this section shall be construed to prevent a State from requiring health plan issuers offering coverage to individuals under an individual health plan to actively market such plan.

(4) CONSTRUCTION.—Nothing in this Act shall be construed to require that a State replace or dissolve high risk pools or other similar State mechanisms which are designed to provide individuals in such State with access to health benefits.

SEC. 111. GUARANTEED RENEWABILITY OF INDIVIDUAL HEALTH COVERAGE.

(a) IN GENERAL.—Subject to subsections (b) and (c), coverage for individuals under an individual health plan shall be renewed or continued in force by a health plan issuer at the option of the individual, except that the requirement of this subsection shall not apply in the case of—

(1) the nonpayment of premiums or contributions by the individual in accordance with the terms of the individual health plan or where the health plan issuer has not received timely premium payments;

(2) fraud or misrepresentation of material fact on the part of the individual; or

(3) the termination of the individual health plan in accordance with subsection (b).

(b) TERMINATION OF INDIVIDUAL HEALTH PLANS.—

(1) PARTICULAR TYPE OF INDIVIDUAL HEALTH PLAN NOT OFFERED.—In any case in which a health plan issuer decides to discontinue offering a particular type of individual health plan to individuals, an individual health plan may be discontinued by the health plan issuer only if—

(A) the health plan issuer provides notice to each individual covered under the plan of such discontinuation at least 90 days prior to the date of the expiration of the plan;

(B) the health plan issuer offers to each individual covered under the plan the option to purchase any other individual health plan currently being offered by the health plan issuer to individuals; and

(C) in exercising the option to discontinue the individual health plan and in offering one or more replacement plans, the health plan issuer acts uniformly without regard to the health status or insurability of particular individuals.

(2) DISCONTINUANCE OF ALL INDIVIDUAL HEALTH PLANS.—In any case in which a health plan issuer elects to discontinue all individual health plans in a State, an individual health plan may be discontinued by the health plan issuer only if—

(A) the health plan issuer provides notice to the applicable certifying authority (as defined in section 202(d)) and to each individual covered under the plan of such discontinuation at least 180 days prior to the date of the discontinuation of the plan; and

(B) all individual health plans issued or delivered for issuance in the State are discontinued and coverage under such plans is not renewed.

(3) PROHIBITION ON MARKET REENTRY.—In the case of a discontinuation under paragraph (2), the health plan issuer may not provide for the issuance of any individual health plan in the State involved during the 5-year period beginning on the date of the discontinuation of the last plan not so renewed.

(c) TREATMENT OF NETWORK PLANS.—

(1) GEOGRAPHIC LIMITATIONS.—A health plan issuer which offers a network plan (as defined in paragraph (2)) may deny continued participation under the plan to individuals who neither live, reside, nor work in an area in which the individual health plan is offered, but only if such denial is applied uniformly, without regard to health status or the insurability of particular individuals.

(2) NETWORK PLAN.—As used in paragraph (1), the term ''network plan'' means an individual health plan that arranges for the financing and delivery of health care services to individuals covered under such health plan, in whole or in part, through arrangements with providers.

SEC. 112. STATE FLEXIBILITY IN INDIVIDUAL MARKET REFORMS.

(a) ADOPTION OF ALTERNATIVE MECHANISMS.—

(1) IN GENERAL.—A State, in accordance with this section, may adopt alternative mechanisms (public or private) that are designed to provide access to affordable health benefits for individuals meeting the requirements of sections 110(b) and 111 (such as mechanisms providing for guaranteed issue, open enrollment by one or more health plan issuers, high-risk pools, mandatory conversion policies, or any combination thereof).

(2) PROCEDURE FOR STATE ELECTION.—If, not later than 6 months after the date of enactment

of this Act, the Governor of a State notifies the Secretary of Health and Human Services that—

(A) the State has adopted an alternative mechanism that achieves the goals of sections 110 and 111; or

(B) the State intends to implement an alternative mechanism that is designed to achieve the goals of sections 110 and 111;

such State alternative mechanism shall, except as provided in paragraphs (3) and (4), apply in lieu of the standards described in sections 110 and 111.

(3) NONAPPLICATION OF MECHANISM.—A State alternative mechanism adopted under paragraph (1) shall be presumed to achieve the goals of sections 110 and 111 and shall apply in lieu of such sections, unless the Secretary of Health and Human Services, in consultation with the Governor and Insurance Commissioner or chief insurance regulatory official of the State, finds that the State alternative mechanism fails to—

(A) offer coverage to those individuals who meet the requirements of sections 110(b) and 111;

(B) prohibit a limitation or exclusion of benefits relating to treatment of a preexisting condition that was covered under the previous group health plan or employee health benefit plan of an individual who meets the requirements of sections 110(b) and 111;

(C) offer individuals who meet the requirements of sections 110(b) and 111 a choice of individual health plans, including at least one plan comparable to comprehensive plans offered in the individual market in such State or a plan comparable to a standard option plan available under the group or individual health insurance laws of such State; or

(D) except as provided in paragraph (4), implement a risk spreading mechanism, cross subsidy mechanism, risk adjustment mechanism, rating limitation or other mechanism (such as mechanisms described in the NAIC Model Health Plan for Uninsurable Individuals Act) designed to reduce the variation among the cost of such plans and other individual health plans offered by the carrier or available in such State.

(4) CHOICE OF PLANS.—The Secretary of Health and Human Services shall waive the requirement in subparagraph (D) of paragraph (3) with respect to a State if individuals who meet the requirements of sections 110(b) and 111 in such State are provided with a choice of all individual health plans otherwise available in the individual market.

(5) FUTURE ADOPTION OF MECHANISMS.—With respect to a State that implements an alternative mechanism under paragraph (1) after the period referred to in paragraph (2)—

(A) the State shall provide notice to the Secretary that such alternative mechanism achieves the goals of sections 110 and 111;

(B) the State alternative mechanism shall apply in lieu of sections 110 and 111;

(C) except as provided in subsections (d) and (e), the Secretary may make a determination as provided for in paragraph (3); and

(D) the procedures described in subsection (c) shall apply.

(b) TIMEFRAME FOR SECRETARIAL DETERMINATION.—

(1) IN GENERAL.—With respect to a State election under subsection (a)(2)(B), the Secretary of Health and Human Services shall not make a determination under subsection (a)(3) until the expiration of the 12-month period beginning on the date on which such notification is made, or until January 1, 1998, whichever is later.

(2) RULE APPLICABLE TO CERTAIN STATES.—With respect to a State that makes an election under subsection (a)(2)(B) and that has a legislature that does not meet within the 12-month period beginning on the date of enactment of this Act, the Secretary of Health and Human Services shall not make a determination under subsection (a) prior to January 1, 1999.

(c) NOTICE TO STATE.—If the Secretary of Health and Human Services determines that a State alternative mechanism fails to meet the criteria described in subsection (a)(3), or that such mechanism is no longer being implemented, the Secretary of Health and Human Services shall notify the Governor of such State of such preliminary determination and permit the State a reasonable opportunity in which to modify the alternative mechanism or to adopt another mechanism that is designed to meet the goals of sections 110 and 111. If, after an opportunity to modify such State alternative mechanism, the mechanism fails to meet the criteria described in subsection (a)(3), the Secretary shall notify the Governor of such State that sections 110 and 111 shall apply in the State.

(d) ADOPTION OF NAIC MODEL.—If, not later than 9 months after the date of enactment of this Act—

(1) the National Association of Insurance Commissioners (hereafter referred to as the ''NAIC''), through a process which the Secretary of Health and Human Services determines has included consultation with representatives of the insurance industry and consumer groups, has adopted a model act or acts including provisions addressing portability from a group health plan or employee health benefit plan into the individual health insurance market; and

(2) the Secretary of Health and Human Services determines, within 30 days of the adoption of such NAIC model act or acts, that such act or acts comply with the goals of sections 110 and 111;

a State that elects to adopt such model act or acts shall be deemed to have met the requirements of sections 110 and 111 and shall not be subject to a determination under subsection (a)(3).

(e) STATE HIGH RISK POOLS DEEMED IN COMPLIANCE.—If the Governor of a State notifies the Secretary of Health and Human Services in a timeframe consistent with either subsection (a)(2) or (a)(5) that such State has a high risk pool open to those individuals meeting the requirements of sections 110(b) and 111, that limits preexisting condition waiting periods consistent with section 110(a)(1)(B) and that with respect to premium rates and covered benefits is consistent with standards included in the NAIC Model Health Plan for Uninsurable Individuals Act, such State high risk pool shall be deemed to have met the requirements of sections 110 and 111 and shall not be subject to a determination under subsection (a)(3).

SEC. 113. DEFINITION.

(a) IN GENERAL.—As used in this title, the term ''individual health plan'' means any contract, policy, certificate or other arrangement offered to individuals by a health plan issuer that provides or pays for health benefits (such as provider and hospital benefits) and that is not a group health plan under section 2(6).

(b) ARRANGEMENTS NOT INCLUDED.—Such term does not include the following, or any combination thereof:

(1) Coverage only for accident, or disability income insurance, or any combination thereof.

(2) Medicare supplemental health insurance (as defined under section 1882(g)(1) of the Social Security Act).

(3) Coverage issued as a supplement to liability insurance.

(4) Liability insurance, including general liability insurance and automobile liability insurance.

(5) Workers' compensation or similar insurance.

(6) Automobile medical payment insurance.

(7) Coverage for a specified disease or illness.

(8) Hospital or fixed indemnity insurance.

(9) Short-term limited duration insurance.

(10) Credit-only, dental-only, or vision-only insurance.

(11) A health insurance policy providing benefits only for long-term care, nursing home care, home health care, community-based care, or any combination thereof.

Subtitle C—COBRA Clarifications

SEC. 121. COBRA CLARIFICATIONS.

(a) PUBLIC HEALTH SERVICE ACT.—

(1) PERIOD OF COVERAGE.—Section 2202(2) of the Public Health Service Act (42 U.S.C. 300bb–2(2)) is amended—

(A) in subparagraph (A)—

(i) by transferring the sentence immediately preceding clause (iv) so as to appear immediately following such clause (iv); and

(ii) in the last sentence (as so transferred)—

(I) by inserting '', or a beneficiary-family member of the individual,'' after ''an individual''; and

(II) by striking ''at the time of a qualifying event described in section 2203(2)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this title'';

(B) in subparagraph (D)(i), by inserting before '', or'' the following: '', except that the exclusion or limitation contained in this clause shall not be considered to apply to a plan under which a preexisting condition or exclusion does not apply to an individual otherwise eligible for continuation coverage under this section because of the provision of the Health Insurance Reform Act of 1996''; and

(C) in subparagraph (E), by striking ''at the time of a qualifying event described in section 2203(2)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this title''.

(2) NOTICES.—Section 2206(3) of the Public Health Service Act (42 U.S.C. 300bb–6(3)) is amended by striking ''at the time of a qualifying event described in section 2203(2)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this title''.

(3) BIRTH OR ADOPTION OF A CHILD.—Section 2208(3)(A) of the Public Health Service Act (42 U.S.C. 300bb–8(3)(A)) is amended by adding at the end thereof the following new flush sentence:

''Such term shall also include a child who is born to or placed for adoption with the covered employee during the period of continued coverage under this title.''.

(b) EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) PERIOD OF COVERAGE.—Section 602(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1162(2)) is amended—

(A) in the last sentence of subparagraph (A)—

(i) by inserting '', or a beneficiary-family member of the individual,'' after ''an individual''; and

(ii) by striking ''at the time of a qualifying event described in section 603(2)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this part'';

(B) in subparagraph (D)(i), by inserting before '', or'' the following: '', except that the exclusion or limitation contained in this clause shall not be considered to apply to a plan under which a preexisting condition or exclusion does not apply to an individual otherwise eligible for continuation coverage under this section because of the provision of the Health Insurance Reform Act of 1996''; and

(C) in subparagraph (E), by striking ''at the time of a qualifying event described in section 603(2)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this part''.

(2) NOTICES.—Section 606(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1166(3)) is amended by striking ''at the time of a qualifying event described in section 603(2)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this part''.

(3) BIRTH OR ADOPTION OF A CHILD.—Section 607(3)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1167(3)) is amended by adding at the end thereof the following new flush sentence:

''Such term shall also include a child who is born to or placed for adoption with the covered

employee during the period of continued coverage under this part.''.

(c) INTERNAL REVENUE CODE OF 1986.—

(1) PERIOD OF COVERAGE.—Section 4980B(f)(2)(B) of the Internal Revenue Code of 1986 is amended—

(A) in the last sentence of clause (i) by striking ''at the time of a qualifying event described in paragraph (3)(B)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this section'';

(B) in clause (iv)(I), by inserting before '', or'' the following: '', except that the exclusion or limitation contained in this subclause shall not be considered to apply to a plan under which a preexisting condition or exclusion does not apply to an individual otherwise eligible for continuation coverage under this subsection because of the provision of the Health Insurance Reform Act of 1995''; and

(C) in clause (v), by striking ''at the time of a qualifying event described in paragraph (3)(B)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this section''.

(2) NOTICES.—Section 4980B(f)(6)(C) of the Internal Revenue Code of 1986 is amended by striking ''at the time of a qualifying event described in paragraph (3)(B)'' and inserting ''at any time during the initial 18-month period of continuing coverage under this section''.

(3) BIRTH OR ADOPTION OF A CHILD.—Section 4980B(g)(1)(A) of the Internal Revenue Code of 1986 is amended by adding at the end thereof the following new flush sentence:

''Such term shall also include a child who is born to or placed for adoption with the covered employee during the period of continued coverage under this section.''.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to qualifying events occurring on or after the date of the enactment of this Act for plan years beginning after December 31, 1997.

(e) NOTIFICATION OF CHANGES.—Not later than 60 days prior to the date on which this section becomes effective, each group health plan (covered under title XXII of the Public Health Service Act, part 6 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, and section 4980B(f) of the Internal Revenue Code of 1986) shall notify each qualified beneficiary who has elected continuation coverage under such title, part or section of the amendments made by this section.

Subtitle D—Private Health Plan Purchasing Cooperatives

SEC. 131. PRIVATE HEALTH PLAN PURCHASING COOPERATIVES.

(a) DEFINITION.—As used in this Act, the term ''health plan purchasing cooperative'' means a group of employees or a group of individuals and employers that, on a voluntary basis and in accordance with this section, form a cooperative for the purpose of purchasing individual health plans or group health plans offered by health plan issuers.

(b) CERTIFICATION.—

(1) REQUIREMENT.—If a group described in subsection (a), desires to form a health plan purchasing cooperative in accordance with this section and such group appropriately notifies the State and the Secretary of such desire, the State, upon a determination that such group meets the requirements of this section, shall certify the group as a health plan purchasing cooperative. The State shall make a determination of whether such group meets the requirements of this section in a timely fashion and shall oversee the operations of such cooperative in order to ensure continued compliance with the requirements of this section. Each such cooperative shall also be registered with the Secretary.

(2) STATE REFUSAL TO CERTIFY.—

(A) IN GENERAL.—If a State fails to implement a program for certifying health plan purchasing cooperatives in accordance with the standards under this Act, the Secretary shall certify and oversee the operations of such cooperatives in such State.

(B) EXCEPTION.—The Secretary shall not certify a health plan purchasing cooperative described in this section if, upon the submission of an application by the State to the Secretary, the Secretary determines that under a State law in effect on the date of enactment of this Act, all small employers have a means readily available that ensures—

(i) that individuals and employees have a choice of multiple, unaffiliated health plan issuers;

(ii) that health plan coverage is subject to State premium rating requirements that are not based on the factors described in subsection (f)(3) and that contains a mandatory minimum loss ratio; and

(iii) that comparative health plan materials are disseminated consistent with subsection (e)(1)(D);

and that otherwise meets the objectives of this Act.

(3) INTERSTATE COOPERATIVES.—For purposes of this section, a health plan purchasing cooperative operating in more than one State shall be certified by the State in which the cooperative is domiciled. States may enter into cooperative agreements for the purpose of overseeing the operation of such cooperatives. For purposes of this subsection, a cooperative shall be considered to be domiciled in the State in which most of the members of the cooperative reside.

(c) BOARD OF DIRECTORS.—

(1) IN GENERAL.—Each health plan purchasing cooperative shall be governed by a Board of Directors that shall be responsible for ensuring the performance of the duties of the cooperative under this section. The Board shall be composed of a broad cross-section of representatives of employers, employees, and individuals participating in the cooperative.

(2) LIMITATION ON COMPENSATION.—A health plan purchasing cooperative may not provide compensation to members of the Board of Directors. The cooperative may provide reimbursements to such members for the reasonable and necessary expenses incurred by the members in the performance of their duties as members of the Board.

(d) MEMBERSHIP AND MARKETING AREA.—

(1) MEMBERSHIP.—A health plan purchasing cooperative may establish limits on the maximum size of employers who may become members of the cooperative, and may determine whether to permit individuals to become members. Upon the establishment of such membership requirements, the cooperative shall, except as provided in subparagraph (B), accept all employers (or individuals) residing within the area served by the cooperative who meet such requirements as members on a first come, first-served basis, or on another basis established by the State to ensure equitable access to the cooperative.

(2) MARKETING AREA.—A State may establish rules regarding the geographic area that must be served by health plan purchasing cooperatives to ensure that cooperatives do not discriminate on the basis of the health status or insurability of the populations that reside in the area served. A State may not use such rules to arbitrarily limit the number of health plan purchasing cooperatives.

(e) DUTIES AND RESPONSIBILITIES.—

(1) IN GENERAL.—A health plan purchasing cooperative shall—

(A) objectively evaluate potential health plan issuers and enter into agreements with multiple, unaffiliated health plan issuers, except that the requirement of this subparagraph shall not apply in regions (such as remote or frontier areas) in which compliance with such requirement is not possible;

(B) enter into agreements with employers and individuals who become members of the cooperative;

(C) participate in any program of risk-adjustment or reinsurance, or any similar program, that is established by the State;

(D) prepare and disseminate comparative health plan materials (including information about cost, quality, benefits, and other information concerning group health plans and individual health plans offered through the cooperative);

(E) broadly solicit and actively market to all eligible employers and individuals residing within the service area; and

(F) act as an ombudsman for group health plan or individual health plan enrollees.

(2) PERMISSIBLE ACTIVITIES.—A health plan purchasing cooperative may perform such other functions as necessary to further the purposes of this Act, including—

(A) collecting and distributing premiums and performing other administrative functions;

(B) collecting and analyzing surveys of enrollee satisfaction;

(C) charging membership fee to enrollees (such fees may not be based on health status) and charging participation fees to health plan issuers;

(D) cooperating with (or accepting as members) employers who provide health benefits directly to participants and beneficiaries only for the purpose of negotiating with providers; and

(E) negotiating with health care providers and health plan issuers.

(f) LIMITATIONS ON COOPERATIVE ACTIVITIES.—A health plan purchasing cooperative shall not—

(1) perform any activity relating to the licensing of health plan issuers;

(2) assume financial risk directly or indirectly on behalf of members of a health plan purchasing cooperative relating to any group health plan or individual health plan;

(3) establish eligibility, enrollment, or premium contribution requirements for individual participants or beneficiaries based on health status, medical condition, claims experience, receipt of health care, medical history, evidence of insurability, genetic information, or disability;

(4) operate on a for-profit or other basis where the legal structure of the cooperative permits profits to be made and not returned to the members of the cooperative, except that a for-profit health plan purchasing cooperative may be formed by a nonprofit organization or organizations—

(A) in which membership in such organization is not based on health status, medical condition, claims experience, receipt of health care, medical history, evidence of insurability, genetic information, or disability; and

(B) that accepts as members all employers or individuals on a first-come, first-served basis, subject to any established limit on the maximum size of an employer that may become a member; or

(5) perform any other activities that conflict or are inconsistent with the performance of its duties under this Act.

(g) CONFLICT OF INTEREST.—

(1) PROHIBITION.—No individual, partnership, or corporation shall serve on the board of a health plan purchasing cooperative, be employed by such a cooperative, receive compensation from such a cooperative, or initiate or finance such a cooperative if such individual, partnership, or corporation—

(A) fails to discharge the duties and responsibilities of such individual, partnership or corporation in a manner that is solely in the interest of the members of the cooperative; or

(B) derives personal benefit (other than in the form of ordinary compensation received) from the sale of, or has a financial interest in, health plans, services or products sold by or distributed through that cooperative.

(2) CONTRACTS WITH THIRD PARTIES.—Nothing in paragraph (1) shall be construed to prohibit the board of directors of a health plan purchasing cooperative, or its officers, at the initiative

and under this direction of the board, from contracting with third parties to provide administrative, marketing, consultive, or other services to the cooperative.

(h) LIMITED PREEMPTION OF CERTAIN STATE LAWS.—

(1) IN GENERAL.—With respect to a health plan purchasing cooperative that meets the requirements of this section, State fictitious group laws shall be preempted.

(2) HEALTH PLAN ISSUERS.—

(A) RATING.—Except as provided in subparagraph (B), a health plan issuer offering a group health plan or individual health plan through a health plan purchasing cooperative that meets the requirements of this section shall comply with all State rating requirements that would otherwise apply if the health plan were offered outside of the cooperative.

(B) EXCEPTION.—A State shall permit a health plan issuer to reduce premium rates negotiated with a health plan purchasing cooperative that meets the requirements of this section to reflect savings derived from administrative costs, marketing costs, profit margins, economies of scale, or other factors, except that any such reduction in premium rates may not be based on the health status, demographic factors, industry type, duration, or other indicators of health risk of the members of the cooperative.

(C) BENEFITS.—Except as provided in subparagraph (D), a health plan issuer offering a group health plan or individual health plan through a health plan purchasing cooperative shall comply with all State mandated benefit laws that require the offering of any services, category of care, or services of any class or type of provider.

(D) EXCEPTION.—In those States that have enacted laws authorizing the issuance of alternative benefit plans to small employers, health plan issuers may offer such alternative benefit plans through a health plan purchasing cooperative that meets the requirements of this section.

(i) RULES OF CONSTRUCTION.—Nothing in this section shall be construed to—

(1) require that a State organize, operate, or otherwise create health plan purchasing cooperatives;

(2) otherwise require the establishment of health plan purchasing cooperatives;

(3) require individuals, plan sponsors, or employers to purchase group health plans or individual health plans through a health plan purchasing cooperative;

(4) preempt a State from requiring licensure for individuals who are involved in directly supplying advice or selling health plans on behalf of a purchasing cooperative;

(5) require that a health plan purchasing cooperative be the only type of purchasing arrangement permitted to operate in a State;

(6) confer authority upon a State that the State would not otherwise have to regulate health plan issuers or employee health benefits plans;

(7) confer authority upon a State (or the Federal Government) that the State (or Federal Government) would not otherwise have to regulate group purchasing arrangements, coalitions, association plans, or other similar entities that do not desire to become a health plan purchasing cooperative in accordance with this section; or

(8) except as specifically provided otherwise in this subsection, prevent the application of State laws and regulations otherwise applicable to health plan issuers offering group health plans or individual health plans through a health plan purchasing cooperative.

(j) APPLICATION OF ERISA.—For purposes of enforcement only, the requirements of parts 4 and 5 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1101) shall apply to a health plan purchasing cooperative as if such plan were an employee welfare benefit plan.

TITLE II—APPLICATION AND ENFORCEMENT OF STANDARDS

SEC. 201. APPLICABILITY.

(a) CONSTRUCTION.—

(1) ENFORCEMENT.—

(A) IN GENERAL.—A requirement or standard imposed under this Act on a group health plan or individual health plan offered by a health plan issuer shall be deemed to be a requirement or standard imposed on the health plan issuer. Such requirements or standards shall be enforced by the State insurance commissioner for the State involved or the official or officials designated by the State to enforce the requirements of this Act. In the case of a group health plan offered by a health plan issuer in connection with an employee health benefit plan, the requirements or standards imposed under this Act shall be enforced with respect to the health plan issuer by the State insurance commissioner for the State involved or the official or officials designated by the State to enforce the requirements of this Act.

(B) LIMITATION.—Except as provided in subsection (c), the Secretary shall not enforce the requirements or standards of this Act as they relate to health plan issuers, group health plans, or individual health plans. In no case shall a State enforce the requirements or standards of this Act as they relate to employee health benefit plans.

(2) PREEMPTION OF STATE LAW.—Nothing in this Act shall be construed to prevent a State from establishing, implementing, or continuing in effect standards and requirements—

(A) not prescribed in this Act; or

(B) related to the issuance, renewal, or portability of health insurance or the establishment or operation of group purchasing arrangements, that are consistent with, and are not in direct conflict with, this Act and provide greater protection or benefit to participants, beneficiaries or individuals.

(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to affect or modify the provisions of section 514 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144).

(c) CONTINUATION.—Nothing in this Act shall be construed as requiring a group health plan or an employee health benefit plan to provide benefits to a particular participant or beneficiary, to all participants or beneficiaries, or to any class or group of participants or beneficiaries, in excess of or other than those provided under the terms of such plan.

SEC. 202. ENFORCEMENT OF STANDARDS.

(a) HEALTH PLAN ISSUERS.—Each State shall require that each group health plan and individual health plan issued, sold, renewed, offered for sale or operated in such State by a health plan issuer meet the standards established under this Act pursuant to an enforcement plan filed by the State with the Secretary. A State shall submit such information as required by the Secretary demonstrating effective implementation of the State enforcement plan.

(b) EMPLOYEE HEALTH BENEFIT PLANS.—With respect to employee health benefit plans, the Secretary shall enforce the reform standards established under this Act in the same manner as provided for under sections 502, 504, 506, and 510 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132, 1134, 1136, and 1140). The civil penalties contained in paragraphs (1) and (2) of section 502(c) of such Act (29 U.S.C. 1132(c)(1) and (2)) shall apply to any information required by the Secretary to be disclosed and reported under this section.

(c) FAILURE TO IMPLEMENT PLAN.—In the case of the failure of a State to substantially enforce the standards and requirements set forth in this Act with respect to group health plans and individual health plans as provided for under the State enforcement plan filed under subsection (a), the Secretary, in consultation with the Secretary of Health and Human Services, shall implement an enforcement plan meeting the standards of this Act in such State. In the case of a State that fails to substantially enforce the standards and requirements set forth in this Act, each health plan issuer operating in such State shall be subject to civil enforcement as provided for under sections 502, 504, 506, and 510 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132, 1134, 1136, and 1140). The civil penalties contained in paragraphs (1) and (2) of section 502(c) of such Act (29 U.S.C. 1132(c)(1) and (2)) shall apply to any information required by the Secretary to be disclosed and reported under this section.

(d) APPLICABLE CERTIFYING AUTHORITY.—As used in this title, the term ''applicable certifying authority'' means, with respect to—

(1) health plan issuers, the State insurance commissioner or official or officials designated by the State to enforce the requirements of this Act for the State involved; and

(2) an employee health benefit plan, the Secretary.

(e) REGULATIONS.—The Secretary may promulgate such regulations as may be necessary or appropriate to carry out this Act.

(f) TECHNICAL AMENDMENT.—Section 508 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1138) is amended by inserting ''and under the Health Insurance Reform Act of 1996'' before the period.

TITLE III—MISCELLANEOUS PROVISIONS

SEC. 301. HMOS ALLOWED TO OFFER PLANS WITH DEDUCTIBLES TO INDIVIDUALS WITH MEDICAL SAVINGS ACCOUNTS.

(a) IN GENERAL.—Section 1301(b) of the Public Health Service Act (42 U.S.C. 300e(b)) is amended by adding at the end the following new paragraph:

''(6)(A) If a member certifies that a medical savings account has been established for the benefit of such member, a health maintenance organization may, at the request of such member reduce the basic health services payment otherwise determined under paragraph (1) by requiring the payment of a deductible by the member for basic health services.

''(B) For purposes of this paragraph, the term 'medical savings account' means an account which, by its terms, allows the deposit of funds and the use of such funds and income derived from the investment of such funds for the payment of the deductible described in subparagraph (A).''.

(b) MEDICAL SAVINGS ACCOUNTS.—It is the sense of the Committee on Labor and Human Resources of the Senate that the establishment of medical savings accounts, including those defined in section 1301(b)(6)(B) of the Public Health Service Act (42 U.S.C. 300e(b)(6)(B)), should be encouraged as part of any health insurance reform legislation passed by the Senate through the use of tax incentives relating to contributions to, the income growth of, and the qualified use of, such accounts.

(c) SENSE OF THE SENATE.—It is the sense of the Senate that the Congress should take measures to further the purposes of this Act, including any necessary changes to the Internal Revenue Code of 1986 to encourage groups and individuals to obtain health coverage, and to promote access, equity, portability, affordability, and security of health benefits.

SEC. 302. HEALTH COVERAGE AVAILABILITY STUDY.

(a) IN GENERAL.—The Secretary of Health and Human Services, in consultation with the Secretary, representatives of State officials, consumers, and other representatives of individuals and entities that have expertise in health insurance and employee benefits, shall conduct a three-part study, and prepare and submit reports, in accordance with this section.

(b) EVALUATION OF AVAILABILITY.—Not later than January 1, 1998, the Secretary of Health and Human Services shall prepare and submit to the appropriate committees of Congress a report, concerning—

(1) an evaluation, based on the experience of States, expert opinions, and such additional data as may be available, of the various mechanisms used to ensure the availability of reasonably priced health coverage to employers purchasing group coverage and to individuals purchasing coverage on a non-group basis; and

(2) whether standards that limit the variation in premiums will further the purposes of this Act.

(c) EVALUATION OF EFFECTIVENESS.—Not later than January 1, 1999, the Secretary of Health and Human Services shall prepare and submit to the appropriate committees of Congress a report, concerning the effectiveness of the provisions of this Act and the various State laws, in ensuring the availability of reasonably priced health coverage to employers purchasing group coverage and individuals purchasing coverage on a non-group basis.

(d) EVALUATION OF ACCESS AND CHOICE.—Not later than June 1, 1998, the Secretary of Health and Human Services shall prepare and submit to the appropriate committees of Congress a report concerning—

(1) an evaluation of the extent to which patients have direct access to, and choice of, health care provider, including specialty providers, within a network of providers, as well as the opportunity to utilize providers outside of the network, under the various types of coverage offered under the provisions of this Act;

(2) an evaluation of the cost to the insurer of providing out-of-network access to providers, and the feasibility of providing out-of-network access in all health plans offered under provisions of this Act; and

(3) an evaluation of the percent of premium dollar utilized for medical care and administration of the various types of coverage offered, including coverage which permits out-of-network access and choice of provider, under provisions of this Act.

SEC. 303. REIMBURSEMENT OF TELEMEDICINE.

The Health Care Financing Administration is directed to complete their ongoing study of reimbursement of all telemedicine services and submit a report to Congress with a proposal for reimbursement of fee-for-service medicine by March 1, 1997. The report shall utilize data compiled from the current demonstration projects already under review and gather data from other ongoing telemedicine networks. This report shall include an analysis of the cost of services provided via telemedicine.

SEC. 304. SENSE OF THE COMMITTEE CONCERNING MEDICARE.

(a) FINDINGS.—The Committee on Labor and Human Resources of the Senate finds that the Public Trustees of Medicare concluded in their 1995 Annual Report that—

(1) the Medicare program is clearly unsustainable in its present form;

(2) ''the Hospital Insurance Trust Fund, which pays inpatient hospital expenses, will be able to pay benefits for only about 7 years and is severely out of financial balance in the long range''; and

(3) the Public Trustees ''strongly recommend that the crisis presented by the financial condition of the Medicare trust fund be urgently addressed on a comprehensive basis, including a review of the programs's financing methods, benefit provisions, and delivery mechanisms''.

(b) SENSE OF THE COMMITTEE.—It is the Sense of the Committee on Labor and Human Resources of the Senate that the Senate should take measures necessary to reform the Medicare program, to provide increased choice for seniors, and to respond to the findings of the Public Trustees by protecting the short-term solvency and long-term sustainability of the Medicare program.

SEC. 305. PARITY FOR MENTAL HEALTH SERVICES.

(a) PROHIBITION.—An employee health benefit plan, or a health plan issuer offering a group health plan or an individual health plan, shall not impose treatment limitations or financial requirements on the coverage of mental health services if similar limitations or requirements are not imposed on coverage for services for other conditions.

(b) RULE OF CONSTRUCTION.—Nothing in subsection (a) shall be construed as prohibiting an employee health benefit plan, or a health plan issuer offering a group health plan or an individual health plan, from requiring preadmission screening prior to the authorization of services covered under the plan or from applying other limitations that restrict coverage for mental health services to those services that are medically necessary.

SEC. 306. WAIVER OF FOREIGN COUNTRY RESIDENCE REQUIREMENT WITH RESPECT TO INTERNATIONAL MEDICAL GRADUATES.

(a) EXTENSION OF WAIVER PROGRAM.—Section 220(c) of the Immigration and Nationality Technical Corrections Act of 1994 (8 U.S.C. 1182 note) is amended by striking ''June 1, 1996'' and inserting ''June 1, 2002''.

(b) CONDITIONS ON FEDERALLY REQUESTED WAIVERS.—Section 212(e) of the Immigration and Nationality Act (8 U.S.C. 1184(e)) is amended by inserting after ''except that in the case of a waiver requested by a State Department of Public Health or its equivalent'' the following: ''or in the case of a waiver requested by an interested United States Government agency on behalf of an alien described in clause (iii)''.

(c) RESTRICTIONS ON FEDERALLY REQUESTED WAIVERS.—Section 214(k) (8 U.S.C. 1184(k)) is amended to read as follows:

''(k)(1) In the case of a request by an interested State agency or by an interested United States Government agency for a waiver of the two-year foreign residence requirement under section 212(e) with respect to an alien described in clause (iii) of that section, the Attorney General shall not grant such waiver unless—

''(A) in the case of an alien who is otherwise contractually obligated to return to a foreign country, the government of such country furnishes the Director of the United States Information Agency with a statement in writing that it has no objection to such waiver; and

''(B)(i) in the case of a request by an interested State agency—

''(I) the alien demonstrates a bona fide offer of full-time employment, agrees to begin employment with the health facility or organization named in the waiver application within 90 days of receiving such waiver, and agrees to work for a total of not less than three years (unless the Attorney General determines that extenuating circumstances exist, such as closure of the facility or hardship to the alien would justify a lesser period of time); and

''(II) the alien's employment continues to benefit the public interest; or

''(ii) in the case of a request by an interested United States Government agency—

''(I) the alien demonstrates a bona fide offer of full-time employment that has been found to be in the public interest, agrees to begin employment with the health facility or organization named in the waiver application within 90 days of receiving such waiver, and agrees to work for a total of not less than three years (unless the Attorney General determines that extenuating circumstances exist, such as closure of the facility or hardship to the alien would justify a lesser period of time); and

''(II) the alien's employment continues to benefit the public interest;

''(C) in the case of a request by an interested State agency, the alien agrees to practice medicine in accordance with paragraph (2) for a total of not less than three years only in the geographic area or areas which are designated by the Secretary of Health and Human Services as having a shortage of health care professionals; and

''(D) in the case of a request by an interested State agency, the grant of such a waiver would not cause the number of waivers allotted for that State for that fiscal year to exceed 20.

''(2)(A) Notwithstanding section 248(2) the Attorney General may change the status of an alien that qualifies under this subsection and section 212(e) to that of an alien described in section 101(a)(15)(H)(i)(b).

''(B) No person who has obtained a change of status under subparagraph (A) and who has failed to fulfill the terms of the contract with the health facility or organization named in the waiver application shall be eligible to apply for an immigrant visa, for permanent residence, or for any other change of nonimmigrant status until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States.

''(3) Notwithstanding any other provisions of this subsection, the two-year foreign residence requirement under section 212(e) shall apply with respect to an alien in clause (iii) of that section who has not otherwise been accorded status under section 101(a)(27)(H)—

''(A) in the case of a request by an interested State agency, if at any time the alien practices medicine in an area other than an area described in paragraph (1)(C); and

''(B) in the case of a request by an interested United States Government agency, if at any time the alien engages in employment for a health facility or organization not named in the waiver application.''.

SEC. 307. ORGAN AND TISSUE DONATION INFORMATION INCLUDED WITH INCOME TAX REFUND PAYMENTS.

(a) IN GENERAL.—The Secretary of the Treasury shall include with any payment of a refund of individual income tax made during the period beginning on February 1, 1997, and ending on June 30, 1997, a copy of the document described in subsection (b).

(b) TEXT OF DOCUMENT.—The Secretary of the Treasury shall, after consultation with the Secretary of Health and Human Services and organizations promoting organ and tissue (including eye) donation, prepare a document suitable for inclusion with individual income tax refund payments which—

(1) encourages organ and tissue donation;

(2) includes a detachable organ and tissue donor card; and

(3) urges recipients to—

(A) sign the organ and tissue donor card;

(B) discuss organ and tissue donation with family members and tell family members about the recipient's desire to be an organ and tissue donor if the occasion arises; and

(C) encourage family members to request or authorize organ and tissue donation if the occasion arises.

SEC. 308. SENSE OF THE SENATE REGARDING ADEQUATE HEALTH CARE COVERAGE FOR ALL CHILDREN AND PREGNANT WOMEN.

(a) FINDINGS.—The Senate finds the following:

(1) The health care coverage of mothers and children in the United States is unacceptable, with more than 9,300,000 children and 500,000 expectant mothers having no health insurance.

(2) Among industrial nations, the United States ranks 1st in wealth but 18th in infant mortality, and 14th among such nations in maternal mortality.

(3) 22 percent of pregnant women do not have prenatal care in the first trimester, and 22 percent of all poor children are uninsured, despite the medicaid program under title XIX of the Social Security Act.

(4) Of the 1,100,000 net increase in uninsured persons from 1992 to 1993, 84 percent or 922,500 were children.

(5) Since 1987, the number of children covered by employment based health insurance has decreased, and many children lack health insurance despite the relative affordability of providing insurance for children.

(6) Health care coverage for children is relatively inexpensive and in 1993 the medicaid program spent an average of $1,012 per child compared to $8,220 per elderly adult.

(7) Uninsured children are generally children of lower income workers, who are less likely than higher income workers to have health insurance for their families because they are less likely to work for a firm that offers insurance, and if such insurance is offered, it is often too costly for lower income workers to purchase.

(8) In 1993, 61 percent of uninsured children were in families with at least one parent working full time for the entire year the child was uninsured, and about 57 percent of uninsured children had a family income at or below 150 percent of the Federal poverty level.

(9) If Congress eliminates the Federal guarantee of medicaid, an estimated 4,900,000 children may lose their guarantee of health care coverage, and those same children may be added to the currently projected 12,600,000 children who will be uninsured by the year 2002.

(10) Studies have shown that uninsured children are less likely than insured children to receive needed health and preventive care, which can affect their health status adversely throughout their lives, with such children less likely to have routine doctor visits, receive care for injuries, and have a regular source of medical care.

(11) The families of uninsured children are more likely to take the children to an emergency room than to a private physician or health maintenance organization.

(12) Children without health insurance are less likely to be appropriately immunized or receive other preventive care for childhood illnesses.

(13) Ensuring the health of children clearly increases their chances to become productive members of society and averts more serious or more expensive health conditions later in life, and ensuring that all pregnant women receive competent prenatal care also saves social costs.

(14) Although the United States has made great improvements in health care coverage through the medicaid program, it is still the only developed nation that does not ensure that all of its children and pregnant women have health care coverage.

(15) The United States should not accept a status quo in which children in many neighborhoods are more likely to have access to drugs and guns than to doctors, or accept a status quo in which health care is ensured for all prisoners but not for all children.

(b) SENSE OF THE SENATE.—It is the sense of the Senate that the issue of adequate health care for our mothers and children is important to the future of the United States, and in consideration of the importance of such issue, the Senate should pass health care legislation that will ensure health care coverage for all of the United States's pregnant women and children.

SEC. 309. SENSE OF THE SENATE REGARDING AVAILABLE TREATMENTS.

It is the sense of the Senate that the Senate finds that patients deserve to know the full range of treatments available to them and Congress should thoughtfully examine these issues to ensure that all patients get the care they deserve.

SEC. 310. MEDICAL VOLUNTEERS.

(a) SHORT TITLE.—This title may be cited as the ''Medical Volunteer Act''.

(b) TORT CLAIM IMMUNITY.—

(1) GENERAL RULE.—A health care professional who provides a health care service to a medically underserved person without receiving compensation for such health care service, shall be regarded, for purposes of any medical malpractice claim that may arise in connection with the provision of such service, as an employee of the Federal Government for purposes of the Federal tort claims provisions in title 28, United States Code.

(2) COMPENSATION.—For purposes of paragraph (1), a health care professional shall be deemed to have provided a health care service without compensation only if, prior to furnishing a health care service, the health care professional—

(A) agrees to furnish the health care service without charge to any person, including any health insurance plan or program under which the recipient is covered; and

(B) provides the recipient of the health care service with adequate notice (as determined by the Secretary) of the limited liability of the health care professional with respect to the service.

(c) PREEMPTION.—The provisions of this section shall preempt any State law to the extent that such law is inconsistent with such provisions. The provisions of this section shall not preempt any State law that provides greater incentives or protections to a health care professional rendering a health care service.

(d) DEFINITIONS.—For purposes of this section:

(1) HEALTH CARE PROFESSIONAL.—The term ''health care professional'' means a person who, at the time the person provides a health care service, is licensed or certified by the appropriate authorities for practice in a State to furnish health care services.

(2) HEALTH CARE SERVICE.—The term ''health care service'' means any medical assistance to the extent it is included in the plan submitted under title XIX of the Social Security Act for the State in which the service was provided.

(3) MEDICALLY UNDERSERVED PERSON.—The term ''medically underserved person'' means a person who resides in—

(A) a medically underserved area as defined for purposes of determining a medically underserved population under section 330 of the Public Health Service Act (42 U.S.C. 254c); or

(B) a health professional shortage area as defined in section 332 of such Act (42 U.S.C. 254e);

and who receives care in a health care facility substantially comparable to any of those designated in the Federally Supported Health Centers Assistance Act (42 U.S.C. 233 et seq.), as shall be determined in regulations promulgated by the Secretary.

(4) SECRETARY.—The term ''Secretary'' means the Secretary of the Department of Health and Human Services.

SEC. 311. EFFECTIVE DATE.

Except as otherwise provided for in this Act, the provisions of this Act shall apply as follows:

(1) With respect to group health plans, such provisions shall apply to plans offered, sold, issued, renewed, in effect, or operated on or after January 1, 1997.

(2) With respect to individual health plans, such provisions shall apply to plans offered, sold, issued, renewed, in effect, or operated on or after the date that is 6 months after the date of enactment of this Act, or January 1, 1997, whichever is later.

(3) With respect to employee health benefit plans, such provisions shall apply to such plans on the first day of the first plan year beginning on or after January 1, 1997.

SEC. 312. SEVERABILITY.

If any provision of this Act or the application of such provision to any person or circumstance is held to be unconstitutional, the remainder of this Act and the application of the provisions of such to any person or circumstance shall not be affected thereby.

TITLE IV—TAX-RELATED HEALTH PROVISIONS

SEC. 400. SHORT TITLE; AMENDMENT OF 1986 CODE.

(a) SHORT TITLE.—This title may be cited as the ''Health Insurance and Long-Term Care Affordability Act of 1996''.

(b) AMENDMENT OF 1986 CODE.—Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

Subtitle A—Increase in Deduction for Health Insurance Costs of Self-Employed Individuals

SEC. 401. INCREASE IN SELF-EMPLOYED INDIVIDUALS' DEDUCTION FOR HEALTH INSURANCE COSTS.

(a) IN GENERAL.—Section 162(l) (relating to special rules for health insurance costs of self-employed individuals) is amended—

(1) by striking ''30 percent'' in paragraph (1) and inserting ''the applicable percentage'', and

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

''(6) APPLICABLE PERCENTAGE.—For purposes of this subsection, the term 'applicable percentage' means the percentage determined in accordance with the following table:

"In the case of taxable years beginning in:	***The applicable percentage is:***
1997	*35*
1998	*40*
1999	*45*
2000	*50*
2001	*55*
2002	*60*
2003	*65*
2004	*70*
2005	*75*
2006 and thereafter	*80.''.*

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1996.

Subtitle B—Long-Term Care Provisions

CHAPTER 1—LONG-TERM CARE SERVICES AND CONTRACTS

Subchapter A—General Provisions

SEC. 411. TREATMENT OF LONG-TERM CARE INSURANCE.

(a) GENERAL RULE.—Chapter 79 (relating to definitions) is amended by inserting after section 7702A the following new section:

"SEC. 7702B. TREATMENT OF QUALIFIED LONG-TERM CARE INSURANCE.

''(a) IN GENERAL.—For purposes of this title—

''(1) a qualified long-term care insurance contract shall be treated as an accident and health insurance contract,

''(2) amounts (other than policyholder dividends, as defined in section 808, or premium refunds) received under a qualified long-term care insurance contract shall be treated as amounts received for personal injuries and sickness and shall be treated as reimbursement for expenses actually incurred for medical care (as defined in section 213(d)),

''(3) any plan of an employer providing coverage under a qualified long-term care insurance contract shall be treated as an accident and health plan with respect to such coverage,

''(4) except as provided in subsection (e)(3), amounts paid for a qualified long-term care insurance contract providing the benefits described in subsection (b)(2)(A) shall be treated as payments made for insurance for purposes of section 213(d)(1)(D), and

''(5) a qualified long-term care insurance contract shall be treated as a guaranteed renewable contract subject to the rules of section 816(e).

''(b) QUALIFIED LONG-TERM CARE INSURANCE CONTRACT.—For purposes of this title—

''(1) IN GENERAL.—The term 'qualified long-term care insurance contract' means any insurance contract if—

''(A) the only insurance protection provided under such contract is coverage of qualified long-term care services,

''(B) such contract does not pay or reimburse expenses incurred for services or items to the extent that such expenses are reimbursable under title XVIII of the Social Security Act or would be so reimbursable but for the application of a deductible or coinsurance amount,

''(C) such contract is guaranteed renewable,

''(D) such contract does not provide for a cash surrender value or other money that can be—

''(i) paid, assigned, or pledged as collateral for a loan, or

''(ii) borrowed,

other than as provided in subparagraph (E) or paragraph (2)(C), and

''(E) all refunds of premiums, and all policyholder dividends or similar amounts, under such contract are to be applied as a reduction in future premiums or to increase future benefits.

''(2) SPECIAL RULES.—

''(A) PER DIEM, ETC. PAYMENTS PERMITTED.—A contract shall not fail to be described in subparagraph (A) or (B) of paragraph (1) by reason of payments being made on a per diem or other periodic basis without regard to the expenses incurred during the period to which the payments relate.

''(B) SPECIAL RULES RELATING TO MEDICARE.—

''(i) Paragraph (1)(B) shall not apply to expenses which are reimbursable under title XVIII of the Social Security Act only as a secondary payor.

''(ii) No provision of law shall be construed or applied so as to prohibit the offering of a qualified long-term care insurance contract on the basis that the contract coordinates its benefits with those provided under such title.

''(C) REFUNDS OF PREMIUMS.—Paragraph (1)(E) shall not apply to any refund on the death of the insured, or on a complete surrender or cancellation of the contract, which cannot exceed the aggregate premiums paid under the contract. Any refund on a complete surrender or cancellation of the contract shall be includible in gross income to the extent that any deduction or exclusion was allowable with respect to the premiums.

''(c) QUALIFIED LONG-TERM CARE SERVICES.—For purposes of this section—

''(1) IN GENERAL.—The term 'qualified long-term care services' means necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services, which—

''(A) are required by a chronically ill individual, and

''(B) are provided pursuant to a plan of care prescribed by a licensed health care practitioner.

''(2) CHRONICALLY ILL INDIVIDUAL.—

''(A) IN GENERAL.—The term 'chronically ill individual' means any individual who has been certified by a licensed health care practitioner as—

''(i) being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity,

''(ii) having a level of disability similar (as determined by the Secretary in consultation with the Secretary of Health and Human Services) to the level of disability described in clause (i), or

''(iii) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.

Such term shall not include any individual otherwise meeting the requirements of the preceding sentence unless within the preceding 12-month period a licensed health care practitioner has certified that such individual meets such requirements.

''(B) ACTIVITIES OF DAILY LIVING.—For purposes of subparagraph (A), each of the following is an activity of daily living:

''(i) Eating.

''(ii) Toileting.

''(iii) Transferring.

''(iv) Bathing.

''(v) Dressing.

''(vi) Continence.

Nothing in this section shall be construed to require a contract to take into account all of the preceding activities of daily living.

''(3) MAINTENANCE OR PERSONAL CARE SERVICES.—The term 'maintenance or personal care services' means any care the primary purpose of which is the provision of needed assistance with any of the disabilities as a result of which the individual is a chronically ill individual (including the protection from threats to health and safety due to severe cognitive impairment).

''(4) LICENSED HEALTH CARE PRACTITIONER.—The term 'licensed health care practitioner' means any physician (as defined in section 1861(r)(1) of the Social Security Act (42 U.S.C. 1395x(r)(1)) and any registered professional nurse, licensed social worker, or other individual who meets such requirements as may be prescribed by the Secretary.

''(d) AGGREGATE PAYMENTS IN EXCESS OF LIMITS.—

''(1) IN GENERAL.—If the aggregate amount of periodic payments under all qualified long-term care insurance contracts with respect to an insured for any period exceeds the dollar amount in effect for such period under paragraph (3), such excess payments shall be treated as made for qualified long-term care services only to the extent of the costs incurred by the payee (not otherwise compensated for by insurance or otherwise) for qualified long-term care services provided during such period for such insured.

''(2) PERIODIC PAYMENTS.—For purposes of paragraph (1), the term 'periodic payment' means any payment (whether on a periodic basis or otherwise) made without regard to the extent of the costs incurred by the payee for qualified long-term care services.

''(3) DOLLAR AMOUNT.—The dollar amount in effect under this subsection shall be $175 per day (or the equivalent amount in the case of payments on another periodic basis).

''(4) INFLATION ADJUSTMENT.—In the case of a calendar year after 1997, the dollar amount contained in paragraph (3) shall be increased at the same time and in the same manner as amounts are increased pursuant to section 213(d)(11).

''(e) TREATMENT OF COVERAGE PROVIDED AS PART OF A LIFE INSURANCE CONTRACT.—Except as otherwise provided in regulations prescribed by the Secretary, in the case of any long-term care insurance coverage (whether or not qualified) provided by a rider on or as a part of a life insurance contract—

''(1) IN GENERAL.—This section shall apply as if the portion of the contract providing such coverage is a separate contract.

''(2) APPLICATION OF 7702.—Section 7702(c)(2) (relating to the guideline premium limitation) shall be applied by increasing the guideline premium limitation with respect to a life insurance contract, as of any date—

''(A) by the sum of any charges (but not premium payments) against the life insurance contract's cash surrender value (within the meaning of section 7702(f)(2)(A)) for such coverage made to that date under the contract, less

''(B) any such charges the imposition of which reduces the premiums paid for the contract (within the meaning of section 7702(f)(1)).

''(3) APPLICATION OF SECTION 213.—No deduction shall be allowed under section 213(a) for charges against the life insurance contract's cash surrender value described in paragraph (2), unless such charges are includible in income as a result of the application of section 72(e)(10) and the rider is a qualified long-term care insurance contract under subsection (b).

''(4) PORTION DEFINED.—For purposes of this subsection, the term 'portion' means only the terms and benefits under a life insurance contract that are in addition to the terms and benefits under the contract without regard to the coverage under a qualified long-term care insurance contract.''.

(b) RESERVE METHOD.—Clause (iii) of section 807(d)(3)(A) is amended by inserting ''(other than a qualified long-term care insurance contract, as defined in section 7702B(b))'' after ''insurance contract''.

(c) LONG-TERM CARE INSURANCE NOT PERMITTED UNDER CAFETERIA PLANS OR FLEXIBLE SPENDING ARRANGEMENTS.—

(1) CAFETERIA PLANS.—Section 125(f) is amended by adding at the end the following new sentence: ''Such term shall not include any long-term care insurance contract (as defined in section 4980C).''.

(2) FLEXIBLE SPENDING ARRANGEMENTS.—The text of section 106 (relating to contributions by employer to accident and health plans) is amended to read as follows:

''(a) GENERAL RULE.—Except as otherwise provided in this section, gross income of an employee does not include employer-provided coverage under an accident or health plan.

''(b) INCLUSION OF LONG-TERM CARE BENEFITS PROVIDED THROUGH FLEXIBLE SPENDING ARRANGEMENTS.—

''(1) IN GENERAL.—Effective on and after January 1, 1997, gross income of an employee shall include employer-provided coverage for qualified long-term care services (as defined in section 7702B(c)) to the extent that such coverage is provided through a flexible spending or similar arrangement.

''(2) FLEXIBLE SPENDING ARRANGEMENT.—For purposes of this subsection, a flexible spending arrangement is a benefit program which provides employees with coverage under which—

''(A) specified incurred expenses may be reimbursed (subject to reimbursement maximums and other reasonable conditions), and

''(B) the maximum amount of reimbursement which is reasonably available to a participant for such coverage is less than 500 percent of the value of such coverage.

In the case of an insured plan, the maximum amount reasonably available shall be determined on the basis of the underlying coverage.''.

(d) CONTINUATION COVERAGE EXCISE TAX NOT TO APPLY.—Subsection (f) of section 4980B is amended by adding at the end the following new paragraph:

''(9) CONTINUATION OF LONG-TERM CARE COVERAGE NOT REQUIRED.—A group health plan shall not be treated as failing to meet the requirements of this subsection solely by reason of failing to provide coverage under any qualified long-term care insurance contract (as defined in section 7702B(b)).''.

(e) AMOUNTS PAID TO SPOUSE OR RELATIVES TREATED AS NOT PAID FOR MEDICAL CARE.—Section 213(d) is amended by adding at the end the following new paragraph:

''(10) CERTAIN PAYMENTS TO SPOUSE OR RELATIVES TREATED AS NOT PAID FOR MEDICAL CARE.—An amount paid for a qualified long-term care service (as defined in section 7702B(c)) provided to an individual shall be treated as not paid for medical care if such service is provided—

''(A) by the spouse of the individual or a relative (directly or through a partnership, corporation, or other entity) unless the spouse or relative is a licensed professional with respect to such services, or

''(B) by a corporation or partnership which is related (within the meaning of section 267(b) or 707(b)) to the individual.

For purposes of this paragraph, the term 'relative' means an individual bearing a relationship to the individual which is described in any of paragraphs (1) through (8) of section 152(a). This paragraph shall not apply for purposes of section 105(b) with respect to reimbursements through insurance.''.

(f) CLERICAL AMENDMENT.—The table of sections for chapter 79 is amended by inserting after the item relating to section 7702A the following new item:

''Sec. 7702B. Treatment of qualified long-term care insurance.''.

(g) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to contracts issued after December 31, 1996.

(2) CONTINUATION OF EXISTING POLICIES.—In the case of any contract issued before January 1, 1997, which met the long-term care insurance

requirements of the State in which the contract was issued at the time the contract was issued—

(A) such contract shall be treated for purposes of the Internal Revenue Code of 1986 as a qualified long-term care insurance contract (as defined in section 7702B(b) of such Code), and

(B) services provided under, or reimbursed by, such contract shall be treated for such purposes as qualified long-term care services (as defined in section 7702B(c) of such Code).

(3) EXCHANGES OF EXISTING POLICIES.—If, after the date of enactment of this Act and before January 1, 1998, a contract providing for long-term care insurance coverage is exchanged solely for a qualified long-term care insurance contract (as defined in section 7702B(b) of such Code), no gain or loss shall be recognized on the exchange. If, in addition to a qualified long-term care insurance contract, money or other property is received in the exchange, then any gain shall be recognized to the extent of the sum of the money and the fair market value of the other property received. For purposes of this paragraph, the cancellation of a contract providing for long-term care insurance coverage and reinvestment of the cancellation proceeds in a qualified long-term care insurance contract within 60 days thereafter shall be treated as an exchange.

(4) ISSUANCE OF CERTAIN RIDERS PERMITTED.—For purposes of applying sections 101(f), 7702, and 7702A of the Internal Revenue Code of 1986 to any contract—

(A) the issuance of a rider which is treated as a qualified long-term care insurance contract under section 7702B, and

(B) the addition of any provision required to conform any other long-term care rider to be so treated,

shall not be treated as a modification or material change of such contract.

SEC. 412. QUALIFIED LONG-TERM CARE SERVICES TREATED AS MEDICAL CARE.

(a) GENERAL RULE.—Paragraph (1) of section 213(d) (defining medical care) is amended by striking ''or'' at the end of subparagraph (B), by redesignating subparagraph (C) as subparagraph (D), and by inserting after subparagraph (B) the following new subparagraph:

''(C) for qualified long-term care services (as defined in section 7702B(c)), or''.

(b) TECHNICAL AMENDMENTS.—

(1) Subparagraph (D) of section 213(d)(1) (as redesignated by subsection (a)) is amended by striking ''subparagraphs (A) and (B)'' and inserting ''subparagraphs (A), (B), and (C)''.

(2)(A) Paragraph (1) of section 213(d) is amended by adding at the end the following new flush sentence:

''In the case of a qualified long-term care insurance contract (as defined in section 7702B(b)), only eligible long-term care premiums (as defined in paragraph (11)) shall be taken into account under subparagraph (D).''.

(B) Subsection (d) of section 213 is amended by adding at the end the following new paragraph:

''(11) ELIGIBLE LONG-TERM CARE PREMIUMS.—

''(A) IN GENERAL.—For purposes of this section, the term 'eligible long-term care premiums' means the amount paid during a taxable year for any qualified long-term care insurance contract (as defined in section 7702B(b)) covering an individual, to the extent such amount does not exceed the limitation determined under the following table:

''In the case of an individual with an attained age before the close of the taxable year of:	***The limitation is:***
40 or less	*$200*
More than 40 but not more than 50	*375*
More than 50 but not more than 60	*750*
More than 60 but not more than 70	*2,000*
''In the case of an individual with an attained age before the close of the taxable year of:	***The limitation is:***
More than 70	*2,500.*

''(B) INDEXING.—

''(i) IN GENERAL.—In the case of any taxable year beginning in a calendar year after 1997, each dollar amount contained in subparagraph (A) shall be increased by the medical care cost adjustment of such amount for such calendar year. If any increase determined under the preceding sentence is not a multiple of $10, such increase shall be rounded to the nearest multiple of $10.

''(ii) MEDICAL CARE COST ADJUSTMENT.—For purposes of clause (i), the medical care cost adjustment for any calendar year is the percentage (if any) by which—

''(I) the medical care component of the Consumer Price Index (as defined in section 1(f)(5)) for August of the preceding calendar year, exceeds

''(II) such component for August of 1996.

The Secretary shall, in consultation with the Secretary of Health and Human Services, prescribe an adjustment which the Secretary determines is more appropriate for purposes of this paragraph than the adjustment described in the preceding sentence, and the adjustment so prescribed shall apply in lieu of the adjustment described in the preceding sentence.''.

(3) Paragraph (6) of section 213(d) is amended—

(A) by striking ''subparagraphs (A) and (B)'' and inserting ''subparagraphs (A), (B), and (C)'', and

(B) by striking ''paragraph (1)(C)'' in subparagraph (A) and inserting ''paragraph (1)(D)''.

(4) Paragraph (7) of section 213(d) is amended by striking ''subparagraphs (A) and (B)'' and inserting ''subparagraphs (A), (B), and (C)''.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1996.

SEC. 413. CERTAIN EXCHANGES OF LIFE INSURANCE CONTRACTS FOR QUALIFIED LONG-TERM CARE INSURANCE CONTRACTS NOT TAXABLE.

(a) IN GENERAL.—Subsection (a) of section 1035 (relating to certain exchanges of insurance contracts) is amended by striking the period at the end of paragraph (3) and inserting ''; or'', and by adding at the end the following new paragraph:

''(4) a contract of life insurance or an endowment or annuity contract for a qualified long-term care insurance contract (as defined in section 7702B(b)).''.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 1997.

SEC. 414. EXCEPTION FROM PENALTY TAX FOR AMOUNTS WITHDRAWN FROM CERTAIN RETIREMENT PLANS FOR QUALIFIED LONG-TERM CARE INSURANCE.

(a) IN GENERAL.—Paragraph (2) of section 72(t) is amended by adding at the end the following new subparagraph:

''(D) PREMIUMS FOR QUALIFIED LONG-TERM CARE INSURANCE CONTRACTS.—Distributions to an individual from an individual retirement plan, or from amounts attributable to employer contributions made pursuant to elective deferrals described in subparagraph (A) or (C) of section 402(g)(3), to the extent such distributions do not exceed the premiums for a qualified long-term care insurance contract (as defined in section 7702B(b)) for such individual or the spouse of such individual. In applying subparagraph (B), such premiums shall be treated as amounts not paid for medical care.''.

(b) DISTRIBUTIONS PERMITTED FROM CERTAIN PLANS TO PAY LONG-TERM CARE PREMIUMS.—

(1) Section 401(k)(2)(B)(i) is amended by striking ''or'' at the end of subclause (III), by striking ''and'' at the end of subclause (IV) and inserting ''or'', and by inserting after subclause (IV) the following new subclause:

''(V) the date distributions for premiums for a long-term care insurance contract (as defined in section 7702B(b)) for coverage of such individual or the spouse of such individual are made, and''.

(2) Section 403(b)(11) is amended by striking ''or'' at the end of subparagraph (A), by striking the period at the end of subparagraph (B) and inserting '', or'', and by inserting after subparagraph (B) the following new subparagraph:

''(C) for the payment of premiums for a long-term care insurance contract (as defined in section 7702B(b)) for coverage of the employee or the spouse of the employee.''.

(3) Subparagraph (A) of section 457(d)(1) is amended by striking ''or'' at the end of clause (ii), by striking ''and'' at the end of clause (iii) and inserting ''or'', and by inserting after clause (iii) the following new clause:

''(iv) the date distributions for premiums for a long-term care insurance contract (as defined in section 7702B(b)) for coverage of such individual or the spouse of such individual are made, and''.

(c) CONFORMING AMENDMENT.—Section 72t(2)(B) is amended by striking ''subparagraph (A) or (C))'' and inserting ''subparagraph (A), (C), or (D))''.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to payments and distributions after December 31, 1996.

SEC. 415. REPORTING REQUIREMENTS.

(a) IN GENERAL.—Subpart B of part III of subchapter A of chapter 61 is amended by adding at the end the following new section:

''SEC. 6050Q. CERTAIN LONG-TERM CARE BENEFITS.

''(a) REQUIREMENT OF REPORTING.—Any person who pays long-term care benefits shall make a return, according to the forms or regulations prescribed by the Secretary, setting forth—

''(1) the aggregate amount of such benefits paid by such person to any individual during any calendar year, and

''(2) the name, address, and TIN of such individual.

''(b) STATEMENTS TO BE FURNISHED TO PERSONS WITH RESPECT TO WHOM INFORMATION IS REQUIRED.—Every person required to make a return under subsection (a) shall furnish to each individual whose name is required to be set forth in such return a written statement showing—

''(1) the name of the person making the payments, and

''(2) the aggregate amount of long-term care benefits paid to the individual which are required to be shown on such return.

The written statement required under the preceding sentence shall be furnished to the individual on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

''(c) LONG-TERM CARE BENEFITS.—For purposes of this section, the term 'long-term care benefit' means any amount paid under a long-term care insurance policy (within the meaning of section 4980C(e)).''.

(b) PENALTIES.—

(1) Subparagraph (B) of section 6724(d)(1) is amended by redesignating clauses (ix) through (xiv) as clauses (x) through (xv), respectively, and by inserting after clause (viii) the following new clause:

''(ix) section 6050Q (relating to certain long-term care benefits),''.

(2) Paragraph (2) of section 6724(d) is amended by redesignating subparagraphs (Q) through (T) as subparagraphs (R) through (U), respectively, and by inserting after subparagraph (P) the following new subparagraph:

''(Q) section 6050Q(b) (relating to certain long-term care benefits),''.

(c) CLERICAL AMENDMENT.—The table of sections for subpart B of part III of subchapter A of chapter 61 is amended by adding at the end the following new item:

''Sec. 6050Q. Certain long-term care benefits.''.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to benefits paid after December 31, 1996.

Subchapter B—Consumer Protection Provisions

SEC. 421. POLICY REQUIREMENTS.

Section 7702B (as added by section 411) is amended by adding at the end the following new subsection:

''(f) CONSUMER PROTECTION PROVISIONS.—

''(1) IN GENERAL.—The requirements of this subsection are met with respect to any contract if any long-term care insurance policy issued under the contract meets—

''(A) the requirements of the model regulation and model Act described in paragraph (2),

''(B) the disclosure requirement of paragraph (3), and

''(C) the requirements relating to nonforfeitability under paragraph (4).

''(2) REQUIREMENTS OF MODEL REGULATION AND ACT.—

''(A) IN GENERAL.—The requirements of this paragraph are met with respect to any policy if such policy meets—

''(i) MODEL REGULATION.—The following requirements of the model regulation:

''(I) Section 7A (relating to guaranteed renewal or noncancellability), and the requirements of section 6B of the model Act relating to such section 7A.

''(II) Section 7B (relating to prohibitions on limitations and exclusions).

''(III) Section 7C (relating to extension of benefits).

''(IV) Section 7D (relating to continuation or conversion of coverage).

''(V) Section 7E (relating to discontinuance and replacement of policies).

''(VI) Section 8 (relating to unintentional lapse).

''(VII) Section 9 (relating to disclosure), other than section 9F thereof.

''(VIII) Section 10 (relating to prohibitions against post-claims underwriting).

''(IX) Section 11 (relating to minimum standards).

''(X) Section 12 (relating to requirement to offer inflation protection), except that any requirement for a signature on a rejection of inflation protection shall permit the signature to be on an application or on a separate form.

''(XI) Section 23 (relating to prohibition against preexisting conditions and probationary periods in replacement policies or certificates).

''(ii) MODEL ACT.—The following requirements of the model Act:

''(I) Section 6C (relating to preexisting conditions).

''(II) Section 6D (relating to prior hospitalization).

''(B) DEFINITIONS.—For purposes of this paragraph—

''(i) MODEL PROVISIONS.—The terms 'model regulation' and 'model Act' mean the long-term care insurance model regulation, and the long-term care insurance model Act, respectively, promulgated by the National Association of Insurance Commissioners (as adopted as of January 1993).

''(ii) COORDINATION.—Any provision of the model regulation or model Act listed under clause (i) or (ii) of subparagraph (A) shall be treated as including any other provision of such regulation or Act necessary to implement the provision.

''(3) DISCLOSURE REQUIREMENT.—The requirement of this paragraph is met with respect to any policy if such policy meets the requirements of section 4980C(d)(1).

''(4) NONFORFEITURE REQUIREMENTS.—

''(A) IN GENERAL.—The requirements of this paragraph are met with respect to any level premium long-term care insurance policy, if the issuer of such policy offers to the policyholder, including any group policyholder, a nonforfeiture provision meeting the requirements of subparagraph (B).

''(B) REQUIREMENTS OF PROVISION.—The nonforfeiture provision required under subparagraph (A) shall meet the following requirements:

''(i) The nonforfeiture provision shall be appropriately captioned.

''(ii) The nonforfeiture provision shall provide for a benefit available in the event of a default in the payment of any premiums and the amount of the benefit may be adjusted subsequent to being initially granted only as necessary to reflect changes in claims, persistency, and interest as reflected in changes in rates for premium paying policies approved by the appropriate State regulatory authority for the same policy form.

''(iii) The nonforfeiture provision shall provide at least one of the following:

''(I) Reduced paid-up insurance.

''(II) Extended term insurance.

''(III) Shortened benefit period.

''(IV) Other similar offerings approved by the Secretary.

''(5) LONG-TERM CARE INSURANCE POLICY DEFINED.—For purposes of this subsection, the term 'long-term care insurance policy' has the meaning given such term by section 4980C(e).''.

SEC. 422. REQUIREMENTS FOR ISSUERS OF LONG-TERM CARE INSURANCE POLICIES.

(a) IN GENERAL.—Chapter 43 is amended by adding at the end the following new section:

''SEC. 4980C. REQUIREMENTS FOR ISSUERS OF LONG-TERM CARE INSURANCE POLICIES.

''(a) GENERAL RULE.—There is hereby imposed on any person failing to meet the requirements of subsection (c) or (d) a tax in the amount determined under subsection (b).

''(b) AMOUNT.—

''(1) IN GENERAL.—The amount of the tax imposed by subsection (a) shall be $100 per policy for each day any requirements of subsection (c) or (d) are not met with respect to each long-term care insurance policy.

''(2) WAIVER.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that payment of the tax would be excessive relative to the failure involved.

''(c) RESPONSIBILITIES.—The requirements of this subsection are as follows:

''(1) REQUIREMENTS OF MODEL PROVISIONS.—

''(A) MODEL REGULATION.—The following requirements of the model regulation must be met:

''(i) Section 13 (relating to application forms and replacement coverage).

''(ii) Section 14 (relating to reporting requirements), except that the issuer shall also report at least annually the number of claims denied during the reporting period for each class of business (expressed as a percentage of claims denied), other than claims denied for failure to meet the waiting period or because of any applicable preexisting condition.

''(iii) Section 20 (relating to filing requirements for marketing).

''(iv) Section 21 (relating to standards for marketing), including inaccurate completion of medical histories, other than sections 21C(1) and 21C(6) thereof, except that—

''(I) in addition to such requirements, no person shall, in selling or offering to sell a long-term care insurance policy, misrepresent a material fact; and

''(II) no such requirements shall include a requirement to inquire or identify whether a prospective applicant or enrollee for long-term care insurance has accident and sickness insurance.

''(v) Section 22 (relating to appropriateness of recommended purchase).

''(vi) Section 24 (relating to standard format outline of coverage).

''(vii) Section 25 (relating to requirement to deliver shopper's guide).

''(B) MODEL ACT.—The following requirements of the model Act must be met:

''(i) Section 6F (relating to right to return), except that such section shall also apply to denials of applications and any refund shall be made within 30 days of the return or denial.

''(ii) Section 6G (relating to outline of coverage).

''(iii) Section 6H (relating to requirements for certificates under group plans).

''(iv) Section 6I (relating to policy summary).

''(v) Section 6J (relating to monthly reports on accelerated death benefits).

''(vi) Section 7 (relating to incontestability period).

''(C) DEFINITIONS.—For purposes of this paragraph, the terms 'model regulation' and 'model Act' have the meanings given such terms by section 7702B(f)(2)(B).

''(2) DELIVERY OF POLICY.—If an application for a long-term care insurance policy (or for a certificate under a group long-term care insurance policy) is approved, the issuer shall deliver to the applicant (or policyholder or certificateholder) the policy (or certificate) of insurance not later than 30 days after the date of the approval.

''(3) INFORMATION ON DENIALS OF CLAIMS.—If a claim under a long-term care insurance policy is denied, the issuer shall, within 60 days of the date of a written request by the policyholder or certificateholder (or representative)—

''(A) provide a written explanation of the reasons for the denial, and

''(B) make available all information directly relating to such denial.

''(d) DISCLOSURE.—The requirements of this subsection are met if the issuer of a long-term care insurance policy discloses in such policy and in the outline of coverage required under subsection (c)(1)(B)(ii) that the policy is intended to be a qualified long-term care insurance contract under section 7702B(b).

''(e) LONG-TERM CARE INSURANCE POLICY DEFINED.—For purposes of this section, the term 'long-term care insurance policy' means any product which is advertised, marketed, or offered as long-term care insurance.''.

(b) CONFORMING AMENDMENT.—The table of sections for chapter 43 is amended by adding at the end the following new item:

''Sec. 4980C. Requirements for issuers of long-term care insurance policies.''.

SEC. 423. COORDINATION WITH STATE REQUIREMENTS.

Nothing in this subchapter shall prevent a State from establishing, implementing, or continuing in effect standards related to the protection of policyholders of long-term care insurance policies (as defined in section 4980C(e) of the Internal Revenue Code of 1986), if such standards are not in conflict with or inconsistent with the standards established under such Code.

SEC. 424. EFFECTIVE DATES.

(a) IN GENERAL.—The provisions of, and amendments made by, this subchapter shall apply to contracts issued after December 31, 1996. The provisions of section 411(g) of this Act (relating to transition rule) shall apply to such contracts.

(b) ISSUERS.—The amendments made by section 422 shall apply to actions taken after December 31, 1996.

CHAPTER 2—TREATMENT OF ACCELERATED DEATH BENEFITS

SEC. 431. TREATMENT OF ACCELERATED DEATH BENEFITS BY RECIPIENT.

(a) IN GENERAL.—Section 101 (relating to certain death benefits) is amended by adding at the end the following new subsection:

''(g) TREATMENT OF CERTAIN ACCELERATED DEATH BENEFITS.—

''(1) IN GENERAL.—For purposes of this section, the following amounts shall be treated as

an amount paid by reason of the death of an insured:

''(A) Any amount received under a life insurance contract on the life of an insured who is a terminally ill individual.

''(B) Any amount received under a life insurance contract on the life of an insured who is a chronically ill individual (as defined in section 7702B(c)(2)) but only if such amount is received under a rider or other provision of such contract which is treated as a qualified long-term care insurance contract under section 7702B.

''(2) TREATMENT OF VIATICAL SETTLEMENTS.—

''(A) IN GENERAL.—In the case of a life insurance contract on the life of an insured described in paragraph (1), if—

''(i) any portion of such contract is sold to any viatical settlement provider, or

''(ii) any portion of the death benefit is assigned to such a provider,

the amount paid for such sale or assignment shall be treated as an amount paid under the life insurance contract by reason of the death of such insured.

''(B) VIATICAL SETTLEMENT PROVIDER.—The term 'viatical settlement provider' means any person regularly engaged in the trade or business of purchasing, or taking assignments of, life insurance contracts on the lives of insureds described in paragraph (1) if—

''(i) such person is licensed for such purposes in the State in which the insured resides, or

''(ii) in the case of an insured who resides in a State not requiring the licensing of such persons for such purposes—

''(I) such person meets the requirements of sections 8 and 9 of the Viatical Settlements Model Act of the National Association of Insurance Commissioners, and

''(II) meets the requirements of the Model Regulations of the National Association of Insurance Commissioners (relating to standards for evaluation of reasonable payments) in determining amounts paid by such person in connection with such purchases or assignments.

''(3) DEFINITIONS.—For purposes of this subsection—

''(A) TERMINALLY ILL INDIVIDUAL.—The term 'terminally ill individual' means an individual who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in 24 months or less after the date of the certification.

''(B) PHYSICIAN.—The term 'physician' has the meaning given to such term by section 1861(r)(1) of the Social Security Act (42 U.S.C. 1395x(r)(1)).

''(4) EXCEPTION FOR BUSINESS-RELATED POLICIES.—This subsection shall not apply in the case of any amount paid to any taxpayer other than the insured if such taxpayer has an insurable interest with respect to the life of the insured by reason of the insured being a director, officer, or employee of the taxpayer or by reason of the insured being financially interested in any trade or business carried on by the taxpayer.''.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to amounts received after December 31, 1996.

SEC. 432. TAX TREATMENT OF COMPANIES ISSUING QUALIFIED ACCELERATED DEATH BENEFIT RIDERS.

(a) QUALIFIED ACCELERATED DEATH BENEFIT RIDERS TREATED AS LIFE INSURANCE.—Section 818 (relating to other definitions and special rules) is amended by adding at the end the following new subsection:

''(g) QUALIFIED ACCELERATED DEATH BENEFIT RIDERS TREATED AS LIFE INSURANCE.—For purposes of this part—

''(1) IN GENERAL.—Any reference to a life insurance contract shall be treated as including a reference to a qualified accelerated death benefit rider on such contract.

''(2) QUALIFIED ACCELERATED DEATH BENEFIT RIDERS.—For purposes of this subsection, the term 'qualified accelerated death benefit rider' means any rider on a life insurance contract if the only payments under the rider are payments meeting the requirements of section 101(g).

''(3) EXCEPTION FOR LONG-TERM CARE RIDERS.—Paragraph (1) shall not apply to any rider which is treated as a long-term care insurance contract under section 7702B.''.

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendment made by this section shall take effect on January 1, 1997.

(2) ISSUANCE OF RIDER NOT TREATED AS MATERIAL CHANGE.—For purposes of applying sections 101(f), 7702, and 7702A of the Internal Revenue Code of 1986 to any contract—

(A) the issuance of a qualified accelerated death benefit rider (as defined in section 818(g) of such Code (as added by this Act)), and

(B) the addition of any provision required to conform an accelerated death benefit rider to the requirements of such section 818(g),

shall not be treated as a modification or material change of such contract.

Subtitle C—High-Risk Pools

SEC. 451. EXEMPTION FROM INCOME TAX FOR STATE-SPONSORED ORGANIZATIONS PROVIDING HEALTH COVERAGE FOR HIGH-RISK INDIVIDUALS.

(a) IN GENERAL.—Subsection (c) of section 501 (relating to list of exempt organizations) is amended by adding at the end the following new paragraph:

''(26) Any membership organization if—

''(A) such organization is established by a State exclusively to provide coverage for medical care (as defined in section 213(d)) on a not-for-profit basis to individuals described in subparagraph (B) through—

''(i) insurance issued by the organization, or

''(ii) a health maintenance organization under an arrangement with the organization,

''(B) the only individuals receiving such coverage through the organization are individuals—

''(i) who are residents of such State, and

''(ii) who, by reason of the existence or history of a medical condition, are unable to acquire medical care coverage for such condition through insurance or from a health maintenance organization or are able to acquire such coverage only at a rate which is substantially in excess of the rate for such coverage through the membership organization,

''(C) the composition of the membership in such organization is specified by such State, and

''(D) no part of the net earnings of the organization inures to the benefit of any private shareholder or individual.''.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 1996.

Subtitle D—Penalty-Free IRA Distributions

SEC. 461. DISTRIBUTIONS FROM CERTAIN PLANS MAY BE USED WITHOUT PENALTY TO PAY FINANCIALLY DEVASTATING MEDICAL EXPENSES.

(a) IN GENERAL.—Section 72(t)(3)(A) is amended by striking ''(B),''.

(b) PENALTY-FREE DISTRIBUTIONS FOR PAYMENT OF HEALTH INSURANCE PREMIUMS OF CERTAIN UNEMPLOYED INDIVIDUALS.—Paragraph (2) of section 72(t), as amended by section 414, is amended by adding at the end the following new subparagraph:

''(E) DISTRIBUTIONS TO UNEMPLOYED INDIVIDUALS FOR HEALTH INSURANCE PREMIUMS.—Distributions from an individual retirement plan to an individual after separation from employment—

''(i) if such individual has received unemployment compensation for 12 consecutive weeks under any Federal or State unemployment compensation law by reason of such separation,

''(ii) if such distributions are made during any taxable year during which such unemployment compensation is paid or the succeeding taxable year, and

''(iii) to the extent such distributions do not exceed the amount paid during the taxable year for insurance described in section 213(d)(1)(D) with respect to the individual and the individual's spouse and dependents (as defined in section 152).

To the extent provided in regulations, a self-employed individual shall be treated as meeting the requirements of clause (i) if, under Federal or State law, the individual would have received unemployment compensation but for the fact the individual was self-employed.''.

(c) CONFORMING AMENDMENT.—Subparagraph (B) of section 72(t)(2), as amended by section 414, is amended by striking ''or (D)'' and inserting '', (D), or (E)''.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1996.

Subtitle E—Revenue Offsets

CHAPTER 1—TREATMENT OF INDIVIDUALS WHO EXPATRIATE

SEC. 471. REVISION OF TAX RULES ON EXPATRIATION.

(a) IN GENERAL.—Subpart A of part II of subchapter N of chapter 1 is amended by inserting after section 877 the following new section:

''SEC. 877A. TAX RESPONSIBILITIES OF EXPATRIATION.

''(a) GENERAL RULES.—For purposes of this subtitle—

''(1) MARK TO MARKET.—Except as provided in subsection (f), all property of a covered expatriate to which this section applies shall be treated as sold on the expatriation date for its fair market value.

''(2) RECOGNITION OF GAIN OR LOSS.—In the case of any sale under paragraph (1)—

''(A) notwithstanding any other provision of this title, any gain arising from such sale shall be taken into account for the taxable year of the sale unless such gain is excluded from gross income under part III of subchapter B, and

''(B) any loss arising from such sale shall be taken into account for the taxable year of the sale to the extent otherwise provided by this title, except that section 1091 shall not apply (and section 1092 shall apply) to any such loss.

''(3) EXCLUSION FOR CERTAIN GAIN.—The amount which would (but for this paragraph) be includible in the gross income of any individual by reason of this section shall be reduced (but not below zero) by $600,000. For purposes of this paragraph, allocable expatriation gain taken into account under subsection (f)(2) shall be treated in the same manner as an amount required to be includible in gross income.

''(4) ELECTION TO CONTINUE TO BE TAXED AS UNITED STATES CITIZEN.—

''(A) IN GENERAL.—If an expatriate elects the application of this paragraph—

''(i) this section (other than this paragraph) shall not apply to the expatriate, but

''(ii) the expatriate shall be subject to tax under this title, with respect to property to which this section would apply but for such election, in the same manner as if the individual were a United States citizen.

''(B) LIMITATION ON AMOUNT OF ESTATE, GIFT, AND GENERATION-SKIPPING TRANSFER TAXES.—The aggregate amount of taxes imposed under subtitle B with respect to any transfer of property by reason of an election under subparagraph (A) shall not exceed the amount of income tax which would be due if the property were sold for its fair market value immediately before the time of the transfer or death (taking into account the rules of paragraph (2)).

''(C) REQUIREMENTS.—Subparagraph (A) shall not apply to an individual unless the individual—

''(i) provides security for payment of tax in such form and manner, and in such amount, as the Secretary may require,

''(ii) consents to the waiver of any right of the individual under any treaty of the United States which would preclude assessment or collection

of any tax which may be imposed by reason of this paragraph, and

''(iii) complies with such other requirements as the Secretary may prescribe.

''(D) ELECTION.—An election under subparagraph (A) shall apply to all property to which this section would apply but for the election and, once made, shall be irrevocable. Such election shall also apply to property the basis of which is determined in whole or in part by reference to the property with respect to which the election was made.

''(b) ELECTION TO DEFER TAX.—

''(1) IN GENERAL.—If the taxpayer elects the application of this subsection with respect to any property—

''(A) no amount shall be required to be included in gross income under subsection (a)(1) with respect to the gain from such property for the taxable year of the sale, but

''(B) the taxpayer's tax for the taxable year in which such property is disposed of shall be increased by the deferred tax amount with respect to the property.

Except to the extent provided in regulations, subparagraph (B) shall apply to a disposition whether or not gain or loss is recognized in whole or in part on the disposition.

''(2) DEFERRED TAX AMOUNT.—

''(A) IN GENERAL.—For purposes of paragraph (1), the term 'deferred tax amount' means, with respect to any property, an amount equal to the sum of—

''(i) the difference between the amount of tax paid for the taxable year described in paragraph (1)(A) and the amount which would have been paid for such taxable year if the election under paragraph (1) had not applied to such property, plus

''(ii) an amount of interest on the amount described in clause (i) determined for the period—

''(I) beginning on the 91st day after the expatriation date, and

''(II) ending on the due date for the taxable year described in paragraph (1)(B),

by using the rates and method applicable under section 6621 for underpayments of tax for such period.

For purposes of clause (ii), the due date is the date prescribed by law (determined without regard to extension) for filing the return of the tax imposed by this chapter for the taxable year.

''(B) ALLOCATION OF LOSSES.—For purposes of subparagraph (A), any losses described in subsection (a)(2)(B) shall be allocated ratably among the gains described in subsection (a)(2)(A).

''(3) SECURITY.—

''(A) IN GENERAL.—No election may be made under paragraph (1) with respect to any property unless adequate security is provided with respect to such property.

''(B) ADEQUATE SECURITY.—For purposes of subparagraph (A), security with respect to any property shall be treated as adequate security if—

''(i) it is a bond in an amount equal to the deferred tax amount under paragraph (2)(A) for the property, or

''(ii) the taxpayer otherwise establishes to the satisfaction of the Secretary that the security is adequate.

''(4) WAIVER OF CERTAIN RIGHTS.—No election may be made under paragraph (1) unless the taxpayer consents to the waiver of any right under any treaty of the United States which would preclude assessment or collection of any tax imposed by reason of this section.

''(5) DISPOSITIONS.—For purposes of this subsection, a taxpayer making an election under this subsection with respect to any property shall be treated as having disposed of such property—

''(A) immediately before death if such property is held at such time, and

''(B) at any time the security provided with respect to the property fails to meet the requirements of paragraph (3) and the taxpayer does not correct such failure within the time specified by the Secretary.

''(6) ELECTIONS.—An election under paragraph (1) shall only apply to property described in the election and, once made, is irrevocable. An election may be under paragraph (1) with respect to an interest in a trust with respect to which gain is required to be recognized under subsection (f)(1).

''(c) COVERED EXPATRIATE.—For purposes of this section—

''(1) IN GENERAL.—The term 'covered expatriate' means an expatriate—

''(A) whose average annual net income tax (as defined in section 38(c)(1)) for the period of 5 taxable years ending before the expatriation date is greater than $100,000, or

''(B) whose net worth as of such date is $500,000 or more.

If the expatriation date is after 1996, such $100,000 and $500,000 amounts shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) for such calendar year by substituting '1995' for '1992' in subparagraph (B) thereof. Any increase under the preceding sentence shall be rounded to the nearest multiple of $1,000.

''(2) EXCEPTIONS.—An individual shall not be treated as a covered expatriate if—

''(A) the individual—

''(i) became at birth a citizen of the United States and a citizen of another country and, as of the expatriation date, continues to be a citizen of, and is taxed as a resident of, such other country, and

''(ii) has been a resident of the United States (as defined in section 7701(b)(1)(A)(ii)) for not more than 8 taxable years during the 15-taxable year period ending with the taxable year during which the expatriation date occurs, or

''(B)(i) the individual's relinquishment of United States citizenship occurs before such individual attains age 18½, and

''(ii) the individual has been a resident of the United States (as so defined) for not more than 5 taxable years before the date of relinquishment.

''(d) PROPERTY TO WHICH SECTION APPLIES.—For purposes of this section—

''(1) IN GENERAL.—Except as otherwise provided by the Secretary, this section shall apply to—

''(A) any interest in property held by a covered expatriate on the expatriation date the gain from which would be includible in the gross income of the expatriate if such interest had been sold for its fair market value on such date in a transaction in which gain is recognized in whole or in part, and

''(B) any other interest in a trust to which subsection (f) applies.

''(2) EXCEPTIONS.—This section shall not apply to the following property:

''(A) UNITED STATES REAL PROPERTY INTERESTS.—Any United States real property interest (as defined in section 897(c)(1)), other than stock of a United States real property holding corporation which does not, on the expatriation date, meet the requirements of section 897(c)(2).

''(B) INTEREST IN CERTAIN RETIREMENT PLANS.—

''(i) IN GENERAL.—Any interest in a qualified retirement plan (as defined in section 4974(c)), other than any interest attributable to contributions which are in excess of any limitation or which violate any condition for tax-favored treatment.

''(ii) FOREIGN PENSION PLANS.—

''(I) IN GENERAL.—Under regulations prescribed by the Secretary, interests in foreign pension plans or similar retirement arrangements or programs.

''(II) LIMITATION.—The value of property which is treated as not sold by reason of this subparagraph shall not exceed $500,000.

''(e) DEFINITIONS.—For purposes of this section—

''(1) EXPATRIATE.—The term 'expatriate' means—

''(A) any United States citizen who relinquishes his citizenship, or

''(B) any long-term resident of the United States who—

''(i) ceases to be a lawful permanent resident of the United States (within the meaning of section 7701(b)(6)), or

''(ii) commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country and who does not waive the benefits of such treaty applicable to residents of the foreign country.

''(2) EXPATRIATION DATE.—The term 'expatriation date' means—

''(A) the date an individual relinquishes United States citizenship, or

''(B) in the case of a long-term resident of the United States, the date of the event described in clause (i) or (ii) of paragraph (1)(B).

''(3) RELINQUISHMENT OF CITIZENSHIP.—A citizen shall be treated as relinquishing his United States citizenship on the earliest of—

''(A) the date the individual renounces his United States nationality before a diplomatic or consular officer of the United States pursuant to paragraph (5) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a)(5)),

''(B) the date the individual furnishes to the United States Department of State a signed statement of voluntary relinquishment of United States nationality confirming the performance of an act of expatriation specified in paragraph (1), (2), (3), or (4) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a)(1)–(4)),

''(C) the date the United States Department of State issues to the individual a certificate of loss of nationality, or

''(D) the date a court of the United States cancels a naturalized citizen's certificate of naturalization.

Subparagraph (A) or (B) shall not apply to any individual unless the renunciation or voluntary relinquishment is subsequently approved by the issuance to the individual of a certificate of loss of nationality by the United States Department of State.

''(4) LONG-TERM RESIDENT.—

''(A) IN GENERAL.—The term 'long-term resident' means any individual (other than a citizen of the United States) who is a lawful permanent resident of the United States in at least 8 taxable years during the period of 15 taxable years ending with the taxable year during which the expatriation date occurs. For purposes of the preceding sentence, an individual shall not be treated as a lawful permanent resident for any taxable year if such individual is treated as a resident of a foreign country for the taxable year under the provisions of a tax treaty between the United States and the foreign country and does not waive the benefits of such treaty applicable to residents of the foreign country.

''(B) SPECIAL RULE.—For purposes of subparagraph (A), there shall not be taken into account—

''(i) any taxable year during which any prior sale is treated under subsection (a)(1) as occurring, or

''(ii) any taxable year prior to the taxable year referred to in clause (i).

''(f) SPECIAL RULES APPLICABLE TO BENEFICIARIES' INTERESTS IN TRUST.—

''(1) IN GENERAL.—Except as provided in paragraph (2), if an individual is determined under paragraph (3) to hold an interest in a trust—

''(A) the individual shall not be treated as having sold such interest,

''(B) such interest shall be treated as a separate share in the trust, and

''(C)(i) such separate share shall be treated as a separate trust consisting of the assets allocable to such share,

''(ii) the separate trust shall be treated as having sold its assets immediately before the expatriation date for their fair market value and as having distributed all of its assets to the individual as of such time, and

''(iii) the individual shall be treated as having recontributed the assets to the separate trust.

Subsection (a)(2) shall apply to any income, gain, or loss of the individual arising from a distribution described in subparagraph (C)(ii).

''(2) SPECIAL RULES FOR INTERESTS IN QUALIFIED TRUSTS.—

''(A) IN GENERAL.—If the trust interest described in paragraph (1) is an interest in a qualified trust—

''(i) paragraph (1) and subsection (a) shall not apply, and

''(ii) in addition to any other tax imposed by this title, there is hereby imposed on each distribution with respect to such interest a tax in the amount determined under subparagraph (B).

''(B) AMOUNT OF TAX.—The amount of tax under subparagraph (A)(ii) shall be equal to the lesser of—

''(i) the highest rate of tax imposed by section 1(e) for the taxable year in which the expatriation date occurs, multiplied by the amount of the distribution, or

''(ii) the balance in the deferred tax account immediately before the distribution determined without regard to any increases under subparagraph (C)(ii) after the 30th day preceding the distribution.

''(C) DEFERRED TAX ACCOUNT.—For purposes of subparagraph (B)(ii)—

''(i) OPENING BALANCE.—The opening balance in a deferred tax account with respect to any trust interest is an amount equal to the tax which would have been imposed on the allocable expatriation gain with respect to the trust interest if such gain had been included in gross income under subsection (a).

''(ii) INCREASE FOR INTEREST.—The balance in the deferred tax account shall be increased by the amount of interest determined (on the balance in the account at the time the interest accrues), for periods after the 90th day after the expatriation date, by using the rates and method applicable under section 6621 for underpayments of tax for such periods.

''(iii) DECREASE FOR TAXES PREVIOUSLY PAID.—The balance in the tax deferred account shall be reduced—

''(I) by the amount of taxes imposed by subparagraph (A) on any distribution to the person holding the trust interest, and

''(II) in the case of a person holding a nonvested interest, to the extent provided in regulations, by the amount of taxes imposed by subparagraph (A) on distributions from the trust with respect to nonvested interests not held by such person.

''(D) ALLOCABLE EXPATRIATION GAIN.—For purposes of this paragraph, the allocable expatriation gain with respect to any beneficiary's interest in a trust is the amount of gain which would be allocable to such beneficiary's vested and nonvested interests in the trust if the beneficiary held directly all assets allocable to such interests.

''(E) TAX DEDUCTED AND WITHHELD.—

''(i) IN GENERAL.—The tax imposed by subparagraph (A)(ii) shall be deducted and withheld by the trustees from the distribution to which it relates.

''(ii) EXCEPTION WHERE FAILURE TO WAIVE TREATY RIGHTS.—If an amount may not be deducted and withheld under clause (i) by reason of the distributee failing to waive any treaty right with respect to such distribution—

''(I) the tax imposed by subparagraph (A)(ii) shall be imposed on the trust and each trustee shall be personally liable for the amount of such tax, and

''(II) any other beneficiary of the trust shall be entitled to recover from the distributee the amount of such tax imposed on the other beneficiary.

''(F) DISPOSITION.—If a trust ceases to be a qualified trust at any time, a covered expatriate disposes of an interest in a qualified trust, or a covered expatriate holding an interest in a qualified trust dies, then, in lieu of the tax imposed by subparagraph (A)(ii), there is hereby imposed a tax equal to the lesser of—

''(i) the tax determined under paragraph (1) as if the expatriation date were the date of such cessation, disposition, or death, whichever is applicable, or

''(ii) the balance in the tax deferred account immediately before such date.

Such tax shall be imposed on the trust and each trustee shall be personally liable for the amount of such tax and any other beneficiary of the trust shall be entitled to recover from the covered expatriate or the estate the amount of such tax imposed on the other beneficiary.

''(G) DEFINITIONS AND SPECIAL RULE.—For purposes of this paragraph—

''(i) QUALIFIED TRUST.—The term 'qualified trust' means a trust—

''(I) which is organized under, and governed by, the laws of the United States or a State, and

''(II) with respect to which the trust instrument requires that at least 1 trustee of the trust be an individual citizen of the United States or a domestic corporation.

''(ii) VESTED INTEREST.—The term 'vested interest' means any interest which, as of the expatriation date, is vested in the beneficiary.

''(iii) NONVESTED INTEREST.—The term 'nonvested interest' means, with respect to any beneficiary, any interest in a trust which is not a vested interest. Such interest shall be determined by assuming the maximum exercise of discretion in favor of the beneficiary and the occurrence of all contingencies in favor of the beneficiary.

''(iv) ADJUSTMENTS.—The Secretary may provide for such adjustments to the bases of assets in a trust or a deferred tax account, and the timing of such adjustments, in order to ensure that gain is taxed only once.

''(3) DETERMINATION OF BENEFICIARIES' INTEREST IN TRUST.—

''(A) DETERMINATIONS UNDER PARAGRAPH (1).—For purposes of paragraph (1), a beneficiary's interest in a trust shall be based upon all relevant facts and circumstances, including the terms of the trust instrument and any letter of wishes or similar document, historical patterns of trust distributions, and the existence of and functions performed by a trust protector or any similar advisor.

''(B) OTHER DETERMINATIONS.—For purposes of this section—

''(i) CONSTRUCTIVE OWNERSHIP.—If a beneficiary of a trust is a corporation, partnership, trust, or estate, the shareholders, partners, or beneficiaries shall be deemed to be the trust beneficiaries for purposes of this section.

''(ii) TAXPAYER RETURN POSITION.—A taxpayer shall clearly indicate on its income tax return—

''(I) the methodology used to determine that taxpayer's trust interest under this section, and

''(II) if the taxpayer knows (or has reason to know) that any other beneficiary of such trust is using a different methodology to determine such beneficiary's trust interest under this section.

''(g) TERMINATION OF DEFERRALS, ETC.—On the date any property held by an individual is treated as sold under subsection (a), notwithstanding any other provision of this title—

''(1) any period during which recognition of income or gain is deferred shall terminate, and

''(2) any extension of time for payment of tax shall cease to apply and the unpaid portion of such tax shall be due and payable at the time and in the manner prescribed by the Secretary.

''(h) IMPOSITION OF TENTATIVE TAX.—

''(1) IN GENERAL.—If an individual is required to include any amount in gross income under subsection (a) for any taxable year, there is hereby imposed, immediately before the expatriation date, a tax in an amount equal to the amount of tax which would be imposed if the taxable year were a short taxable year ending on the expatriation date.

''(2) DUE DATE.—The due date for any tax imposed by paragraph (1) shall be the 90th day after the expatriation date.

''(3) TREATMENT OF TAX.—Any tax paid under paragraph (1) shall be treated as a payment of the tax imposed by this chapter for the taxable year to which subsection (a) applies.

''(4) DEFERRAL OF TAX.—The provisions of subsection (b) shall apply to the tax imposed by this subsection to the extent attributable to gain includible in gross income by reason of this section.

''(i) COORDINATION WITH ESTATE AND GIFT TAXES.—If subsection (a) applies to property held by an individual for any taxable year and—

''(1) such property is includible in the gross estate of such individual solely by reason of section 2107, or

''(2) section 2501 applies to a transfer of such property by such individual solely by reason of section 2501(a)(3),

then there shall be allowed as a credit against the additional tax imposed by section 2101 or 2501, whichever is applicable, solely by reason of section 2107 or 2501(a)(3) an amount equal to the increase in the tax imposed by this chapter for such taxable year by reason of this section.

''(j) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including regulations—

''(1) to prevent double taxation by ensuring that—

''(A) appropriate adjustments are made to basis to reflect gain recognized by reason of subsection (a) and the exclusion provided by subsection (a)(3), and

''(B) any gain by reason of a deemed sale under subsection (a) of an interest in a corporation, partnership, trust, or estate is reduced to reflect that portion of such gain which is attributable to an interest in a trust which a shareholder, partner, or beneficiary is treated as holding directly under subsection (f)(3)(B)(i), and

''(2) which provide for the proper allocation of the exclusion under subsection (a)(3) to property to which this section applies.

''(k) CROSS REFERENCE.—

''For income tax treatment of individuals who terminate United States citizenship, see section 7701(a)(47).''.

(b) INCLUSION IN INCOME OF GIFTS AND INHERITANCES FROM COVERED EXPATRIATES.—Section 102 (relating to gifts, etc. not included in gross income) is amended by adding at the end the following new subsection:

''(d) GIFTS AND INHERITANCES FROM COVERED EXPATRIATES.—Subsection (a) shall not exclude from gross income the value of any property acquired by gift, bequest, devise, or inheritance from a covered expatriate after the expatriation date. For purposes of this subsection, any term used in this subsection which is also used in section 877A shall have the same meaning as when used in section 877A.''.

(c) DEFINITION OF TERMINATION OF UNITED STATES CITIZENSHIP.—Section 7701(a) is amended by adding at the end the following new paragraph:

''(47) TERMINATION OF UNITED STATES CITIZENSHIP.—An individual shall not cease to be treated as a United States citizen before the date on which the individual's citizenship is treated as relinquished under section 877A(e)(3).''.

(d) CONFORMING AMENDMENTS.—

(1) Section 877 is amended by adding at the end the following new subsection:

''(f) APPLICATION.—This section shall not apply to any individual who relinquishes (within the meaning of section 877A(e)(3)) United States citizenship on or after February 6, 1995.''.

(2) Section 2107(c) is amended by adding at the end the following new paragraph:

''(3) CROSS REFERENCE.—For credit against the tax imposed by subsection (a) for expatriation tax, see section 877A(i).''.

(3) Section 2501(a)(3) is amended by adding at the end the following new flush sentence:

''For credit against the tax imposed under this section by reason of this paragraph, see section 877A(i).''.

(4) Paragraph (10) of section 7701(b) is amended by adding at the end the following new sentence: ''This paragraph shall not apply to any long-term resident of the United States who is an expatriate (as defined in section 877A(e)(1)).''.

(e) CLERICAL AMENDMENT.—The table of sections for subpart A of part II of subchapter N of chapter 1 is amended by inserting after the item relating to section 877 the following new item:

''Sec. 877A. Tax responsibilities of expatriation.''.

(f) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in this subsection, the amendments made by this section shall apply to expatriates (within the meaning of section 877A(e) of the Internal Revenue Code of 1986, as added by this section) whose expatriation date (as so defined) occurs on or after February 6, 1995.

(2) GIFTS AND BEQUESTS.—Section 102(d) of the Internal Revenue Code of 1986 (as added by subsection (b)) shall apply to amounts received from expatriates (as so defined) whose expatriation date (as so defined) occurs on and after February 6, 1995.

(3) SPECIAL RULES RELATING TO CERTAIN ACTS OCCURRING BEFORE FEBRUARY 6, 1995.—In the case of an individual who took an act of expatriation specified in paragraph (1), (2), (3), or (4) of section 349(a) of the Immigration and Nationality Act (8 U.S.C. 1481(a) (1)–(4)) before February 6, 1995, but whose expatriation date (as so defined) occurs after February 6, 1995—

(A) the amendment made by subsection (c) shall not apply,

(B) the amendment made by subsection (d)(1) shall not apply for any period prior to the expatriation date, and

(C) the other amendments made by this section shall apply as of the expatriation date.

(4) DUE DATE FOR TENTATIVE TAX.—The due date under section 877A(h)(2) of such Code shall in no event occur before the 90th day after the date of the enactment of this Act.

SEC. 472. INFORMATION ON INDIVIDUALS EXPATRIATING.

(a) IN GENERAL.—Subpart A of part III of subchapter A of chapter 61 is amended by inserting after section 6039E the following new section:

''SEC. 6039F. INFORMATION ON INDIVIDUALS EXPATRIATING.

''(a) REQUIREMENT.—

''(1) IN GENERAL.—Notwithstanding any other provision of law, any expatriate (within the meaning of section 877A(e)(1)) shall provide a statement which includes the information described in subsection (b).

''(2) TIMING.—

''(A) CITIZENS.—In the case of an expatriate described in section 877(e)(1)(A), such statement shall be—

''(i) provided not later than the expatriation date (within the meaning of section 877A(e)(2)), and

''(ii) provided to the person or court referred to in section 877A(e)(3).

''(B) NONCITIZENS.—In the case of an expatriate described in section 877A(e)(1)(B), such statement shall be provided to the Secretary with the return of tax imposed by chapter 1 for the taxable year during which the event described in such section occurs.

''(b) INFORMATION TO BE PROVIDED.—Information required under subsection (a) shall include—

''(1) the taxpayer's TIN,

''(2) the mailing address of such individual's principal foreign residence,

''(3) the foreign country in which such individual is residing,

''(4) the foreign country of which such individual is a citizen,

''(5) in the case of an individual having a net worth of at least the dollar amount applicable under section 877A(c)(1)(B), information detailing the assets and liabilities of such individual, and

''(6) such other information as the Secretary may prescribe.

''(c) PENALTY.—Any individual failing to provide a statement required under subsection (a) shall be subject to a penalty for each year during any portion of which such failure continues in an amount equal to the greater of—

''(1) 5 percent of the additional tax required to be paid under section 877A for such year, or

''(2) $1,000,

unless it is shown that such failure is due to reasonable cause and not to willful neglect.

''(d) INFORMATION TO BE PROVIDED TO SECRETARY.—Notwithstanding any other provision of law—

''(1) any Federal agency or court which collects (or is required to collect) the statement under subsection (a) shall provide to the Secretary—

''(A) a copy of any such statement, and

''(B) the name (and any other identifying information) of any individual refusing to comply with the provisions of subsection (a),

''(2) the Secretary of State shall provide to the Secretary a copy of each certificate as to the loss of American nationality under section 358 of the Immigration and Nationality Act which is approved by the Secretary of State, and

''(3) the Federal agency primarily responsible for administering the immigration laws shall provide to the Secretary the name of each lawful permanent resident of the United States (within the meaning of section 7701(b)(6)) whose status as such has been revoked or has been administratively or judicially determined to have been abandoned.

Notwithstanding any other provision of law, not later than 30 days after the close of each calendar quarter, the Secretary shall publish in the Federal Register the name of each individual relinquishing United States citizenship (within the meaning of section 877A(e)(3)) with respect to whom the Secretary receives information under the preceding sentence during such quarter.

''(e) EXEMPTION.—The Secretary may by regulations exempt any class of individuals from the requirements of this section if the Secretary determines that applying this section to such individuals is not necessary to carry out the purposes of this section.''.

(b) CLERICAL AMENDMENT.—The table of sections for such subpart A is amended by inserting after the item relating to section 6039E the following new item:

''Sec. 6039F. Information on individuals expatriating.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to individuals to whom section 877A of the Internal Revenue Code of 1986 applies and whose expatriation date (as defined in section 877A(e)(2)) occurs on or after February 6, 1995, except that no statement shall be required by such amendments before the 90th day after the date of the enactment of this Act.

SEC. 473. REPORT ON TAX COMPLIANCE BY UNITED STATES CITIZENS AND RESIDENTS LIVING ABROAD.

Not later than 90 days after the date of the enactment of this Act, the Secretary of the Treasury shall prepare and submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a report—

(1) describing the compliance with subtitle A of the Internal Revenue Code of 1986 by citizens and lawful permanent residents of the United States (within the meaning of section 7701(b)(6) of such Code) residing outside the United States, and

(2) recommending measures to improve such compliance (including improved coordination between executive branch agencies).

CHAPTER 2—COMPANY-OWNED INSURANCE

SEC. 495. DENIAL OF DEDUCTION FOR INTEREST ON LOANS WITH RESPECT TO COMPANY-OWNED INSURANCE.

(a) IN GENERAL.—Paragraph (4) of section 264(a) is amended—

(1) by inserting '', or any endowment or annuity contracts owned by the taxpayer covering any individual,'' after ''the life of any individual'', and

(2) by striking all that follows ''carried on by the taxpayer'' and inserting a period.

(b) EXCEPTION FOR CONTRACTS RELATING TO KEY PERSONS; PERMISSIBLE INTEREST RATES.—Section 264 is amended—

(1) by striking ''Any'' in subsection (a)(4) and inserting ''Except as provided in subsection (d), any'', and

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

''(d) SPECIAL RULES FOR APPLICATION OF SUBSECTION (a)(4).—

''(1) EXCEPTION FOR KEY PERSONS.—Subsection (a)(4) shall not apply to any interest paid or accrued on any indebtedness with respect to policies or contracts covering an individual who is a key person to the extent that the aggregate amount of such indebtedness with respect to policies and contracts covering such individual does not exceed $50,000.

''(2) INTEREST RATE CAP ON KEY PERSONS AND PRE-1986 CONTRACTS.—

''(A) IN GENERAL.—No deduction shall be allowed by reason of paragraph (1) or the last sentence of subsection (a) with respect to interest paid or accrued for any month to the extent the amount of such interest exceeds the amount which would have been determined if the applicable rate of interest were used for such month.

''(B) APPLICABLE RATE OF INTEREST.—For purposes of subparagraph (A)—

''(i) IN GENERAL.—The applicable rate of interest for any month is the rate of interest described as Moody's Corporate Bond Yield Average-Monthly Average Corporates as published by Moody's Investors Service, Inc., or any successor thereto, for such month.

''(ii) PRE-1986 CONTRACT.—In the case of indebtedness on a contract to which the last sentence of subsection (a) applies—

''(I) which is a contract providing a fixed rate of interest, the applicable rate of interest for any month shall be the Moody's rate described in clause (i) for the month in which the contract was purchased, or

''(II) which is a contract providing a variable rate of interest, the applicable rate of interest for any month in an applicable period shall be such Moody's rate for the last month preceding such period.

For purposes of subclause (II), the taxpayer shall elect an applicable period for such contract on its return of tax imposed by this chapter for its first taxable year ending on or after October 13, 1995. Such applicable period shall be for any number of months (not greater than 12) specified in the election and may not be changed by the taxpayer without the consent of the Secretary.

''(3) KEY PERSON.—For purposes of paragraph (1), the term 'key person' means an officer or 20-percent owner, except that the number of individuals who may be treated as key persons with respect to any taxpayer shall not exceed the greater of—

''(A) 5 individuals, or

''(B) the lesser of 5 percent of the total officers and employees of the taxpayer or 10 individuals.

''(4) 20-PERCENT OWNER.—For purposes of this subsection, the term '20-percent owner' means—

''(A) if the taxpayer is a corporation, any person who owns directly 20 percent or more of the outstanding stock of the corporation or stock possessing 20 percent or more of the total combined voting power of all stock of the corporation, or

''(B) if the taxpayer is not a corporation, any person who owns 20 percent or more of the capital or profits interest in the employer.

''(5) AGGREGATION RULES.—

''(A) IN GENERAL.—For purposes of paragraph (4)(A) and applying the $50,000 limitation in paragraph (1)—

''(i) all members of a controlled group shall be treated as 1 taxpayer, and

''(ii) such limitation shall be allocated among the members of such group in such manner as the Secretary may prescribe.

''(B) CONTROLLED GROUP.—For purposes of this paragraph, all persons treated as a single employer under subsection (a) or (b) of section 52 or subsection (m) or (o) of section 414 shall be treated as members of a controlled group.''.

(c) EFFECTIVE DATES.—

(1) IN GENERAL.—The amendments made by this section shall apply to interest paid or accrued after December 31, 1995.

(2) TRANSITION RULE FOR EXISTING INDEBTEDNESS.—

(A) IN GENERAL.—In the case of—

(i) indebtedness incurred before January 1, 1996, or

(ii) indebtedness incurred before January 1, 1997 with respect to any contract or policy entered into in 1994 or 1995,

the amendments made by this section shall not apply to qualified interest paid or accrued on such indebtedness after October 13, 1995, and before January 1, 1999.

(B) QUALIFIED INTEREST.—For purposes of subparagraph (A), the qualified interest with respect to any indebtedness for any month is the amount of interest which would be paid or accrued for such month on such indebtedness if—

(i) in the case of any interest paid or accrued after December 31, 1995, indebtedness with respect to no more than 20,000 insured individuals were taken into account, and

(ii) the lesser of the following rates of interest were used for such month:

(I) The rate of interest specified under the terms of the indebtedness as in effect on October 13, 1995 (and without regard to modification of such terms after such date).

(II) The applicable percentage rate of interest described as Moody's Corporate Bond Yield Average-Monthly Average Corporates as published by Moody's Investors Service, Inc., or any successor thereto, for such month.

For purposes of clause (i), all persons treated as a single employer under subsection (a) or (b) of section 52 of the Internal Revenue Code of 1986 or subsection (m) or (o) of section 414 of such Code shall be treated as one person.

(C) APPLICABLE PERCENTAGE.—For purposes of subparagraph (B), the applicable percentage is as follows:

For calendar year:	The percentage is:
1995	100 percent
1996	90 percent
1997	80 percent
1998	70 percent.

(3) SPECIAL RULE FOR GRANDFATHERED CONTRACTS.—This section shall not apply to any contract purchased on or before June 20, 1986, except that section 264(d)(2) of the Internal Revenue Code of 1986 shall apply to interest paid or accrued after October 13, 1995.

(d) SPREAD OF INCOME INCLUSION ON SURRENDER, ETC. OF CONTRACTS.—

(1) IN GENERAL.—If any amount is received under any life insurance policy or endowment or annuity contract described in paragraph (4) of section 264(a) of the Internal Revenue Code of 1986—

(A) on the complete surrender, redemption, or maturity of such policy or contract during calendar year 1996, 1997, or 1998, or

(B) in full discharge during any such calendar year of the obligation under the policy or contract which is in the nature of a refund of the consideration paid for the policy or contract,

then (in lieu of any other inclusion in gross income) such amount shall be includible in gross income ratably over the 4-taxable year period beginning with the taxable year such amount would (but for this paragraph) be includible. The preceding sentence shall only apply to the extent the amount is includible in gross income for the taxable year in which the event described in subparagraph (A) or (B) occurs.

(2) SPECIAL RULES FOR APPLYING SECTION 264.—A contract shall not be treated as—

(A) failing to meet the requirement of section 264(c)(1) of the Internal Revenue Code of 1986, or

(B) a single premium contract under section 264(b)(1) of such Code,

solely by reason of an occurrence described in subparagraph (A) or (B) of paragraph (1) of this subsection or solely by reason of no additional premiums being received under the contract by reason of a lapse occurring after October 13, 1995.

(3) SPECIAL RULE FOR DEFERRED ACQUISITION COSTS.—In the case of the occurrence of any event described in subparagraph (A) or (B) of paragraph (1) of this subsection with respect to any policy or contract—

(A) section 848 of the Internal Revenue Code of 1986 shall not apply to the unamortized balance (if any) of the specified policy acquisition expenses attributable to such policy or contract immediately before the insurance company's taxable year in which such event occurs, and

(B) there shall be allowed as a deduction to such company for such taxable year under chapter 1 of such Code an amount equal to such unamortized balance.

TITLE V—HEALTH CARE FRAUD AND ABUSE PREVENTION

SEC. 500. AMENDMENTS.

Except as otherwise specifically provided, whenever in this title an amendment is expressed in terms of an amendment to or repeal of a section or other provision, the reference shall be considered to be made to that section or other provision of the Social Security Act.

Subtitle A—Fraud and Abuse Control Program

SEC. 501. FRAUD AND ABUSE CONTROL PROGRAM.

(a) ESTABLISHMENT OF PROGRAM.—Title XI (42 U.S.C. 1301 et seq.) is amended by inserting after section 1128B the following new section:

''FRAUD AND ABUSE CONTROL PROGRAM

''SEC. 1128C. (a) ESTABLISHMENT OF PROGRAM.—

''(1) IN GENERAL.—Not later than January 1, 1997, the Secretary, acting through the Office of the Inspector General of the Department of Health and Human Services, and the Attorney General shall establish a program—

''(A) to coordinate Federal, State, and local law enforcement programs to control fraud and abuse with respect to health plans,

''(B) to conduct investigations, audits, evaluations, and inspections relating to the delivery of and payment for health care in the United States,

''(C) to facilitate the enforcement of the provisions of sections 1128, 1128A, and 1128B and other statutes applicable to health care fraud and abuse,

''(D) to provide for the modification and establishment of safe harbors and to issue interpretative rulings and special fraud alerts pursuant to section 1128D, and

''(E) to provide for the reporting and disclosure of certain final adverse actions against health care providers, suppliers, or practitioners pursuant to the data collection system established under section 1128E.

''(2) COORDINATION WITH HEALTH PLANS.—In carrying out the program established under paragraph (1), the Secretary and the Attorney General shall consult with, and arrange for the sharing of data with representatives of health plans.

''(3) GUIDELINES.—

''(A) IN GENERAL.—The Secretary and the Attorney General shall issue guidelines to carry out the program under paragraph (1). The provisions of sections 553, 556, and 557 of title 5, United States Code, shall not apply in the issuance of such guidelines.

''(B) INFORMATION GUIDELINES.—

''(i) IN GENERAL.—Such guidelines shall include guidelines relating to the furnishing of information by health plans, providers, and others to enable the Secretary and the Attorney General to carry out the program (including coordination with health plans under paragraph (2)).

''(ii) CONFIDENTIALITY.—Such guidelines shall include procedures to assure that such information is provided and utilized in a manner that appropriately protects the confidentiality of the information and the privacy of individuals receiving health care services and items.

''(iii) QUALIFIED IMMUNITY FOR PROVIDING INFORMATION.—The provisions of section 1157(a) (relating to limitation on liability) shall apply to a person providing information to the Secretary or the Attorney General in conjunction with their performance of duties under this section.

''(4) ENSURING ACCESS TO DOCUMENTATION.—The Inspector General of the Department of Health and Human Services is authorized to exercise such authority described in paragraphs (3) through (9) of section 6 of the Inspector General Act of 1978 (5 U.S.C. App.) as necessary with respect to the activities under the fraud and abuse control program established under this subsection.

''(5) AUTHORITY OF INSPECTOR GENERAL.—Nothing in this Act shall be construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978 (5 U.S.C. App.).

''(b) ADDITIONAL USE OF FUNDS BY INSPECTOR GENERAL.—

''(1) REIMBURSEMENTS FOR INVESTIGATIONS.—The Inspector General of the Department of Health and Human Services is authorized to receive and retain for current use reimbursement for the costs of conducting investigations and audits and for monitoring compliance plans when such costs are ordered by a court, voluntarily agreed to by the payor, or otherwise.

''(2) CREDITING.—Funds received by the Inspector General under paragraph (1) as reimbursement for costs of conducting investigations shall be deposited to the credit of the appropriation from which initially paid, or to appropriations for similar purposes currently available at the time of deposit, and shall remain available for obligation for 1 year from the date of the deposit of such funds.

''(c) HEALTH PLAN DEFINED.—For purposes of this section, the term 'health plan' means a plan or program that provides health benefits, whether directly, through insurance, or otherwise, and includes—

''(1) a policy of health insurance;

''(2) a contract of a service benefit organization; and

''(3) a membership agreement with a health maintenance organization or other prepaid health plan.''.

(b) ESTABLISHMENT OF HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT IN FEDERAL HOSPITAL INSURANCE TRUST FUND.—Section 1817 (42 U.S.C. 1395i) is amended by adding at the end the following new subsection:

''(k) HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT.—

''(1) ESTABLISHMENT.—There is hereby established in the Trust Fund an expenditure account to be known as the 'Health Care Fraud and Abuse Control Account' (in this subsection referred to as the 'Account').

''(2) APPROPRIATED AMOUNTS TO TRUST FUND.—

''(A) IN GENERAL.—There are hereby appropriated to the Trust Fund—

''(i) such gifts and bequests as may be made as provided in subparagraph (B);

''(ii) such amounts as may be deposited in the Trust Fund as provided in sections 541(b) and 542(c) of the Health Insurance Reform Act of 1996, and title XI; and

''(iii) such amounts as are transferred to the Trust Fund under subparagraph (C).

''(B) AUTHORIZATION TO ACCEPT GIFTS.—The Trust Fund is authorized to accept on behalf of the United States money gifts and bequests made unconditionally to the Trust Fund, for the benefit of the Account or any activity financed through the Account.

''(C) TRANSFER OF AMOUNTS.—The Managing Trustee shall transfer to the Trust Fund, under rules similar to the rules in section 9601 of the Internal Revenue Code of 1986, an amount equal to the sum of the following:

''(i) Criminal fines recovered in cases involving a Federal health care offense (as defined in section 982(a)(6)(B) of title 18, United States Code).

''(ii) Civil monetary penalties and assessments imposed in health care cases, including amounts recovered under titles XI, XVIII, and XXI, and chapter 38 of title 31, United States Code (except as otherwise provided by law).

''(iii) Amounts resulting from the forfeiture of property by reason of a Federal health care offense.

''(iv) Penalties and damages obtained and otherwise creditable to miscellaneous receipts of the general fund of the Treasury obtained under sections 3729 through 3733 of title 31, United States Code (known as the False Claims Act), in cases involving claims related to the provision of health care items and services (other than funds awarded to a relator, for restitution or otherwise authorized by law).

''(3) APPROPRIATED AMOUNTS TO ACCOUNT FOR FRAUD AND ABUSE CONTROL PROGRAM, ETC.—

''(A) DEPARTMENTS OF HEALTH AND HUMAN SERVICES AND JUSTICE.—

''(i) IN GENERAL.—There are hereby appropriated to the Account from the Trust Fund such sums as the Secretary and the Attorney General certify are necessary to carry out the purposes described in subparagraph (C), to be available without further appropriation, in an amount not to exceed—

''(I) for fiscal year 1997, $104,000,000, and

''(II) for each of the fiscal years 1998 through 2003, the limit for the preceding fiscal year, increased by 15 percent; and

''(III) for each fiscal year after fiscal year 2003, the limit for fiscal year 2003.

''(ii) MEDICARE AND MEDICAID ACTIVITIES.—For each fiscal year, of the amount appropriated in clause (i), the following amounts shall be available only for the purposes of the activities of the Office of the Inspector General of the Department of Health and Human Services with respect to the medicare and medicaid programs—

''(I) for fiscal year 1997, not less than $60,000,000 and not more than $70,000,000;

''(II) for fiscal year 1998, not less than $80,000,000 and not more than $90,000,000;

''(III) for fiscal year 1999, not less than $90,000,000 and not more than $100,000,000;

''(IV) for fiscal year 2000, not less than $110,000,000 and not more than $120,000,000;

''(V) for fiscal year 2001, not less than $120,000,000 and not more than $130,000,000;

''(VI) for fiscal year 2002, not less than $140,000,000 and not more than $150,000,000; and

''(VII) for each fiscal year after fiscal year 2002, not less than $150,000,000 and not more than $160,000,000.

''(B) FEDERAL BUREAU OF INVESTIGATION.—There are hereby appropriated from the general fund of the United States Treasury and hereby appropriated to the Account for transfer to the Federal Bureau of Investigation to carry out the purposes described in subparagraph (C)(i), to be available without further appropriation—

''(i) for fiscal year 1997, $47,000,000;

''(ii) for fiscal year 1998, $56,000,000;

''(iii) for fiscal year 1999, $66,000,000;

''(iv) for fiscal year 2000, $76,000,000;

''(v) for fiscal year 2001, $88,000,000;

''(vi) for fiscal year 2002, $101,000,000; and

''(vii) for each fiscal year after fiscal year 2002, $114,000,000.

''(C) USE OF FUNDS.—The purposes described in this subparagraph are to cover the costs (including equipment, salaries and benefits, and travel and training) of the administration and operation of the health care fraud and abuse control program established under section 1128C(a), including the costs of—

''(i) prosecuting health care matters (through criminal, civil, and administrative proceedings);

''(ii) investigations;

''(iii) financial and performance audits of health care programs and operations;

''(iv) inspections and other evaluations; and

''(v) provider and consumer education regarding compliance with the provisions of title XI.

''(4) APPROPRIATED AMOUNTS TO ACCOUNT FOR MEDICARE INTEGRITY PROGRAM.—

''(A) IN GENERAL.—There are hereby appropriated to the Account from the Trust Fund for each fiscal year such amounts as are necessary to carry out the Medicare Integrity Program under section 1893, subject to subparagraph (B) and to be available without further appropriation.

''(B) AMOUNTS SPECIFIED.—The amount appropriated under subparagraph (A) for a fiscal year is as follows:

''(i) For fiscal year 1997, such amount shall be not less than $430,000,000 and not more than $440,000,000.

''(ii) For fiscal year 1998, such amount shall be not less than $490,000,000 and not more than $500,000,000.

''(iii) For fiscal year 1999, such amount shall be not less than $550,000,000 and not more than $560,000,000.

''(iv) For fiscal year 2000, such amount shall be not less than $620,000,000 and not more than $630,000,000.

''(v) For fiscal year 2001, such amount shall be not less than $670,000,000 and not more than $680,000,000.

''(vi) For fiscal year 2002, such amount shall be not less than $690,000,000 and not more than $700,000,000.

''(vii) For each fiscal year after fiscal year 2002, such amount shall be not less than $710,000,000 and not more than $720,000,000.

''(5) ANNUAL REPORT.—The Secretary and the Attorney General shall submit jointly an annual report to Congress on the amount of revenue which is generated and disbursed, and the justification for such disbursements, by the Account in each fiscal year.''.

SEC. 502. MEDICARE INTEGRITY PROGRAM.

(a) ESTABLISHMENT OF MEDICARE INTEGRITY PROGRAM.—Title XVIII is amended by adding at the end the following new section:

''MEDICARE INTEGRITY PROGRAM

''SEC. 1893. (a) ESTABLISHMENT OF PROGRAM.—There is hereby established the Medicare Integrity Program (in this section referred to as the 'Program') under which the Secretary shall promote the integrity of the medicare program by entering into contracts in accordance with this section with eligible private entities to carry out the activities described in subsection (b).

''(b) ACTIVITIES DESCRIBED.—The activities described in this subsection are as follows:

''(1) Review of activities of providers of services or other individuals and entities furnishing items and services for which payment may be made under this title (including skilled nursing facilities and home health agencies), including medical and utilization review and fraud review (employing similar standards, processes, and technologies used by private health plans, including equipment and software technologies which surpass the capability of the equipment and technologies used in the review of claims under this title as of the date of the enactment of this section).

''(2) Audit of cost reports.

''(3) Determinations as to whether payment should not be, or should not have been, made under this title by reason of section 1862(b), and recovery of payments that should not have been made.

''(4) Education of providers of services, beneficiaries, and other persons with respect to payment integrity and benefit quality assurance issues.

''(5) Developing (and periodically updating) a list of items of durable medical equipment in accordance with section 1834(a)(15) which are subject to prior authorization under such section.

''(c) ELIGIBILITY OF ENTITIES.—An entity is eligible to enter into a contract under the Program to carry out any of the activities described in subsection (b) if—

''(1) the entity has demonstrated capability to carry out such activities;

''(2) in carrying out such activities, the entity agrees to cooperate with the Inspector General of the Department of Health and Human Services, the Attorney General of the United States, and other law enforcement agencies, as appropriate, in the investigation and deterrence of fraud and abuse in relation to this title and in other cases arising out of such activities;

''(3) the entity complies with such conflict of interest standards as are generally applicable to Federal acquisition and procurement;

''(4) the entity meets such other requirements as the Secretary may impose; and

''(5) in the case of any contract entered into for years prior to 2000, the entity has entered into an agreement under section 1816 or a contract under section 1842.

In the case of the activity described in subsection (b)(5), an entity shall be deemed to be eligible to enter into a contract under the Program to carry out the activity if the entity is a carrier with a contract in effect under section 1842.

''(d) PROCESS FOR ENTERING INTO CONTRACTS.—The Secretary shall enter into contracts under the Program in accordance with such procedures as the Secretary shall by regulation establish, except that such procedures shall include the following:

''(1) Procedures for identifying, evaluating, and resolving organizational conflicts of interest that are generally applicable to Federal acquisition and procurement.

''(2) Competitive procedures must be used when entering into new contracts under this section, or at any other time considered appropriate by the Secretary, except that the Secretary may contract with entities that are carrying out the activities described in this section pursuant to agreements under section 1816 or contracts under section 1842 in effect on the date of the enactment of this section.

''(3) A contract under this section may be renewed without regard to any provision of law requiring competition if the contractor has met or exceeded the performance requirements established in the current contract.

''(e) LIMITATION ON CONTRACTOR LIABILITY.—The Secretary shall by regulation provide for the limitation of a contractor's liability for actions taken to carry out a contract under the Program, and such regulation shall, to the extent the Secretary finds appropriate, employ the same or comparable standards and other substantive and procedural provisions as are contained in section 1157.''.

(b) ELIMINATION OF FI AND CARRIER RESPONSIBILITY FOR CARRYING OUT ACTIVITIES SUBJECT TO PROGRAM.—

(1) RESPONSIBILITIES OF FISCAL INTERMEDIARIES UNDER PART A.—Section 1816 (42 U.S.C. 1395h) is amended by adding at the end the following new subsection:

''(l) No payment may be made for carrying out any activity pursuant to an agreement under this section to the extent that the activity is carried out pursuant to a contract under the Medicare Integrity Program under section 1893.''.

(2) RESPONSIBILITIES OF CARRIERS UNDER PART B.—Section 1842(c) (42 U.S.C. 1395u(c)) is amended by adding at the end the following new paragraph:

''(6) No payment may be made for carrying out any activity pursuant to a contract under this subsection to the extent that the activity is carried out pursuant to a contract under the Medicare Integrity Program under section 1893. The previous sentence shall not apply with respect to the activity described in section 1893(b)(5) (relating to prior authorization of certain items of durable medical equipment under section 1834(a)(15)).''.

SEC. 503. BENEFICIARY INCENTIVE PROGRAMS.

(a) CLARIFICATION OF REQUIREMENT TO PROVIDE EXPLANATION OF MEDICARE BENEFITS.—The Secretary of Health and Human Services (in this section referred to as the ''Secretary'') shall provide an explanation of benefits under the medicare program under title XVIII of the Social Security Act with respect to each item or service for which payment may be made under the program which is furnished to an individual, without regard to whether or not a deductible or coinsurance may be imposed against the individual with respect to the item or service.

(b) PROGRAM TO COLLECT INFORMATION ON FRAUD AND ABUSE.—

(1) ESTABLISHMENT OF PROGRAM.—Not later than 3 months after the date of the enactment of this Act, the Secretary shall establish a program under which the Secretary shall encourage individuals to report to the Secretary information on individuals and entities who are engaging or who have engaged in acts or omissions which constitute grounds for the imposition of a sanction under section 1128, section 1128A, or section 1128B of the Social Security Act, or who have otherwise engaged in fraud and abuse against the medicare program for which there is a sanction provided under law. The program shall discourage provision of, and not consider, information which is frivolous or otherwise not relevant or material to the imposition of such a sanction.

(2) PAYMENT OF PORTION OF AMOUNTS COLLECTED.—If an individual reports information to the Secretary under the program established under paragraph (1) which serves as the basis for the collection by the Secretary or the Attorney General of any amount of at least $100 (other than any amount paid as a penalty under section 1128B of the Social Security Act), the Secretary may pay a portion of the amount collected to the individual (under procedures similar to those applicable under section 7623 of the Internal Revenue Code of 1986 to payments to individuals providing information on violations of such Code).

(c) PROGRAM TO COLLECT INFORMATION ON PROGRAM EFFICIENCY.—

(1) ESTABLISHMENT OF PROGRAM.—Not later than 3 months after the date of the enactment of this Act, the Secretary shall establish a program under which the Secretary shall encourage individuals to submit to the Secretary suggestions on methods to improve the efficiency of the medicare program.

(2) PAYMENT OF PORTION OF PROGRAM SAVINGS.—If an individual submits a suggestion to the Secretary under the program established under paragraph (1) which is adopted by the Secretary and which results in savings to the program, the Secretary may make a payment to the individual of such amount as the Secretary considers appropriate.

SEC. 504. APPLICATION OF CERTAIN HEALTH ANTI-FRAUD AND ABUSE SANCTIONS TO FRAUD AND ABUSE AGAINST FEDERAL HEALTH CARE PROGRAMS.

(a) IN GENERAL.—Section 1128B (42 U.S.C. 1320a–7b) is amended as follows:

(1) In the heading, by striking ''MEDICARE OR STATE HEALTH CARE PROGRAMS'' and inserting ''FEDERAL HEALTH CARE PROGRAMS''.

(2) In subsection (a)(1), by striking ''a program under title XVIII or a State health care program (as defined in section 1128(h))'' and inserting ''a Federal health care program''.

(3) In subsection (a)(5), by striking ''a program under title XVIII or a State health care program'' and inserting ''a Federal health care program''.

(4) In the second sentence of subsection (a)—

(A) by striking ''a State plan approved under title XIX'' and inserting ''a Federal health care program'', and

(B) by striking ''the State may at its option (notwithstanding any other provision of that title or of such plan)'' and inserting ''the administrator of such program may at its option (notwithstanding any other provision of such program)''.

(5) In subsection (b), by striking ''title XVIII or a State health care program'' each place it appears and inserting ''a Federal health care program''.

(6) In subsection (c), by inserting ''(as defined in section 1128(h))'' after ''a State health care program''.

(7) By adding at the end the following new subsection:

''(f) For purposes of this section, the term 'Federal health care program' means—

''(1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code); or

''(2) any State health care program, as defined in section 1128(h).''.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on January 1, 1997.

SEC. 505. GUIDANCE REGARDING APPLICATION OF HEALTH CARE FRAUD AND ABUSE SANCTIONS.

Title XI (42 U.S.C. 1301 et seq.), as amended by section 501, is amended by inserting after section 1128C the following new section:

''GUIDANCE REGARDING APPLICATION OF HEALTH CARE FRAUD AND ABUSE SANCTIONS

''SEC. 1128D. (a) SOLICITATION AND PUBLICATION OF MODIFICATIONS TO EXISTING SAFE HARBORS AND NEW SAFE HARBORS.—

''(1) IN GENERAL.—

''(A) SOLICITATION OF PROPOSALS FOR SAFE HARBORS.—Not later than January 1, 1997, and not less than annually thereafter, the Secretary shall publish a notice in the Federal Register soliciting proposals, which will be accepted during a 60-day period, for—

''(i) modifications to existing safe harbors issued pursuant to section 14(a) of the Medicare and Medicaid Patient and Program Protection Act of 1987 (42 U.S.C. 1320a–7b note);

''(ii) additional safe harbors specifying payment practices that shall not be treated as a criminal offense under section 1128B(b) and shall not serve as the basis for an exclusion under section 1128(b)(7);

''(iii) interpretive rulings to be issued pursuant to subsection (b); and

''(iv) special fraud alerts to be issued pursuant to subsection (c).

''(B) PUBLICATION OF PROPOSED MODIFICATIONS AND PROPOSED ADDITIONAL SAFE HARBORS.—After considering the proposals described in clauses (i) and (ii) of subparagraph (A), the Secretary, in consultation with the Attorney General, shall publish in the Federal Register proposed modifications to existing safe harbors and proposed additional safe harbors, if appropriate, with a 60-day comment period. After considering any public comments received during this period, the Secretary shall issue final rules modifying the existing safe harbors and establishing new safe harbors, as appropriate.

''(C) REPORT.—The Inspector General of the Department of Health and Human Services (in this section referred to as the 'Inspector General') shall, in an annual report to Congress or as part of the year-end semiannual report required by section 5 of the Inspector General Act of 1978 (5 U.S.C. App.), describe the proposals received under clauses (i) and (ii) of subparagraph (A) and explain which proposals were included in the publication described in subparagraph (B), which proposals were not included in that publication, and the reasons for the rejection of the proposals that were not included.

''(2) CRITERIA FOR MODIFYING AND ESTABLISHING SAFE HARBORS.—In modifying and establishing safe harbors under paragraph (1)(B), the Secretary may consider the extent to which providing a safe harbor for the specified payment practice may result in any of the following:

''(A) An increase or decrease in access to health care services.

''(B) An increase or decrease in the quality of health care services.

''(C) An increase or decrease in patient freedom of choice among health care providers.

''(D) An increase or decrease in competition among health care providers.

''(E) An increase or decrease in the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

''(F) An increase or decrease in the cost to Federal health care programs (as defined in section 1128B(f)).

''(G) An increase or decrease in the potential overutilization of health care services.

''(H) The existence or nonexistence of any potential financial benefit to a health care professional or provider which may vary based on their decisions of—

''(i) whether to order a health care item or service; or

''(ii) whether to arrange for a referral of health care items or services to a particular practitioner or provider.

''(I) Any other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs (as so defined).

''(b) INTERPRETIVE RULINGS.—

''(1) IN GENERAL.—

''(A) REQUEST FOR INTERPRETIVE RULING.—Any person may present, at any time, a request to the Inspector General for a statement of the Inspector General's current interpretation of the meaning of a specific aspect of the application of sections 1128A and 1128B (in this section referred to as an 'interpretive ruling').

''(B) ISSUANCE AND EFFECT OF INTERPRETIVE RULING.—

''(i) IN GENERAL.—If appropriate, the Inspector General shall in consultation with the Attorney General, issue an interpretive ruling not later than 90 days after receiving a request described in subparagraph (A). Interpretive rulings shall not have the force of law and shall be treated as an interpretive rule within the meaning of section 553(b) of title 5, United States Code. All interpretive rulings issued pursuant to this clause shall be published in the Federal Register or otherwise made available for public inspection.

''(ii) REASONS FOR DENIAL.—If the Inspector General does not issue an interpretive ruling in response to a request described in subparagraph (A), the Inspector General shall notify the requesting party of such decision not later than 60 days after receiving such a request and shall identify the reasons for such decision.

''(2) CRITERIA FOR INTERPRETIVE RULINGS.—

''(A) IN GENERAL.—In determining whether to issue an interpretive ruling under paragraph (1)(B), the Inspector General may consider—

''(i) whether and to what extent the request identifies an ambiguity within the language of the statute, the existing safe harbors, or previous interpretive rulings; and

''(ii) whether the subject of the requested interpretive ruling can be adequately addressed by

interpretation of the language of the statute, the existing safe harbor rules, or previous interpretive rulings, or whether the request would require a substantive ruling (as defined in section 552 of title 5, United States Code) not authorized under this subsection.

''(B) NO RULINGS ON FACTUAL ISSUES.—The Inspector General shall not give an interpretive ruling on any factual issue, including the intent of the parties or the fair market value of particular leased space or equipment.

''(c) SPECIAL FRAUD ALERTS.—

''(1) IN GENERAL.—

''(A) REQUEST FOR SPECIAL FRAUD ALERTS.—Any person may present, at any time, a request to the Inspector General for a notice which informs the public of practices which the Inspector General considers to be suspect or of particular concern under the medicare program or a State health care program, as defined in section 1128(h) (in this subsection referred to as a 'special fraud alert').

''(B) ISSUANCE AND PUBLICATION OF SPECIAL FRAUD ALERTS.—Upon receipt of a request described in subparagraph (A), the Inspector General shall investigate the subject matter of the request to determine whether a special fraud alert should be issued. If appropriate, the Inspector General shall issue a special fraud alert in response to the request. All special fraud alerts issued pursuant to this subparagraph shall be published in the Federal Register.

''(2) CRITERIA FOR SPECIAL FRAUD ALERTS.—In determining whether to issue a special fraud alert upon a request described in paragraph (1), the Inspector General may consider—

''(A) whether and to what extent the practices that would be identified in the special fraud alert may result in any of the consequences described in subsection (a)(2); and

''(B) the volume and frequency of the conduct that would be identified in the special fraud alert.''.

Subtitle B—Revisions to Current Sanctions for Fraud and Abuse

SEC. 511. MANDATORY EXCLUSION FROM PARTICIPATION IN MEDICARE AND STATE HEALTH CARE PROGRAMS.

(a) INDIVIDUAL CONVICTED OF FELONY RELATING TO HEALTH CARE FRAUD.—

(1) IN GENERAL.—Section 1128(a) (42 U.S.C. 1320a–7(a)) is amended by adding at the end the following new paragraph:

''(3) FELONY CONVICTION RELATING TO HEALTH CARE FRAUD.—Any individual or entity that has been convicted after the date of the enactment of the Health Insurance Reform Act of 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.''.

(2) CONFORMING AMENDMENT.—Paragraph (1) of section 1128(b) (42 U.S.C. 1320a–7(b)) is amended to read as follows:

''(1) CONVICTION RELATING TO FRAUD.—Any individual or entity that has been convicted after the date of the enactment of the Health Insurance Reform Act of 1996, under Federal or State law—

''(A) of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct—

''(i) in connection with the delivery of a health care item or service, or

''(ii) with respect to any act or omission in a health care program (other than those specifically described in subsection (a)(1)) operated by or financed in whole or in part by any Federal, State, or local government agency; or

''(B) of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program (other than a health care program) operated by or financed in whole or in part by any Federal, State, or local government agency.''.

(b) INDIVIDUAL CONVICTED OF FELONY RELATING TO CONTROLLED SUBSTANCE.—

(1) IN GENERAL.—Section 1128(a) (42 U.S.C. 1320a–7(a)), as amended by subsection (a), is amended by adding at the end the following new paragraph:

''(4) FELONY CONVICTION RELATING TO CONTROLLED SUBSTANCE.—Any individual or entity that has been convicted after the date of the enactment of the Health Insurance Reform Act of 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.''.

(2) CONFORMING AMENDMENT.—Section 1128(b)(3) (42 U.S.C. 1320a–7(b)(3)) is amended—

(A) in the heading, by striking ''CONVICTION'' and inserting ''MISDEMEANOR CONVICTION''; and

(B) by striking ''criminal offense'' and inserting ''criminal offense consisting of a misdemeanor''.

SEC. 512. ESTABLISHMENT OF MINIMUM PERIOD OF EXCLUSION FOR CERTAIN INDIVIDUALS AND ENTITIES SUBJECT TO PERMISSIVE EXCLUSION FROM MEDICARE AND STATE HEALTH CARE PROGRAMS.

Section 1128(c)(3) (42 U.S.C. 1320a–7(c)(3)) is amended by adding at the end the following new subparagraphs:

''(D) In the case of an exclusion of an individual or entity under paragraph (1), (2), or (3) of subsection (b), the period of the exclusion shall be 3 years, unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances.

''(E) In the case of an exclusion of an individual or entity under subsection (b)(4) or (b)(5), the period of the exclusion shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or the entity is excluded or suspended from a Federal or State health care program.

''(F) In the case of an exclusion of an individual or entity under subsection (b)(6)(B), the period of the exclusion shall be not less than 1 year.''.

SEC. 513. PERMISSIVE EXCLUSION OF INDIVIDUALS WITH OWNERSHIP OR CONTROL INTEREST IN SANCTIONED ENTITIES.

Section 1128(b) (42 U.S.C. 1320a–7(b)) is amended by adding at the end the following new paragraph:

''(15) INDIVIDUALS CONTROLLING A SANCTIONED ENTITY.—(A) Any individual—

''(i) who has a direct or indirect ownership or control interest in a sanctioned entity and who knows or should know (as defined in section 1128A(i)(6)) of the action constituting the basis for the conviction or exclusion described in subparagraph (B); or

''(ii) who is an officer or managing employee (as defined in section 1126(b)) of such an entity.

''(B) For purposes of subparagraph (A), the term 'sanctioned entity' means an entity—

''(i) that has been convicted of any offense described in subsection (a) or in paragraph (1), (2), or (3) of this subsection; or

''(ii) that has been excluded from participation under a program under title XVIII or under a State health care program.''.

SEC. 514. SANCTIONS AGAINST PRACTITIONERS AND PERSONS FOR FAILURE TO COMPLY WITH STATUTORY OBLIGATIONS.

(a) MINIMUM PERIOD OF EXCLUSION FOR PRACTITIONERS AND PERSONS FAILING TO MEET STATUTORY OBLIGATIONS.—

(1) IN GENERAL.—The second sentence of section 1156(b)(1) (42 U.S.C. 1320c–5(b)(1)) is amended by striking ''may prescribe)'' and inserting ''may prescribe, except that such period may not be less than 1 year)''.

(2) CONFORMING AMENDMENT.—Section 1156(b)(2) (42 U.S.C. 1320c–5(b)(2)) is amended by striking ''shall remain'' and inserting ''shall (subject to the minimum period specified in the second sentence of paragraph (1)) remain''.

(b) REPEAL OF ''UNWILLING OR UNABLE'' CONDITION FOR IMPOSITION OF SANCTION.—Section 1156(b)(1) (42 U.S.C. 1320c–5(b)(1)) is amended—

(1) in the second sentence, by striking ''and determines'' and all that follows through ''such obligations,''; and

(2) by striking the third sentence.

SEC. 515. INTERMEDIATE SANCTIONS FOR MEDICARE HEALTH MAINTENANCE ORGANIZATIONS.

(a) APPLICATION OF INTERMEDIATE SANCTIONS FOR ANY PROGRAM VIOLATIONS.—

(1) IN GENERAL.—Section 1876(i)(1) (42 U.S.C. 1395mm(i)(1)) is amended by striking ''the Secretary may terminate'' and all that follows and inserting ''in accordance with procedures established under paragraph (9), the Secretary may at any time terminate any such contract or may impose the intermediate sanctions described in paragraph (6)(B) or (6)(C) (whichever is applicable) on the eligible organization if the Secretary determines that the organization—

''(A) has failed substantially to carry out the contract;

''(B) is carrying out the contract in a manner substantially inconsistent with the efficient and effective administration of this section; or

''(C) no longer substantially meets the applicable conditions of subsections (b), (c), (e), and (f).''.

(2) OTHER INTERMEDIATE SANCTIONS FOR MISCELLANEOUS PROGRAM VIOLATIONS.—Section 1876(i)(6) (42 U.S.C. 1395mm(i)(6)) is amended by adding at the end the following new subparagraph:

''(C) In the case of an eligible organization for which the Secretary makes a determination under paragraph (1) the basis of which is not described in subparagraph (A), the Secretary may apply the following intermediate sanctions:

''(i) Civil money penalties of not more than $25,000 for each determination under paragraph (1) if the deficiency that is the basis of the determination has directly adversely affected (or has the substantial likelihood of adversely affecting) an individual covered under the organization's contract.

''(ii) Civil money penalties of not more than $10,000 for each week beginning after the initiation of procedures by the Secretary under paragraph (9) during which the deficiency that is the basis of a determination under paragraph (1) exists.

''(iii) Suspension of enrollment of individuals under this section after the date the Secretary notifies the organization of a determination under paragraph (1) and until the Secretary is satisfied that the deficiency that is the basis for the determination has been corrected and is not likely to recur.''.

(3) PROCEDURES FOR IMPOSING SANCTIONS.—Section 1876(i) (42 U.S.C. 1395mm(i)) is amended by adding at the end the following new paragraph:

''(9) The Secretary may terminate a contract with an eligible organization under this section or may impose the intermediate sanctions described in paragraph (6) on the organization in accordance with formal investigation and compliance procedures established by the Secretary under which—

''(A) the Secretary first provides the organization with the reasonable opportunity to develop and implement a corrective action plan to correct the deficiencies that were the basis of the Secretary's determination under paragraph (1) and the organization fails to develop or implement such a plan;

''(B) in deciding whether to impose sanctions, the Secretary considers aggravating factors such

as whether an organization has a history of deficiencies or has not taken action to correct deficiencies the Secretary has brought to the organization's attention;

''(C) there are no unreasonable or unnecessary delays between the finding of a deficiency and the imposition of sanctions; and

''(D) the Secretary provides the organization with reasonable notice and opportunity for hearing (including the right to appeal an initial decision) before imposing any sanction or terminating the contract.''.

(4) CONFORMING AMENDMENTS.—Section 1876(i)(6)(B) (42 U.S.C. 1395mm(i)(6)(B)) is amended by striking the second sentence.

(b) AGREEMENTS WITH PEER REVIEW ORGANIZATIONS.—Section 1876(i)(7)(A) (42 U.S.C. 1395mm(i)(7)(A)) is amended by striking ''an agreement'' and inserting ''a written agreement''.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to contract years beginning on or after January 1, 1997.

SEC. 516. ADDITIONAL EXCEPTIONS TO ANTI-KICKBACK PENALTIES FOR RISK-SHARING ARRANGEMENTS.

(a) IN GENERAL.—Section 1128B(b)(3) (42 U.S.C. 1320a–7b(b)(3)) is amended—

(1) by striking ''and'' at the end of subparagraph (D);

(2) by striking the period at the end of subparagraph (E) and inserting ''; and''; and

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

''(F) any remuneration between an organization and an individual or entity providing items or services pursuant to a written agreement between the organization and the individual or entity if the organization is an eligible organization under section 1876, or if the written agreement places the individual or entity at substantial financial risk for the cost or utilization of the items or services, or a combination thereof, which the individual or entity is obligated to provide, whether through a withhold or capitation, or other similar risk arrangements which places the individual or entity at substantial financial risk.''.

(b) REGULATIONS.—Section 1128B(b) (42 U.S.C. 1320a–7b(b)) is amended by adding at the end the following new paragraph:

''(4) The Secretary, in consultation with the Attorney General, not later than 1 year after the date of enactment of Health Insurance Reform Act of 1996, and not less than every 2 years thereafter, shall promulgate regulations to define substantial financial risk as necessary to protect against program or patient abuse.''.

SEC. 517. EFFECTIVE DATE.

Except as otherwise provided, the amendments made by this subtitle shall take effect January 1, 1997.

Subtitle C—Data Collection and Miscellaneous Provisions

SEC. 521. ESTABLISHMENT OF THE HEALTH CARE FRAUD AND ABUSE DATA COLLECTION PROGRAM.

(a) IN GENERAL.—Title XI (42 U.S.C. 1301 et seq.), as amended by sections 501 and 505, is amended by inserting after section 1128D the following new section:

''HEALTH CARE FRAUD AND ABUSE DATA COLLECTION PROGRAM

''SEC. 1128E. (a) GENERAL PURPOSE.—Not later than January 1, 1997, the Secretary shall establish a national health care fraud and abuse data collection program for the reporting of final adverse actions (not including settlements in which no findings of liability have been made) against health care providers, suppliers, or practitioners as required by subsection (b), with access as set forth in subsection (c).

''(b) REPORTING OF INFORMATION.—

''(1) IN GENERAL.—Each Government agency and health plan shall report any final adverse action (not including settlements in which no findings of liability have been made) taken against a health care provider, supplier, or practitioner.

''(2) INFORMATION TO BE REPORTED.—The information to be reported under paragraph (1) includes:

''(A) The name and TIN (as defined in section 7701(a)(41) of the Internal Revenue Code of 1986) of any health care provider, supplier, or practitioner who is the subject of a final adverse action.

''(B) The name (if known) of any health care entity with which a health care provider, supplier, or practitioner is affiliated or associated.

''(C) The nature of the final adverse action and whether such action is on appeal.

''(D) A description of the acts or omissions and injuries upon which the final adverse action was based, and such other information as the Secretary determines by regulation is required for appropriate interpretation of information reported under this section.

''(3) CONFIDENTIALITY.—In determining what information is required, the Secretary shall include procedures to assure that the privacy of individuals receiving health care services is appropriately protected.

''(4) TIMING AND FORM OF REPORTING.—The information required to be reported under this subsection shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall first be required to be reported on a date specified by the Secretary.

''(5) TO WHOM REPORTED.—The information required to be reported under this subsection shall be reported to the Secretary.

''(c) DISCLOSURE AND CORRECTION OF INFORMATION.—

''(1) DISCLOSURE.—With respect to the information about final adverse actions (not including settlements in which no findings of liability have been made) reported to the Secretary under this section respecting a health care provider, supplier, or practitioner, the Secretary shall, by regulation, provide for—

''(A) disclosure of the information, upon request, to the health care provider, supplier, or licensed practitioner, and

''(B) procedures in the case of disputed accuracy of the information.

''(2) CORRECTIONS.—Each Government agency and health plan shall report corrections of information already reported about any final adverse action taken against a health care provider, supplier, or practitioner, in such form and manner that the Secretary prescribes by regulation.

''(d) ACCESS TO REPORTED INFORMATION.—

''(1) AVAILABILITY.—The information in this database shall be available to Federal and State government agencies and health plans pursuant to procedures that the Secretary shall provide by regulation.

''(2) FEES FOR DISCLOSURE.—The Secretary may establish or approve reasonable fees for the disclosure of information in this database (other than with respect to requests by Federal agencies). The amount of such a fee shall be sufficient to recover the full costs of operating the database. Such fees shall be available to the Secretary or, in the Secretary's discretion to the agency designated under this section to cover such costs.

''(e) PROTECTION FROM LIABILITY FOR REPORTING.—No person or entity, including the agency designated by the Secretary in subsection (b)(5) shall be held liable in any civil action with respect to any report made as required by this section, without knowledge of the falsity of the information contained in the report.

''(f) COORDINATION WITH NATIONAL PRACTITIONER DATA BANK.—The Secretary shall implement this section in such a manner as to avoid duplication with the reporting requirements established for the National Practitioner Data Bank under the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.).

''(g) DEFINITIONS AND SPECIAL RULES.—For purposes of this section:

''(1) FINAL ADVERSE ACTION.—

''(A) IN GENERAL.—The term 'final adverse action' includes:

''(i) Civil judgments against a health care provider, supplier, or practitioner in Federal or State court related to the delivery of a health care item or service.

''(ii) Federal or State criminal convictions related to the delivery of a health care item or service.

''(iii) Actions by Federal or State agencies responsible for the licensing and certification of health care providers, suppliers, and licensed health care practitioners, including—

''(I) formal or official actions, such as revocation or suspension of a license (and the length of any such suspension), reprimand, censure or probation,

''(II) any other loss of license or the right to apply for, or renew, a license of the provider, supplier, or practitioner, whether by operation of law, voluntary surrender, non-renewability, or otherwise, or

''(III) any other negative action or finding by such Federal or State agency that is publicly available information.

''(iv) Exclusion from participation in Federal or State health care programs due to program violations.

''(v) Any other adjudicated actions or decisions that the Secretary shall establish by regulation.

''(B) EXCEPTION.—The term does not include any action with respect to a malpractice claim.

''(2) PRACTITIONER.—The terms 'licensed health care practitioner', 'licensed practitioner', and 'practitioner' mean, with respect to a State, an individual who is licensed or otherwise authorized by the State to provide health care services (or any individual who, without authority holds himself or herself out to be so licensed or authorized).

''(3) GOVERNMENT AGENCY.—The term 'Government agency' shall include:

''(A) The Department of Justice.

''(B) The Department of Health and Human Services.

''(C) Any other Federal agency that either administers or provides payment for the delivery of health care services, including, but not limited to the Department of Defense and the Veterans' Administration.

''(D) State law enforcement agencies.

''(E) State medicaid fraud control units.

''(F) Federal or State agencies responsible for the licensing and certification of health care providers and licensed health care practitioners.

''(4) HEALTH PLAN.—The term 'health plan' has the meaning given such term by section 1128C(c).

''(5) DETERMINATION OF CONVICTION.—For purposes of paragraph (1), the existence of a conviction shall be determined under paragraph (4) of section 1128(i).''.

(b) IMPROVED PREVENTION IN ISSUANCE OF MEDICARE PROVIDER NUMBERS.—Section 1842(r) (42 U.S.C. 1395u(r)) is amended by adding at the end the following new sentence: ''Under such system, the Secretary may impose appropriate fees on such physicians to cover the costs of investigation and recertification activities with respect to the issuance of the identifiers.''.

Subtitle D—Civil Monetary Penalties

SEC. 531. SOCIAL SECURITY ACT CIVIL MONETARY PENALTIES.

(a) GENERAL CIVIL MONETARY PENALTIES.—Section 1128A (42 U.S.C. 1320a–7a) is amended as follows:

(1) In the third sentence of subsection (a), by striking ''programs under title XVIII'' and inserting ''Federal health care programs (as defined in section 1128B(f)(1))''.

(2) In subsection (f)—

(A) by redesignating paragraph (3) as paragraph (4); and

(B) by inserting after paragraph (2) the following new paragraph:

''(3) With respect to amounts recovered arising out of a claim under a Federal health care program (as defined in section 1128B(f)), the portion of such amounts as is determined to have been paid by the program shall be repaid to the program, and the portion of such amounts attributable to the amounts recovered under this section by reason of the amendments made by the Health Insurance Reform Act of 1996 (as estimated by the Secretary) shall be deposited into the Federal Hospital Insurance Trust Fund pursuant to section 1817(k)(2)(C).''.

(3) In subsection (i)—

(A) in paragraph (2), by striking ''title V, XVIII, XIX, or XX of this Act'' and inserting ''a Federal health care program (as defined in section 1128B(f))'',

(B) in paragraph (4), by striking ''a health insurance or medical services program under title XVIII or XIX of this Act'' and inserting ''a Federal health care program (as so defined)'', and

(C) in paragraph (5), by striking ''title V, XVIII, XIX, or XX'' and inserting ''a Federal health care program (as so defined)''.

(4) By adding at the end the following new subsection:

''(m)(1) For purposes of this section, with respect to a Federal health care program not contained in this Act, references to the Secretary in this section shall be deemed to be references to the Secretary or Administrator of the department or agency with jurisdiction over such program and references to the Inspector General of the Department of Health and Human Services in this section shall be deemed to be references to the Inspector General of the applicable department or agency.

''(2)(A) The Secretary and Administrator of the departments and agencies referred to in paragraph (1) may include in any action pursuant to this section, claims within the jurisdiction of other Federal departments or agencies as long as the following conditions are satisfied:

''(i) The case involves primarily claims submitted to the Federal health care programs of the department or agency initiating the action.

''(ii) The Secretary or Administrator of the department or agency initiating the action gives notice and an opportunity to participate in the investigation to the Inspector General of the department or agency with primary jurisdiction over the Federal health care programs to which the claims were submitted.

''(B) If the conditions specified in subparagraph (A) are fulfilled, the Inspector General of the department or agency initiating the action is authorized to exercise all powers granted under the Inspector General Act of 1978 with respect to the claims submitted to the other departments or agencies to the same manner and extent as provided in that Act with respect to claims submitted to such departments or agencies.''.

(b) EXCLUDED INDIVIDUAL RETAINING OWNERSHIP OR CONTROL INTEREST IN PARTICIPATING ENTITY.—Section 1128A(a) (42 U.S.C. 1320a–7a(a)) is amended—

(1) by striking ''or'' at the end of paragraph (1)(D);

(2) by striking '', or'' at the end of paragraph (2) and inserting a semicolon;

(3) by striking the semicolon at the end of paragraph (3) and inserting ''; or''; and

(4) by inserting after paragraph (3) the following new paragraph:

''(4) in the case of a person who is not an organization, agency, or other entity, is excluded from participating in a program under title XVIII or a State health care program in accordance with this subsection or under section 1128 and who, at the time of a violation of this subsection—

''(i) retains a direct or indirect ownership or control interest in an entity that is participating in a program under title XVIII or a State health care program, and who knows or should know of the action constituting the basis for the exclusion; or

''(ii) is an officer or managing employee (as defined in section 1126(b)) of such an entity;''.

(c) MODIFICATIONS OF AMOUNTS OF PENALTIES AND ASSESSMENTS.—Section 1128A(a) (42 U.S.C. 1320a–7a(a)), as amended by subsection (b), is amended in the matter following paragraph (4)—

(1) by striking ''$2,000'' and inserting ''$10,000'';

(2) by inserting ''; in cases under paragraph (4), $10,000 for each day the prohibited relationship occurs'' after ''false or misleading information was given''; and

(3) by striking ''twice the amount'' and inserting ''3 times the amount''.

(d) CLAIM FOR ITEM OR SERVICE BASED ON INCORRECT CODING OR MEDICALLY UNNECESSARY SERVICES.—Section 1128A(a)(1) (42 U.S.C. 1320a–7a(a)(1)), as amended by subsection (b), is amended—

(1) in subparagraph (A) by striking ''claimed,'' and inserting ''claimed, including any person who engages in a pattern or practice of presenting or causing to be presented a claim for an item or service that is based on a code that the person knows or should know will result in a greater payment to the person than the code the person knows or should know is applicable to the item or service actually provided,'';

(2) in subparagraph (C), by striking ''or'' at the end;

(3) in subparagraph (D), by striking the semicolon and inserting '', or''; and

(4) by inserting after subparagraph (D) the following new subparagraph:

''(E) is for a medical or other item or service that a person knows or should know is not medically necessary; or''.

(e) SANCTIONS AGAINST PRACTITIONERS AND PERSONS FOR FAILURE TO COMPLY WITH STATUTORY OBLIGATIONS.—Section 1156(b)(3) (42 U.S.C. 1320c–5(b)(3)) is amended by striking ''the actual or estimated cost'' and inserting ''up to $10,000 for each instance''.

(f) PROCEDURAL PROVISIONS.—Section 1876(i)(6) (42 U.S.C. 1395mm(i)(6)), as amended by section 515(a)(2), is amended by adding at the end the following new subparagraph:

''(D) The provisions of section 1128A (other than subsections (a) and (b)) shall apply to a civil money penalty under subparagraph (B)(i) or (C)(i) in the same manner as such provisions apply to a civil money penalty or proceeding under section 1128A(a).''.

(g) PROHIBITION AGAINST OFFERING INDUCEMENTS TO INDIVIDUALS ENROLLED UNDER PROGRAMS OR PLANS.—

(1) OFFER OF REMUNERATION.—Section 1128A(a) (42 U.S.C. 1320a–7a(a)), as amended by subsection (b), is amended—

(A) by striking ''or'' at the end of paragraph (1)(D);

(B) by striking the semicolon at the end of paragraph (4) and inserting ''; or''; and

(C) by inserting after paragraph (4) the following new paragraph:

''(5) offers to or transfers remuneration to any individual eligible for benefits under title XVIII of this Act, or under a State health care program (as defined in section 1128(h)) that such person knows or should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, under title XVIII, or a State health care program (as so defined);''.

(2) REMUNERATION DEFINED.—Section 1128A(i) (42 U.S.C. 1320a–7a(i)) is amended by adding the following new paragraph:

''(6) The term 'remuneration' includes the waiver of coinsurance and deductible amounts (or any part thereof), and transfers of items or services for free or for other than fair market value. The term 'remuneration' does not include—

''(A) the waiver of coinsurance and deductible amounts by a person, if—

''(i) the waiver is not offered as part of any advertisement or solicitation;

''(ii) the person does not routinely waive coinsurance or deductible amounts; and

''(iii) the person—

''(I) waives the coinsurance and deductible amounts after determining in good faith that the individual is in financial need;

''(II) fails to collect coinsurance or deductible amounts after making reasonable collection efforts; or

''(III) provides for any permissible waiver as specified in section 1128B(b)(3) or in regulations issued by the Secretary;

''(B) differentials in coinsurance and deductible amounts as part of a benefit plan design as long as the differentials have been disclosed in writing to all beneficiaries, third party payers, and providers, to whom claims are presented and as long as the differentials meet the standards as defined in regulations promulgated by the Secretary not later than 180 days after the date of the enactment of the Health Insurance Reform Act of 1996; or

''(C) incentives given to individuals to promote the delivery of preventive care as determined by the Secretary in regulations so promulgated.''.

(h) EFFECTIVE DATE.—The amendments made by this section shall take effect January 1, 1997.

Subtitle E—Amendments to Criminal Law

SEC. 541. HEALTH CARE FRAUD.

(a) IN GENERAL.—

(1) FINES AND IMPRISONMENT FOR HEALTH CARE FRAUD VIOLATIONS.—Chapter 63 of title 18, United States Code, is amended by adding at the end the following new section:

''§ 1347. Health care fraud

''Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

''(1) to defraud any health care program, in connection with the delivery of or payment for health care benefits, items, or services; or

''(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care program in connection with the delivery of or payment for health care benefits, items, or services;

shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365(g)(3) of this title), such person may be imprisoned for any term of years.''.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following:

''1347. Health care fraud.''.

(b) CRIMINAL FINES DEPOSITED IN FEDERAL HOSPITAL INSURANCE TRUST FUND.—The Secretary of the Treasury shall deposit into the Federal Hospital Insurance Trust Fund pursuant to section 1817(k)(2)(C) of the Social Security Act, as added by section 501(b), an amount equal to the criminal fines imposed under section 1347 of title 18, United States Code (relating to health care fraud).

SEC. 542. FORFEITURES FOR FEDERAL HEALTH CARE OFFENSES.

(a) IN GENERAL.—Section 982(a) of title 18, United States Code, is amended by adding after paragraph (5) the following new paragraph:

''(6)(A) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

''(B) For purposes of this paragraph, the term 'Federal health care offense' means a violation of, or a criminal conspiracy to violate—

''(i) section 1347 of this title;

''(ii) section 1128B of the Social Security Act; and

''(iii) sections 287, 371, 664, 666, 669, 1001, 1027, 1341, 1343, 1920, or 1954 of this title if the violation or conspiracy relates to health care fraud.''.

(b) CONFORMING AMENDMENT.—Section 982(b)(1)(A) of title 18, United States Code, is amended by inserting ''or (a)(6)'' after ''(a)(1)''.

(c) PROPERTY FORFEITED DEPOSITED IN FEDERAL HOSPITAL INSURANCE TRUST FUND.—

(1) IN GENERAL.—After the payment of the costs of asset forfeiture has been made, and notwithstanding any other provision of law, the Secretary of the Treasury shall deposit into the Federal Hospital Insurance Trust Fund pursuant to section 1817(k)(2)(C) of the Social Security Act, as added by section 501(b), an amount equal to the net amount realized from the forfeiture of property by reason of a Federal health care offense pursuant to section 982(a)(6) of title 18, United States Code.

(2) COSTS OF ASSET FORFEITURE.—For purposes of paragraph (1), the term ''payment of the costs of asset forfeiture'' means—

(A) the payment, at the discretion of the Attorney General, of any expenses necessary to seize, detain, inventory, safeguard, maintain, advertise, sell, or dispose of property under seizure, detention, or forfeited, or of any other necessary expenses incident to the seizure, detention, forfeiture, or disposal of such property, including payment for—

(i) contract services,

(ii) the employment of outside contractors to operate and manage properties or provide other specialized services necessary to dispose of such properties in an effort to maximize the return from such properties; and

(iii) reimbursement of any Federal, State, or local agency for any expenditures made to perform the functions described in this subparagraph;

(B) at the discretion of the Attorney General, the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Health Care Fraud and Abuse Control Account;

(C) the compromise and payment of valid liens and mortgages against property that has been forfeited, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made, and the employment of attorneys and other personnel skilled in State real estate law as necessary;

(D) payment authorized in connection with remission or mitigation procedures relating to property forfeited; and

(E) the payment of State and local property taxes on forfeited real property that accrued between the date of the violation giving rise to the forfeiture and the date of the forfeiture order.

SEC. 543. INJUNCTIVE RELIEF RELATING TO FEDERAL HEALTH CARE OFFENSES.

(a) IN GENERAL.—Section 1345(a)(1) of title 18, United States Code, is amended—

(1) by striking ''or'' at the end of subparagraph (A);

(2) by inserting ''or'' at the end of subparagraph (B); and

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

''(C) committing or about to commit a Federal health care offense (as defined in section 982(a)(6)(B) of this title);''.

(b) FREEZING OF ASSETS.—Section 1345(a)(2) of title 18, United States Code, is amended by inserting ''or a Federal health care offense (as defined in section 982(a)(6)(B))'' after ''title)''.

SEC. 544. FALSE STATEMENTS.

(a) IN GENERAL.—Chapter 47 of title 18, United States Code, is amended by adding at the end the following new section:

''§ 1033. False statements relating to health care matters

''Whoever, in any matter involving a health care program, knowingly and willfully—

''(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or

''(2) makes any materially false, fictitious, or fraudulent statement or representation, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,

shall be fined under this title or imprisoned not more than 5 years, or both.''.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 47 of title 18, United States Code, is amended by adding at the end the following:

''1033. False statements relating to health care matters.''.

SEC. 545. OBSTRUCTION OF CRIMINAL INVESTIGATIONS OF FEDERAL HEALTH CARE OFFENSES.

(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by adding at the end the following new section:

''§ 1518. Obstruction of criminal investigations of Federal health care offenses

''(a) Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a Federal health care offense to a criminal investigator shall be fined under this title or imprisoned not more than 5 years, or both.

''(b) As used in this section the term 'Federal health care offense' has the same meaning given such term in section 982(a)(6)(B) of this title.

''(c) As used in this section the term 'criminal investigator' means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses.''.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by adding at the end the following:

''1518. Obstruction of Criminal Investigations of Federal Health Care Offenses.''.

SEC. 546. THEFT OR EMBEZZLEMENT.

(a) IN GENERAL.—Chapter 31 of title 18, United States Code, is amended by adding at the end the following new section:

''§ 669. Theft or embezzlement in connection with health care

''Whoever willfully embezzles, steals, or otherwise willfully and unlawfully converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care program, shall be fined under this title or imprisoned not more than 10 years, or both.''.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 31 of title 18, United States Code, is amended by adding at the end the following:

''669. Theft or Embezzlement in Connection with Health Care.''.

SEC. 547. LAUNDERING OF MONETARY INSTRUMENTS.

Section 1956(c)(7) of title 18, United States Code, is amended by adding at the end the following new subparagraph:

''(F) Any act or activity constituting an offense involving a Federal health care offense as that term is defined in section 982(a)(6)(B) of this title.''.

SEC. 548. AUTHORIZED INVESTIGATIVE DEMAND PROCEDURES.

(a) IN GENERAL.—Chapter 233 of title 18, United States Code, is amended by adding after section 3485 the following new section:

''§ 3486. Authorized investigative demand procedures

''(a)(1)(A) In any investigation relating to functions set forth in paragraph (2), the Attorney General or designee may issue in writing and cause to be served a subpoena compelling production of any records (including any books, papers, documents, electronic media, or other objects or tangible things), which may be relevant to an authorized law enforcement inquiry, that a person or legal entity may possess or have care, custody, or control.

''(B) A custodian of records may be required to give testimony concerning the production and authentication of such records.

''(C) The production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place; except that such production shall not be required more than 500 miles distant from the place where the subpoena is served.

''(D) Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

''(E) A subpoena requiring the production of records shall describe the objects required to be produced and prescribe a return date within a reasonable period of time within which the objects can be assembled and made available.

''(2) Investigative demands utilizing an administrative subpoena are authorized for any investigation with respect to any act or activity constituting or involving health care fraud, including a scheme or artifice—

''(A) to defraud any health care program, in connection with the delivery of or payment for health care benefits, items, or services; or

''(B) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care program in connection with the delivery of or payment for health care benefits, items, or services.

''(b)(1) A subpoena issued under this section may be served by any person designated in the subpoena to serve it.

''(2) Service upon a natural person may be made by personal delivery of the subpoena to such person.

''(3) Service may be made upon a domestic or foreign association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

''(4) The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

''(c)(1) In the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which such person carries on business or may be found, to compel compliance with the subpoena.

''(2) The court may issue an order requiring the subpoenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony required under subsection (a)(1)(B).

''(3) Any failure to obey the order of the court may be punished by the court as a contempt thereof.

''(4) All process in any such case may be served in any judicial district in which such person may be found.

''(d) Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer.

''(e)(1) Health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a

fraudulent claim related to health; or if authorized by an appropriate order of a court of competent jurisdiction, granted after application showing good cause therefor.

''(2) In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.

''(3) Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.''.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 223 of title 18, United States Code, is amended by inserting after the item relating to section 3405 the following new item:

''3486. Authorized investigative demand procedures.''.

(c) CONFORMING AMENDMENT.—Section 1510(b)(3)(B) of title 18, United States Code, is amended by inserting ''or a Department of Justice subpoena (issued under section 3486),'' after ''subpoena''.

TITLE VI—INTERNAL REVENUE CODE AND OTHER PROVISIONS

SEC. 600. REFERENCES.

Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

Subtitle A—Foreign Trust Tax Compliance

SEC. 601. IMPROVED INFORMATION REPORTING ON FOREIGN TRUSTS.

(a) IN GENERAL.—Section 6048 (relating to returns as to certain foreign trusts) is amended to read as follows:

''SEC. 6048. INFORMATION WITH RESPECT TO CERTAIN FOREIGN TRUSTS.

''(a) NOTICE OF CERTAIN EVENTS.—

''(1) GENERAL RULE.—On or before the 90th day (or such later day as the Secretary may prescribe) after any reportable event, the responsible party shall provide written notice of such event to the Secretary in accordance with paragraph (2).

''(2) CONTENTS OF NOTICE.—The notice required by paragraph (1) shall contain such information as the Secretary may prescribe, including—

''(A) the amount of money or other property (if any) transferred to the trust in connection with the reportable event, and

''(B) the identity of the trust and of each trustee and beneficiary (or class of beneficiaries) of the trust.

''(3) REPORTABLE EVENT.—For purposes of this subsection—

''(A) IN GENERAL.—The term 'reportable event' means—

''(i) the creation of any foreign trust by a United States person,

''(ii) the transfer of any money or property (directly or indirectly) to a foreign trust by a United States person, including a transfer by reason of death, and

''(iii) the death of a citizen or resident of the United States if—

''(I) the decedent was treated as the owner of any portion of a foreign trust under the rules of subpart E of part I of subchapter J of chapter 1, or

''(II) any portion of a foreign trust was included in the gross estate of the decedent.

''(B) EXCEPTIONS.—

''(i) FAIR MARKET VALUE SALES.—Subparagraph (A)(ii) shall not apply to any transfer of property to a trust in exchange for consideration of at least the fair market value of the transferred property. For purposes of the preceding sentence, consideration other than cash shall be taken into account at its fair market value and the rules of section 679(a)(3) shall apply.

''(ii) DEFERRED COMPENSATION AND CHARITABLE TRUSTS.—Subparagraph (A) shall not apply with respect to a trust which is—

''(I) described in section 402(b), 404(a)(4), or 404A, or

''(II) determined by the Secretary to be described in section 501(c)(3).

''(4) RESPONSIBLE PARTY.—For purposes of this subsection, the term 'responsible party' means—

''(A) the grantor in the case of the creation of an inter vivos trust,

''(B) the transferor in the case of a reportable event described in paragraph (3)(A)(ii) other than a transfer by reason of death, and

''(C) the executor of the decedent's estate in any other case.

''(b) UNITED STATES GRANTOR OF FOREIGN TRUST.—

''(1) IN GENERAL.—If, at any time during any taxable year of a United States person, such person is treated as the owner of any portion of a foreign trust under the rules of subpart E of part I of subchapter J of chapter 1, such person shall be responsible to ensure that—

''(A) such trust makes a return for such year which sets forth a full and complete accounting of all trust activities and operations for the year, the name of the United States agent for such trust, and such other information as the Secretary may prescribe, and

''(B) such trust furnishes such information as the Secretary may prescribe to each United States person (i) who is treated as the owner of any portion of such trust or (ii) who receives (directly or indirectly) any distribution from the trust.

''(2) TRUSTS NOT HAVING UNITED STATES AGENT.—

''(A) IN GENERAL.—If the rules of this paragraph apply to any foreign trust, the determination of amounts required to be taken into account with respect to such trust by a United States person under the rules of subpart E of part I of subchapter J of chapter 1 shall be determined by the Secretary.

''(B) UNITED STATES AGENT REQUIRED.—The rules of this paragraph shall apply to any foreign trust to which paragraph (1) applies unless such trust agrees (in such manner, subject to such conditions, and at such time as the Secretary shall prescribe) to authorize a United States person to act as such trust's limited agent solely for purposes of applying sections 7602, 7603, and 7604 with respect to—

''(i) any request by the Secretary to examine records or produce testimony related to the proper treatment of amounts required to be taken into account under the rules referred to in subparagraph (A), or

''(ii) any summons by the Secretary for such records or testimony.

The appearance of persons or production of records by reason of a United States person being such an agent shall not subject such persons or records to legal process for any purpose other than determining the correct treatment under this title of the amounts required to be taken into account under the rules referred to in subparagraph (A). A foreign trust which appoints an agent described in this subparagraph shall not be considered to have an office or a permanent establishment in the United States, or to be engaged in a trade or business in the United States, solely because of the activities of such agent pursuant to this subsection.

''(C) OTHER RULES TO APPLY.—Rules similar to the rules of paragraphs (2) and (4) of section 6038A(e) shall apply for purposes of this paragraph.

''(c) REPORTING BY UNITED STATES BENEFICIARIES OF FOREIGN TRUSTS.—

''(1) IN GENERAL.—If any United States person receives (directly or indirectly) during any taxable year of such person any distribution from a foreign trust, such person shall make a return with respect to such trust for such year which includes—

''(A) the name of such trust,

''(B) the aggregate amount of the distributions so received from such trust during such taxable year, and

''(C) such other information as the Secretary may prescribe.

''(2) INCLUSION IN INCOME IF RECORDS NOT PROVIDED.—

''(A) IN GENERAL.—If adequate records are not provided to the Secretary to determine the proper treatment of any distribution from a foreign trust, such distribution shall be treated as an accumulation distribution includible in the gross income of the distributee under chapter 1. To the extent provided in regulations, the preceding sentence shall not apply if the foreign trust elects to be subject to rules similar to the rules of subsection (b)(2)(B).

''(B) APPLICATION OF ACCUMULATION DISTRIBUTION RULES.—For purposes of applying section 668 in a case to which subparagraph (A) applies, the applicable number of years for purposes of section 668(a) shall be ½ of the number of years the trust has been in existence.

''(d) SPECIAL RULES.—

''(1) DETERMINATION OF WHETHER UNITED STATES PERSON RECEIVES DISTRIBUTION.—For purposes of this section, in determining whether a United States person receives a distribution from a foreign trust, the fact that a portion of such trust is treated as owned by another person under the rules of subpart E of part I of subchapter J of chapter 1 shall be disregarded.

''(2) DOMESTIC TRUSTS WITH FOREIGN ACTIVITIES.—To the extent provided in regulations, a trust which is a United States person shall be treated as a foreign trust for purposes of this section and section 6677 if such trust has substantial activities, or holds substantial property, outside the United States.

''(3) TIME AND MANNER OF FILING INFORMATION.—Any notice or return required under this section shall be made at such time and in such manner as the Secretary shall prescribe.

''(4) MODIFICATION OF RETURN REQUIREMENTS.—The Secretary is authorized to suspend or modify any requirement of this section if the Secretary determines that the United States has no significant tax interest in obtaining the required information.''.

(b) INCREASED PENALTIES.—Section 6677 (relating to failure to file information returns with respect to certain foreign trusts) is amended to read as follows:

''SEC. 6677. FAILURE TO FILE INFORMATION WITH RESPECT TO CERTAIN FOREIGN TRUSTS.

''(a) CIVIL PENALTY.—In addition to any criminal penalty provided by law, if any notice or return required to be filed by section 6048—

''(1) is not filed on or before the time provided in such section, or

''(2) does not include all the information required pursuant to such section or includes incorrect information,

the person required to file such notice or return shall pay a penalty equal to 35 percent of the gross reportable amount. If any failure described in the preceding sentence continues for more than 90 days after the day on which the Secretary mails notice of such failure to the person required to pay such penalty, such person shall pay a penalty (in addition to the amount determined under the preceding sentence) of $10,000 for each 30-day period (or fraction thereof) during which such failure continues after the expiration of such 90-day period. In no event shall the penalty under this subsection with respect to any failure exceed the gross reportable amount.

''(b) SPECIAL RULES FOR RETURNS UNDER SECTION 6048(b).—In the case of a return required under section 6048(b)—

''(1) the United States person referred to in such section shall be liable for the penalty imposed by subsection (a), and

''(2) subsection (a) shall be applied by substituting '5 percent' for '35 percent'.

''(c) GROSS REPORTABLE AMOUNT.—For purposes of subsection (a), the term 'gross reportable amount' means—

''(1) the gross value of the property involved in the event (determined as of the date of the event) in the case of a failure relating to section 6048(a),

''(2) the gross value of the portion of the trust's assets at the close of the year treated as owned by the United States person in the case of a failure relating to section 6048(b)(1), and

''(3) the gross amount of the distributions in the case of a failure relating to section 6048(c).

''(d) REASONABLE CAUSE EXCEPTION.—No penalty shall be imposed by this section on any failure which is shown to be due to reasonable cause and not due to willful neglect. The fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the required information is not reasonable cause.

''(e) DEFICIENCY PROCEDURES NOT TO APPLY.—Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) shall not apply in respect of the assessment or collection of any penalty imposed by subsection (a).''.

(c) CONFORMING AMENDMENTS.—

(1) Paragraph (2) of section 6724(d) is amended by striking ''or'' at the end of subparagraph (S), by striking the period at the end of subparagraph (T) and inserting '', or'', and by inserting after subparagraph (T) the following new subparagraph:

''(U) section 6048(b)(1)(B) (relating to foreign trust reporting requirements).''.

(2) The table of sections for subpart B of part III of subchapter A of chapter 61 is amended by striking the item relating to section 6048 and inserting the following new item:

''Sec. 6048. Information with respect to certain foreign trusts.''.

(3) The table of sections for part I of subchapter B of chapter 68 is amended by striking the item relating to section 6677 and inserting the following new item:

''Sec. 6677. Failure to file information with respect to certain foreign trusts.''.

(d) EFFECTIVE DATES.—

(1) REPORTABLE EVENTS.—To the extent related to subsection (a) of section 6048 of the Internal Revenue Code of 1986, as amended by this section, the amendments made by this section shall apply to reportable events (as defined in such section 6048) occurring after the date of the enactment of this Act.

(2) GRANTOR TRUST REPORTING.—To the extent related to subsection (b) of such section 6048, the amendments made by this section shall apply to taxable years of United States persons beginning after the date of the enactment of this Act.

(3) REPORTING BY UNITED STATES BENEFICIARIES.—To the extent related to subsection (c) of such section 6048, the amendments made by this section shall apply to distributions received after the date of the enactment of this Act.

SEC. 602. MODIFICATIONS OF RULES RELATING TO FOREIGN TRUSTS HAVING ONE OR MORE UNITED STATES BENEFICIARIES.

(a) TREATMENT OF TRUST OBLIGATIONS, ETC.—

(1) Paragraph (2) of section 679(a) is amended by striking subparagraph (B) and inserting the following:

''(B) TRANSFERS AT FAIR MARKET VALUE.—To any transfer of property to a trust in exchange for consideration of at least the fair market value of the transferred property. For purposes of the preceding sentence, consideration other than cash shall be taken into account at its fair market value.''.

(2) Subsection (a) of section 679 (relating to foreign trusts having one or more United States beneficiaries) is amended by adding at the end the following new paragraph:

''(3) CERTAIN OBLIGATIONS NOT TAKEN INTO ACCOUNT UNDER FAIR MARKET VALUE EXCEPTION.—

''(A) IN GENERAL.—In determining whether paragraph (2)(B) applies to any transfer by a person described in clause (ii) or (iii) of subparagraph (C), there shall not be taken into account—

''(i) except as provided in regulations, any obligation of a person described in subparagraph (C), and

''(ii) to the extent provided in regulations, any obligation which is guaranteed by a person described in subparagraph (C).

''(B) TREATMENT OF PRINCIPAL PAYMENTS ON OBLIGATION.—Principal payments by the trust on any obligation referred to in subparagraph (A) shall be taken into account on and after the date of the payment in determining the portion of the trust attributable to the property transferred.

''(C) PERSONS DESCRIBED.—The persons described in this subparagraph are—

''(i) the trust,

''(ii) any grantor or beneficiary of the trust, and

''(iii) any person who is related (within the meaning of section 643(i)(2)(B)) to any grantor or beneficiary of the trust.''.

(b) EXEMPTION OF TRANSFERS TO CHARITABLE TRUSTS.—Subsection (a) of section 679 is amended by striking ''section 404(a)(4) or 404A'' and inserting ''section 6048(a)(3)(B)(ii)''.

(c) OTHER MODIFICATIONS.—Subsection (a) of section 679 is amended by adding at the end the following new paragraphs:

''(4) SPECIAL RULES APPLICABLE TO FOREIGN GRANTOR WHO LATER BECOMES A UNITED STATES PERSON.—

''(A) IN GENERAL.—If a nonresident alien individual has a residency starting date within 5 years after directly or indirectly transferring property to a foreign trust, this section and section 6048 shall be applied as if such individual transferred to such trust on the residency starting date an amount equal to the portion of such trust attributable to the property transferred by such individual to such trust in such transfer.

''(B) TREATMENT OF UNDISTRIBUTED INCOME.—For purposes of this section, undistributed net income for periods before such individual's residency starting date shall be taken into account in determining the portion of the trust which is attributable to property transferred by such individual to such trust but shall not otherwise be taken into account.

''(C) RESIDENCY STARTING DATE.—For purposes of this paragraph, an individual's residency starting date is the residency starting date determined under section 7701(b)(2)(A).

''(5) OUTBOUND TRUST MIGRATIONS.—If—

''(A) an individual who is a citizen or resident of the United States transferred property to a trust which was not a foreign trust, and

''(B) such trust becomes a foreign trust while such individual is alive,

then this section and section 6048 shall be applied as if such individual transferred to such trust on the date such trust becomes a foreign trust an amount equal to the portion of such trust attributable to the property previously transferred by such individual to such trust. A rule similar to the rule of paragraph (4)(B) shall apply for purposes of this paragraph.''.

(d) MODIFICATIONS RELATING TO WHETHER TRUST HAS UNITED STATES BENEFICIARIES.—Subsection (c) of section 679 is amended by adding at the end the following new paragraph:

''(3) CERTAIN UNITED STATES BENEFICIARIES DISREGARDED.—A beneficiary shall not be treated as a United States person in applying this section with respect to any transfer of property to foreign trust if such beneficiary first became a United States person more than 5 years after the date of such transfer.''.

(e) TECHNICAL AMENDMENT.—Subparagraph (A) of section 679(c)(2) is amended to read as follows:

''(A) in the case of a foreign corporation, such corporation is a controlled foreign corporation (as defined in section 957(a)),''.

(f) REGULATIONS.—Section 679 is amended by adding at the end the following new subsection:

''(d) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section.''.

(g) EFFECTIVE DATE.—The amendments made by this section shall apply to transfers of property after February 6, 1995.

SEC. 603. FOREIGN PERSONS NOT TO BE TREATED AS OWNERS UNDER GRANTOR TRUST RULES.

(a) GENERAL RULE.—

(1) Subsection (f) of section 672 (relating to special rule where grantor is foreign person) is amended to read as follows:

''(f) SUBPART NOT TO RESULT IN FOREIGN OWNERSHIP.—

''(1) IN GENERAL.—Notwithstanding any other provision of this subpart, this subpart shall apply only to the extent such application results in an amount being currently taken into account (directly or through 1 or more entities) under this chapter in computing the income of a citizen or resident of the United States or a domestic corporation.

''(2) EXCEPTIONS.—

''(A) CERTAIN REVOCABLE AND IRREVOCABLE TRUSTS.—Paragraph (1) shall not apply to any trust if—

''(i) the power to revest absolutely in the grantor title to the trust property is exercisable solely by the grantor without the approval or consent of any other person or with the consent of a related or subordinate party who is subservient to the grantor, or

''(ii) the only amounts distributable from such trust (whether income or corpus) during the lifetime of the grantor are amounts distributable to the grantor or the spouse of the grantor.

''(B) COMPENSATORY TRUSTS.—Except as provided in regulations, paragraph (1) shall not apply to any portion of a trust distributions from which are taxable as compensation for services rendered.

''(3) SPECIAL RULES.—Except as otherwise provided in regulations prescribed by the Secretary—

''(A) a controlled foreign corporation (as defined in section 957) shall be treated as a domestic corporation for purposes of paragraph (1), and

''(B) paragraph (1) shall not apply for purposes of applying section 1296.

''(4) RECHARACTERIZATION OF PURPORTED GIFTS.—In the case of any transfer directly or indirectly from a partnership or foreign corporation which the transferee treats as a gift or bequest, the Secretary may recharacterize such transfer in such circumstances as the Secretary determines to be appropriate to prevent the avoidance of the purposes of this subsection.

''(5) SPECIAL RULE WHERE GRANTOR IS FOREIGN PERSON.—If—

''(A) but for this subsection, a foreign person would be treated as the owner of any portion of a trust, and

''(B) such trust has a beneficiary who is a United States person,

such beneficiary shall be treated as the grantor of such portion to the extent such beneficiary has made transfers of property by gift (directly or indirectly) to such foreign person. For purposes of the preceding sentence, any gift shall not be taken into account to the extent such gift would be excluded from taxable gifts under section 2503(b).

''(6) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection, including regulations providing that paragraph (1) shall not apply in appropriate cases.''.

(2) The last sentence of subsection (c) of section 672 of such Code is amended by inserting ''subsection (f) and'' before ''sections 674''.

(b) CREDIT FOR CERTAIN TAXES.—Paragraph (2) of section 665(d) is amended by adding at the end the following new sentence: ''Under rules or regulations prescribed by the Secretary, in the case of any foreign trust of which the settlor or another person would be treated as owner of any portion of the trust under subpart E but for section 672(f), the term 'taxes imposed on the trust' includes the allocable amount of any income, war profits, and excess profits taxes imposed by any foreign country or possession of the United States on the settlor or such other person in respect of trust gross income.''.

(c) DISTRIBUTIONS BY CERTAIN FOREIGN TRUSTS THROUGH NOMINEES.—

(1) Section 643 is amended by adding at the end the following new subsection:

''(h) DISTRIBUTIONS BY CERTAIN FOREIGN TRUSTS THROUGH NOMINEES.—For purposes of this part, any amount paid to a United States person which is derived directly or indirectly from a foreign trust of which the payor is not the grantor shall be deemed in the year of payment to have been directly paid by the foreign trust to such United States person.''.

(2) Section 665 is amended by striking subsection (c).

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided by paragraph (2), the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) EXCEPTION FOR CERTAIN TRUSTS.—The amendments made by this section shall not apply to any trust—

(A) which is treated as owned by the grantor or another person under section 676 or 677 (other than subsection (a)(3) thereof) of the Internal Revenue Code of 1986, and

(B) which is in existence on September 19, 1995.

The preceding sentence shall not apply to the portion of any such trust attributable to any transfer to such trust after September 19, 1995.

(e) TRANSITIONAL RULE.—If—

(1) by reason of the amendments made by this section, any person other than a United States person ceases to be treated as the owner of a portion of a domestic trust, and

(2) before January 1, 1997, such trust becomes a foreign trust, or the assets of such trust are transferred to a foreign trust,

no tax shall be imposed by section 1491 of the Internal Revenue Code of 1986 by reason of such trust becoming a foreign trust or the assets of such trust being transferred to a foreign trust.

SEC. 604. INFORMATION REPORTING REGARDING FOREIGN GIFTS.

(a) IN GENERAL.—Subpart A of part III of subchapter A of chapter 61 is amended by inserting after section 6039E the following new section:

''SEC. 6039F. NOTICE OF GIFTS RECEIVED FROM FOREIGN PERSONS.

''(a) IN GENERAL.—If the value of the aggregate foreign gifts received by a United States person (other than an organization described in section 501(c) and exempt from tax under section 501(a)) during any taxable year exceeds $10,000, such United States person shall furnish (at such time and in such manner as the Secretary shall prescribe) such information as the Secretary may prescribe regarding each foreign gift received during such year.

''(b) FOREIGN GIFT.—For purposes of this section, the term 'foreign gift' means any amount received from a person other than a United States person which the recipient treats as a gift or bequest. Such term shall not include any qualified transfer (within the meaning of section 2503(e)(2)).

''(c) PENALTY FOR FAILURE TO FILE INFORMATION.—

''(1) IN GENERAL.—If a United States person fails to furnish the information required by subsection (a) with respect to any foreign gift within the time prescribed therefor (including extensions)—

''(A) the tax consequences of the receipt of such gift shall be determined by the Secretary in the Secretary's sole discretion from the Secretary's own knowledge or from such information as the Secretary may obtain through testimony or otherwise, and

''(B) such United States person shall pay (upon notice and demand by the Secretary and in the same manner as tax) an amount equal to 5 percent of the amount of such foreign gift for each month for which the failure continues (not to exceed 25 percent of such amount in the aggregate).

''(2) REASONABLE CAUSE EXCEPTION.—Paragraph (1) shall not apply to any failure to report a foreign gift if the United States person shows that the failure is due to reasonable cause and not due to willful neglect.

''(d) COST-OF-LIVING ADJUSTMENT.—In the case of any taxable year beginning after December 31, 1996, the $10,000 amount under subsection (a) shall be increased by an amount equal to the product of such amount and the cost-of-living adjustment for such taxable year under section 1(f)(3), except that subparagraph (B) thereof shall be applied by substituting '1995' for '1992'.

''(e) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section.''.

(b) CLERICAL AMENDMENT.—The table of sections for such subpart is amended by inserting after the item relating to section 6039E the following new item:

''Sec. 6039F. Notice of large gifts received from foreign persons.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to amounts received after the date of the enactment of this Act in taxable years ending after such date.

SEC. 605. MODIFICATION OF RULES RELATING TO FOREIGN TRUSTS WHICH ARE NOT GRANTOR TRUSTS.

(a) MODIFICATION OF INTEREST CHARGE ON ACCUMULATION DISTRIBUTIONS.—Subsection (a) of section 668 (relating to interest charge on accumulation distributions from foreign trusts) is amended to read as follows:

''(a) GENERAL RULE.—For purposes of the tax determined under section 667(a)—

''(1) INTEREST DETERMINED USING UNDERPAYMENT RATES.—The interest charge determined under this section with respect to any distribution is the amount of interest which would be determined on the partial tax computed under section 667(b) for the period described in paragraph (2) using the rates and the method under section 6621 applicable to underpayments of tax.

''(2) PERIOD.—For purposes of paragraph (1), the period described in this paragraph is the period which begins on the date which is the applicable number of years before the date of the distribution and which ends on the date of the distribution.

''(3) APPLICABLE NUMBER OF YEARS.—For purposes of paragraph (2)—

''(A) IN GENERAL.—The applicable number of years with respect to a distribution is the number determined by dividing—

''(i) the sum of the products described in subparagraph (B) with respect to each undistributed income year, by

''(ii) the aggregate undistributed net income.

The quotient determined under the preceding sentence shall be rounded under procedures prescribed by the Secretary.

''(B) PRODUCT DESCRIBED.—For purposes of subparagraph (A), the product described in this subparagraph with respect to any undistributed income year is the product of—

''(i) the undistributed net income for such year, and

''(ii) the sum of the number of taxable years between such year and the taxable year of the distribution (counting in each case the undistributed income year but not counting the taxable year of the distribution).

''(4) UNDISTRIBUTED INCOME YEAR.—For purposes of this subsection, the term 'undistributed income year' means any prior taxable year of the trust for which there is undistributed net income, other than a taxable year during all of which the beneficiary receiving the distribution was not a citizen or resident of the United States.

''(5) DETERMINATION OF UNDISTRIBUTED NET INCOME.—Notwithstanding section 666, for purposes of this subsection, an accumulation distribution from the trust shall be treated as reducing proportionately the undistributed net income for undistributed income years.

''(6) PERIODS BEFORE 1996.—Interest for the portion of the period described in paragraph (2) which occurs before January 1, 1996, shall be determined—

''(A) by using an interest rate of 6 percent, and

''(B) without compounding until January 1, 1996.''.

(b) ABUSIVE TRANSACTIONS.—Section 643(a) is amended by inserting after paragraph (6) the following new paragraph:

''(7) ABUSIVE TRANSACTIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this part, including regulations to prevent avoidance of such purposes.''.

(c) TREATMENT OF LOANS FROM TRUSTS.—

(1) IN GENERAL.—Section 643 (relating to definitions applicable to subparts A, B, C, and D) is amended by adding at the end the following new subsection:

''(i) LOANS FROM FOREIGN TRUSTS.—For purposes of subparts B, C, and D—

''(1) GENERAL RULE.—Except as provided in regulations, if a foreign trust makes a loan of cash or marketable securities directly or indirectly to—

''(A) any grantor or beneficiary of such trust who is a United States person, or

''(B) any United States person not described in subparagraph (A) who is related to such grantor or beneficiary,

the amount of such loan shall be treated as a distribution by such trust to such grantor or beneficiary (as the case may be).

''(2) DEFINITIONS AND SPECIAL RULES.—For purposes of this subsection—

''(A) CASH.—The term 'cash' includes foreign currencies and cash equivalents.

''(B) RELATED PERSON.—

''(i) IN GENERAL.—A person is related to another person if the relationship between such persons would result in a disallowance of losses under section 267 or 707(b). In applying section 267 for purposes of the preceding sentence, section 267(c)(4) shall be applied as if the family of an individual includes the spouses of the members of the family.

''(ii) ALLOCATION.—If any person described in paragraph (1)(B) is related to more than one person, the grantor or beneficiary to whom the treatment under this subsection applies shall be determined under regulations prescribed by the Secretary.

''(C) EXCLUSION OF TAX-EXEMPTS.—The term 'United States person' does not include any entity exempt from tax under this chapter.

''(D) TRUST NOT TREATED AS SIMPLE TRUST.—Any trust which is treated under this subsection

as making a distribution shall be treated as not described in section 651.

''(3) SUBSEQUENT TRANSACTIONS REGARDING LOAN PRINCIPAL.—If any loan is taken into account under paragraph (1), any subsequent transaction between the trust and the original borrower regarding the principal of the loan (by way of complete or partial repayment, satisfaction, cancellation, discharge, or otherwise) shall be disregarded for purposes of this title.''.

(2) TECHNICAL AMENDMENT.—Paragraph (8) of section 7872(f) is amended by inserting '', 643(i),'' before ''or 1274'' each place it appears.

(d) EFFECTIVE DATES.—

(1) INTEREST CHARGE.—The amendment made by subsection (a) shall apply to distributions after the date of the enactment of this Act.

(2) ABUSIVE TRANSACTIONS.—The amendment made by subsection (b) shall take effect on the date of the enactment of this Act.

(3) LOANS FROM TRUSTS.—The amendment made by subsection (c) shall apply to loans of cash or marketable securities after September 19, 1995.

SEC. 606. RESIDENCE OF ESTATES AND TRUSTS, ETC.

(a) TREATMENT AS UNITED STATES PERSON.—

(1) IN GENERAL.—Paragraph (30) of section 7701(a) is amended by striking subparagraph (D) and by inserting after subparagraph (C) the following:

''(D) any estate or trust if—

''(i) a court within the United States is able to exercise primary supervision over the administration of the estate or trust, and

''(ii) in the case of a trust, one or more United States fiduciaries have the authority to control all substantial decisions of the trust.''.

(2) CONFORMING AMENDMENT.—Paragraph (31) of section 7701(a) is amended to read as follows:

''(31) FOREIGN ESTATE OR TRUST.—The term 'foreign estate' or 'foreign trust' means any estate or trust other than an estate or trust described in section 7701(a)(30)(D).''.

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply—

(A) to taxable years beginning after December 31, 1996, or

(B) at the election of the trustee of a trust, to taxable years ending after the date of the enactment of this Act.

Such an election, once made, shall be irrevocable.

(b) DOMESTIC TRUSTS WHICH BECOME FOREIGN TRUSTS.—

(1) IN GENERAL.—Section 1491 (relating to imposition of tax on transfers to avoid income tax) is amended by adding at the end the following new flush sentence:

''If a trust which is not a foreign trust becomes a foreign trust, such trust shall be treated for purposes of this section as having transferred, immediately before becoming a foreign trust, all of its assets to a foreign trust.''.

(2) PENALTY.—Section 1494 is amended by adding at the end the following new subsection:

''(c) PENALTY.—In the case of any failure to file a return required by the Secretary with respect to any transfer described in section 1491 with respect to a trust, the person required to file such return shall be liable for the penalties provided in section 6677 in the same manner as if such failure were a failure to file a return under section 6048(a).''.

(3) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date of the enactment of this Act.

Subtitle B—Repeal of Bad Debt Reserve Method for Thrift Savings Associations

SEC. 611. REPEAL OF BAD DEBT RESERVE METHOD FOR THRIFT SAVINGS ASSOCIATIONS.

(a) IN GENERAL.—Section 593 (relating to reserves for losses on loans) is hereby repealed.

(b) CONFORMING AMENDMENTS.—

(1) Subsection (d) of section 50 is amended by adding at the end the following new sentence:

''Paragraphs (1)(A), (2)(A), and (4) of section 46(e) referred to in paragraph (1) of this subsection shall not apply to any taxable year beginning after December 31, 1995.''.

(2) Subsection (e) of section 52 is amended by striking paragraph (1) and by redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

(3) Subsection (a) of section 57 is amended by striking paragraph (4).

(4) Section 246 is amended by striking subsection (f).

(5) Clause (i) of section 291(e)(1)(B) is amended by striking ''or to which section 593 applies''.

(6) Subparagraph (A) of section 585(a)(2) is amended by striking ''other than an organization to which section 593 applies''.

(7) Sections 595 and 596 are hereby repealed.

(8) Subsection (a) of section 860E is amended—

(A) by striking ''Except as provided in paragraph (2), the'' in paragraph (1) and inserting ''The'',

(B) by striking paragraphs (2) and (4) and redesignating paragraphs (3) and (5) as paragraphs (2) and (3), respectively, and

(C) by striking in paragraph (2) (as so redesignated) all that follows ''subsection'' and inserting a period.

(9) Paragraph (3) of section 992(d) is amended by striking ''or 593''.

(10) Section 1038 is amended by striking subsection (f).

(11) Clause (ii) of section 1042(c)(4)(B) is amended by striking ''or 593''.

(12) Subsection (c) of section 1277 is amended by striking ''or to which section 593 applies''.

(13) Subparagraph (B) of section 1361(b)(2) is amended by striking ''or to which section 593 applies''.

(14) The table of sections for part II of subchapter H of chapter 1 is amended by striking the items relating to sections 593, 595, and 596.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to taxable years beginning after December 31, 1995.

(2) REPEAL OF SECTION 595.—The repeal of section 595 under subsection (b)(7) shall apply to property acquired in taxable years beginning after December 31, 1995.

(d) 6-YEAR SPREAD OF ADJUSTMENTS.—

(1) IN GENERAL.—In the case of any taxpayer who is required by reason of the amendments made by this section to change its method of computing reserves for bad debts—

(A) such change shall be treated as a change in a method of accounting,

(B) such change shall be treated as initiated by the taxpayer and as having been made with the consent of the Secretary, and

(C) the net amount of the adjustments required to be taken into account by the taxpayer under section 481(a)—

(i) shall be determined by taking into account only applicable excess reserves, and

(ii) as so determined, shall be taken into account ratably over the 6-taxable year period beginning with the first taxable year beginning after December 31, 1995.

(2) APPLICABLE EXCESS RESERVES.—

(A) IN GENERAL.—For purposes of paragraph (1), the term 'applicable excess reserves' means the excess (if any) of—

(i) the balance of the reserves described in section 593(c)(1) of such Code (as in effect on the day before the date of the enactment of this Act) as of the close of the taxpayer's last taxable year beginning before January 1, 1996, over

(ii) the lesser of—

(I) the balance of such reserves as of the close of the taxpayer's last taxable year beginning before January 1, 1988, or

(II) the balance of the reserves described in subclause (I), reduce by an amount determined in the same manner as under section 585(b)(2)(B)(ii) on the basis of the taxable years described in clause (i) and this clause.

(B) SPECIAL RULE FOR THRIFTS WHICH BECOME SMALL BANKS.—In the case of a bank (as defined in section 581 of such Code) which is not a large bank (as defined in section 585(c)(2) of such Code) for its first taxable year beginning after December 31, 1995—

(i) the balance taken into account under subparagraph (A)(ii) shall not be less than the amount which would be the balance of such reserve as of the close of its last taxable year beginning before January 1, 1996, if the additions to such reserve for all taxable years had been determined under section 585(b)(2)(A), and

(ii) the opening balance of the reserve for bad debts as of the beginning of such first taxable year shall be the balance taken into account under subparagraph (A)(ii) (determined after the application of clause (i) of this subparagraph).

The preceding sentence shall not apply for purposes of paragraphs (5), (6), and (7).

(3) RECAPTURE OF PRE-1988 RESERVES WHERE TAXPAYER CEASES TO BE BANK.—If during any taxable year beginning after December 31, 1995, a taxpayer to which paragraph (1) applied is not a bank (as defined in section 581), paragraph (1) shall apply to the reserves described in subparagraph (A)(ii) except that such reserves shall be taken into account ratably over the 6-taxable year period beginning with such taxable year.

(4) SUSPENSION OF RECAPTURE IF RESIDENTIAL LOAN REQUIREMENT MET.—

(A) IN GENERAL.—In the case of a bank which meets the residential loan requirement of subparagraph (B) for a taxable year beginning after December 31, 1995, and before January 1, 1998—

(i) no adjustment shall be taken into account under paragraph (1) for such taxable year, and

(ii) such taxable year shall be disregarded in determining—

(I) whether any other taxable year is a taxable year for which an adjustment is required to be taken into account under paragraph (1), and

(II) the amount of such adjustment.

(B) RESIDENTIAL LOAN REQUIREMENT.—A taxpayer meets the residential loan requirement of this subparagraph for any taxable year if the principal amount of the residential loans made by the taxpayer during such year is not less than the base amount for such year.

(C) RESIDENTIAL LOAN.—For purposes of this paragraph, the term ''residential loan'' means any loan described in clause (v) of section 7701(a)(19)(C) of such Code but only if such loan is incurred in acquiring, constructing, or improving the property described in such clause.

(D) BASE AMOUNT.—For purposes of subparagraph (B), the base amount is the average of the principal amounts of the residential loans made by the taxpayer during the 6 most recent taxable years beginning before January 1, 1996. At the election of the taxpayer who made such loans during each of such 6 taxable years, the preceding sentence shall be applied without regard to the taxable year in which such principal amount was the highest and the taxable year in such principal amount was the lowest. Such an election may be made only for the first taxable year beginning after December 31, 1995, and, if made for such taxable year, shall apply to the succeeding taxable year unless revoked with the consent of the Secretary of the Treasury or the Secretary's delegate.

(E) CONTROLLED GROUPS.—In the case of a taxpayer which is a member of any controlled group of corporations described in section 1563(a)(1) of such Code, subparagraph (B) shall be applied with respect to such group.

(5) CONTINUED APPLICATION OF FRESH START UNDER SECTION 585 TRANSITIONAL RULES.—In the case of a taxpayer to which paragraph (1) applied and which was not a large bank (as defined in section 585(c)(2) of such Code) for its first taxable year beginning after December 31, 1995:

(A) IN GENERAL.—For purposes of determining the net amount of adjustments referred to in section 585(c)(3)(A)(iii) of such Code, there shall be taken into account only the excess of the reserve for bad debts as of the close of the last taxable year before the disqualification year over the balance taken into account by such taxpayer under paragraph (2)(A)(ii) of this subsection.

(B) TREATMENT UNDER ELECTIVE CUT-OFF METHOD.—For purposes of applying section 585(c)(4) of such Code—

(i) the balance of the reserve taken into account under subparagraph (B) thereof shall be reduced by the balance taken into account by such taxpayer under paragraph (2)(A)(ii) of this subsection, and

(ii) no amount shall be includible in gross income by reason of such reduction.

(6) CONTINUED APPLICATION OF SECTION 593(e).—Notwithstanding the amendments made by this section, in the case of a taxpayer to which paragraph (1) of this subsection applies, section 593(e) of such Code (as in effect on the day before the date of the enactment of this Act) shall continue to apply to such taxpayer as if such taxpayer were a domestic building and loan association but the amount of the reserves taken into account under subparagraphs (B) and (C) of section 593(e)(1) (as so in effect) shall be the balance taken into account by such taxpayer under paragraph (2)(A)(ii) of this subsection.

(7) CERTAIN ITEMS INCLUDED AS SECTION 381(c) ITEMS.—The balance of the applicable excess reserves, and the balance taken into account by a taxpayer under paragraph (2)(A)(ii) of this subsection, shall be treated as items described in section 381(c) of such Code.

(8) CONVERSIONS TO CREDIT UNIONS.—In the case of a taxpayer to which paragraph (1) applied which becomes a credit union described in section 501(c)(14)(A)—

(A) any amount required to be included in the gross income of the credit union by reason of this subsection shall be treated as derived from an unrelated trade or business (as defined in section 513), and

(B) for purposes of paragraph (3), the credit union shall not be treated as if it were a bank.

(9) REGULATIONS.—The Secretary of the Treasury or the Secretary's delegate shall prescribe such regulations as may be necessary to carry out this subsection, including regulations providing for the application of paragraphs (4) and (6) in the case of acquisitions, mergers, spin-offs, and other reorganizations.

Subtitle C—Other Provisions

SEC. 621. EXTENSION OF MEDICARE SECONDARY PAYOR PROVISIONS.

Section 1862(b) of the Social Security Act (42 U.S.C. 1395y(b)) is amended—

(1) in paragraph (1)—

(A) in subparagraph (B), by striking clause (iii) and redesignating clause (iv) as clause (iii); and

(B) in the matter following clause (ii) of subparagraph (C), by striking '', and before October 1, 1998''; and

(2) in paragraph (5)(C), by striking clause (iii).

SEC. 622. ANNUAL ADJUSTMENT FACTORS FOR OPERATING COSTS ONLY; RESTRAINT ON RENT INCREASES.

(a) ANNUAL ADJUSTMENT FACTORS FOR OPERATING COSTS ONLY.—Section 8(c)(2)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(A)) is amended—

(1) by striking ''(2)(A)'' and inserting ''(2)(A)(i)'';

(2) by striking the second sentence and all that follows through the end of the subparagraph; and

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

''(ii) Each assistance contract under this section shall provide that—

''(I) if the maximum monthly rent for a unit in a new construction or substantial rehabilitation project to be adjusted using an annual adjustment factor exceeds 100 percent of the fair market rent for an existing dwelling unit in the market area, the Secretary shall adjust the rent using an operating costs factor that increases the rent to reflect increases in operating costs in the market area; and

''(II) if the owner of a unit in a project described in subclause (I) demonstrates that the adjusted rent determined under subclause (I) would not exceed the rent for an unassisted unit of similar quality, type, and age in the same market area, as determined by the Secretary, the Secretary shall use the otherwise applicable annual adjustment factor.''.

(b) RESTRAINT ON SECTION 8 RENT INCREASES.—Section 8(c)(2)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(A)), as amended by subsection (a) of this section, is amended by adding at the end the following new clause:

''(iii)(I) Subject to subclause (II), with respect to any unit assisted under this section that is occupied by the same family at the time of the most recent annual rental adjustment, if the assistance contract provides for the adjustment of the maximum monthly rent by applying an annual adjustment factor, and if the rent for the unit is otherwise eligible for an adjustment based on the full amount of the annual adjustment factor, 0.01 shall be subtracted from the amount of the annual adjustment factor, except that the annual adjustment factor shall not be reduced to less than 1.0.

''(II) With respect to any unit described in subclause (I) that is assisted under the certificate program, the adjusted rent shall not exceed the rent for a comparable unassisted unit of similar quality, type, and age in the market area in which the unit is located.''.

(c) EFFECTIVE DATE.—The amendments made by this section shall be construed to have become effective on October 1, 1995.

SEC. 623. FORECLOSURE AVOIDANCE AND BORROWER ASSISTANCE.

(a) EFFECTIVENESS AND APPLICABILITY.—Section 407 of The Balanced Budget Downpayment Act, I (Public Law 104–99) is amended—

(1) in subsection (c)—

(A) by striking ''Except as provided in subsection (e), the'' and inserting ''The''; and

(B) by striking ''only with respect to mortgages insured under the National Housing Act that are originated before October 1, 1995'' and inserting ''to all mortgages insured under the National Housing Act''; and

(2) by striking subsection (e).

(b) TECHNICAL AMENDMENT.—Section 230(d) of the National Housing Act (12 U.S.C. 1715u(d)) is amended by striking ''the Departments'' and all that follows through ''1996'' and inserting ''The Balanced Budget Downpayment Act, I''.

CONSTITUTIONAL AMENDMENT TO LIMIT CONGRESSIONAL TERMS

The PRESIDING OFFICER. The clerk will now report Senate Joint Resolution 21.

The legislative clerk read as follows:

A joint resolution (S.J. Res. 21) proposing a constitutional amendment to limit congressional terms.

The Senate continued with the consideration of the joint resolution.

The PRESIDING OFFICER. The time until 3:45 is equally divided.

Mr. WARNER addressed the Chair.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Madam President, who controls the time? I would like to speak in favor of the matter before the Senate. My understanding is the Senator from Tennessee or the Senator from Missouri.

The PRESIDING OFFICER. The time is divided between the Senate majority leader and the Senate minority leader or their designees.

Mr. WARNER. Madam President, I inquire of the distinguished Senator from Tennessee if I might have 5 minutes within which to speak in favor of the pending matter.

Mr. THOMPSON. I yield 5 minutes to the Senator from Virginia.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Madam President, I intend to vote in favor of the constitutional amendment limiting the number of terms Members of Congress can serve.

I voted for a similar sense-of-the-Senate amendment on October 17, 1995, and despite the clarity of my position and the documented record thereof in the Senate, the official records of my votes are continually distorted by my detractors. But that is nothing new in the life of a Senator. I wish to say exactly what I believe on this issue.

I think the public is entitled to a national referendum on this issue, and the procedures outlined by the Constitution of the United States as to how the Nation addresses such an issue are very clear. It is not the duty nor the power of the Congress to enact this. It has to be done by the requisite number of State legislatures, and I am highly in favor of that process beginning at the earliest possible date.

In my view, however, we already have term limits, and should this debate unfold in my State and across America, I will take an active role in it, and I will address my concerns about the adoption of such an amendment.

I feel the current constitutional procedures for the election of U.S. Senators and Members of the House of Representatives are themselves adequate protection that could be afforded by any constitutional amendment. It gives the right of the electorate of the States to make their own decision, as they think best for their State at that point in time, as it relates to their Senators and Members of the House of Representatives.

Finally, I am concerned about if we were to adopt for the Nation such a procedure that we would be shifting too much power to the executive branch and also, too, I say candidly, to those individuals who have spent much time here in the U.S. Senate as very capable, very knowledgeable, well trained, dedicated and committed staff persons. If they were to stay here for periods much longer than their respective committee chairmen, for example, or Senators themselves, it seems to me that, too, adds to the imbalance of power.

Then it comes to the question of the seniority procedures and tradition in the U.S. Senate. Seniority is a very important part of the rules and traditions

followed by both sides of the aisle, particularly as it relates to the election of committee chairmen or ranking members. That system was adopted because earlier procedures by the Senate were found to lend themselves to what I call pleasing politics. In other words, an individual would run for chairmanship of a committee and promise and promise to all the members of the committee that whatever they brought up, he or she would vote for.

Fortunately, in the period I have been privileged to serve in the U.S. Senate on behalf of Virginia, we have had very strong and resolute chairmen in the several committees on which I have served. I mention only the Senate Armed Services Committee. Richard Russell, John Stennis, John Tower, Barry Goldwater and now STROM THURMOND, Scoop Jackson for a period and SAM NUNN. What finer men have ever served in the U.S. Senate. But they had to make tough decisions, often inimical and in opposition to their own colleagues of their own party. But they could do so knowing full well that the traditions of how one becomes eventually a chairman could withstand what I call the politics of trying to please everyone.

If a chairman has to please everyone, in my mind it is very doubtful that you will have the strong leadership that is needed in the office of chairman and in the ranking member of our committees.

So I put that out as an open question, and I hope we might address it in the context of this amendment.

Madam President, I thank the distinguished floor leaders for the time, and I yield the floor.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. SIMON addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. SIMON. Madam President, I yield myself 3 minutes in the absence of anyone else, and then 5 minutes to the Senator from California and 5 minutes to the Senator from New Jersey.

Madam President, I think I can speak without anyone saying, ''He is trying to help himself,'' because I am going to be retiring at the end of this year.

Government is complicated. No one here would go to the yellow pages of their phone book when they had plumbing difficulties and get a plumber and he advertises, ''I have no experience with plumbing, call'' whatever the number is. If that is true with something as relatively simple as plumbing, it is infinitely more true of the decisions that we have to make in this body.

BENNETT JOHNSTON, for example, who is retiring, has huge knowledge in the scientific area that I think is unequaled in this body. Meaning no disrespect to whomever may succeed him, that person is not going to have that kind of knowledge.

Senator BYRD brings a wealth of knowledge here from that experience. On the other side of the aisle, a former colleague of yours and mine, Madam President, HENRY HYDE—I differ with Congressman HENRY HYDE on a lot of things, but he is a class act. He brings a wealth of experience, and he has improved the end product of the laws of our country because of what he has contributed. To cut off a HENRY HYDE or a BENNETT JOHNSTON or a ROBERT BYRD arbitrarily and take that decision away from the people of the Nation and of their respective States and districts, I think, is wrong. This is a constitutional amendment that should be defeated.

Mrs. BOXER addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Thank you very much, Madam President. I think the remarks of the Senator from Illinois are very important.

I want to put on the table my position on term limits which is, I support them if they are applied retroactively to all of us, to sitting officeholders. I had planned to support an amendment which Senator LEAHY had planned to offer to make these term limits apply retroactively. Unfortunately, through a series of parliamentary maneuvers known as ''filling the amendment tree,'' the Republican leadership has made it impossible for us to amend this resolution. It is either up or down. So here we are unable to make these term limits apply to us.

Advocates of this proposal assert that in its present form, it limits Senators to two terms. That is simply untrue. Without retroactivity, Senators in this Chamber—every one of us—can serve an additional two terms if this amendment passes.

That is very convenient for Members here, but it really, to me, does not get at the issue of term limits.

Let me cite two specific examples. Under this proposal, the majority leader would be limited to seven terms, or 42 years, in the U.S. Senate. The distinguished chairman of the Armed Services Committee will be limited to nine terms, or 54 years, in the U.S. Senate.

I do not think that most supporters of term limits will be satisfied with so-called limits that allow politicians to stay in office for more than half a century.

One Senator now serving in this body was serving here before another sitting Senator was 2 years old. It is incredible that the Members who would be serving over 50 years or 42 years are going to vote for this term-limit proposal.

So I think the situation undermines the credibility of the Senate. We cannot offer amendments, we cannot make it apply to us, and I do not think we should be congratulating ourselves for supporting term limits when it is obvious that the limits proposed are little more than what I consider to be a sham for every Member serving in this Chamber. It is more of ''do as I say not as I do,'' and I think the public is very tired of that.

So let us offer our retroactivity amendment and not exempt ourselves from this law. Perhaps the majority leader will allow us that chance if we vote down cloture. Let me be clear. At that time, if we vote down cloture and the majority leader allows us a vote on retroactivity, I will support cloture. I think it is very important that we be allowed to make sure that this amendment that so many are congratulating themselves on applies to each and every one of us.

I thank the Chair very much. I believe Senator BRADLEY now has 5 minutes.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. BRADLEY. Madam President, I rise in opposition to the cloture motion. I oppose term limits at this time. I think the answer to the problems of democracy is not less democracy, but is more democracy. Why should we say to people in this country who want a particular Senator or Congressman to return to office that they arbitrarily cannot return them to office?

I also regret the parliamentary circumstance here, the constitutional amendment on term limits. Many of us believe that the problems of democracy have deeper root causes than Senators and Congressmen staying in office more than 12 years and that, indeed, money is at the root of the problem in our democracy.

I had hoped to be able to offer a constitutional amendment as an amendment here in these proceedings that would allow the Congress and the States to limit what an individual may spend on his or her campaign. In my view, it is money that is creating a much greater problem for our democracy than somebody staying in office for 13 years.

I think fundamental campaign finance reform is what we need. I think it has to be radical. I think money and politics is a little bit like ants in your kitchen—you either have to get them all out, block all the holes, or some of them are going to find a way in.

A fundamental campaign finance reform proposal would be limits in primaries and would be also, I think, financing the election in the general election, dividing it equally among Republican, Democrat, and qualified independents, and it would mean a constitutional amendment. That would allow the Congress and States to limit what an individual spends on his or her own campaign. Everybody knows that a wealthy person has a microphone and everybody else has a megaphone here. The ability to raise money is often the prerequisite for deciding to run for Congress.

When everybody goes in to visit their campaign committee, whether it is Republican or Democrat, the first question that is asked them is not, ''Gee, have you been a good citizen? Do you have a good record? Do you have ideas on how to make the country better? Are you willing to put yourself on the

line to do that? Are you willing to stand up for your convictions?'' It is, ''Can you raise $1 million?'' Better yet, ''Do you have $1 million to spend on your campaign?''

Imagine a world in which there are term limits, but without strong campaign finance laws. How is democracy going to be improved? You will have the Senators and Congressmen coming from the same cast, raising money from the same sources, in some cases financing their own campaigns themselves, and will simply have a more active turnover of the same problem that we have now. It will not solve the problem—money in politics—which is the root cause of a lot of our problems. It will simply bring more people who are dependent on a special interest who have to finance their own campaigns themselves.

On the other hand, imagine a campaign or situation where you had strong finance laws but no term limits. Imagine general elections where Republicans and Democrats divided the money in a fund and they each had equal amounts of money, and the money could only come from people in their own State, and that is all the money that they had to spend. You would then have the possibility of a battle of ideas. There is no possibility of a battle of ideas where money dominates the process as much as it does today. Even if term limits passes but we do not address the issue of money in politics, we are not going to have as vibrant a democracy as we otherwise could have. There are no two ways about that.

I rise today simply to make this point because I had hoped, as I said earlier, to offer an amendment, a constitutional amendment, that would allow the Congress and the States to limit what an individual can spend on his or her own campaign as a part of an overall campaign finance proposal. Unfortunately, I cannot do that. I regret that I cannot do that because of the parliamentary circumstance. I hope that I will before the end of this Congress. I think it is absolutely essential. Anything that fails to address the issue of money in politics and claims to be the answer to the problems of democracy is false advertising. I yield the floor.

Mr. THOMPSON addressed the Chair.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. I yield 7 minutes to the Senator from Wyoming.

Mr. THOMAS. I thank the Senator. I thank him for his effort to bring this issue to the floor. It is an issue certainly that all of us who were elected in 1994 had a great interest in because that is what people were talking about. Frankly, had it not been for the Senator from Tennessee and the Senator from Missouri and the leader, we would not be here talking about it.

I rise in strong support of Senate Joint Resolution 21 as a cosponsor of the bill and a long-time advocate of responding to the voice of voters and the voice of the people. I am pleased that the Senate will finally go on record on this important issue.

Obviously, there are different points of view about it. We have heard a number of things just in the last few minutes. Let me comment on some of them.

One of them is the idea of amending. That certainly, if I ever heard a political response, is one. The Senator from California would not vote for this under any circumstances. So the idea that it cannot be amended to be retroactive is simply an obstruction to what we are trying to do.

Limiting dollars. We have talked about that a lot. I think it is a great idea. The only trouble is it does not work. How are you going to do that? Reporting is the best issue. Talk about limiting dollars that can be spent by candidates, we are looking this year at the AFL–CIO spending $35 million, which would not count because they are not in the campaign.

You have heard a little bit about the idea of people having the chance to make their own choice. It makes some sense. They are going to have a chance to make a choice. This is a constitutional amendment. The Congress does not pass this; it simply submits it to the States. The people will have an opportunity to express their feeling on it. This comes up from time to time.

I hear it at home, ''Well, you know, if the folks in that district want someone to continue to serve, they should be able to.'' I thought about that some. I was in the House before I came here. One of the very good Members of the House just 2 years ago had been in the House since before Pearl Harbor. I simply want to make the point that that person, who had a congressional district, as I did, had 10 times as much thrust in the Congress as I did because of the seniority. So the people from every other congressional district had no input into that. But the folks in that district are never going to change because here is a guy who has more authority than anybody else in the Congress. Of course, he is going to continue to be there. That is kind of what we are up against, it seems to me.

In 1992, 77 percent of the Wyoming voters supported term limits, and 70 to 80 percent of Americans support term limits. I think it is important to note that the majority and the freshmen who came in last year support term limits, people who were elected last year when the voters were saying, ''Yes, we're for term limits.''

I think it is important that we consider not just the term limits, but what has to be done to make some institutional change in the Congress. If you do not like the way things have been done for 40 years, if you want to see some fundamental change, then it is difficult to imagine that there is going to be change if we continue to do things the same way.

That is what term limits is about. It is about the end of career politicians in Congress. I happen to think that is a good idea. I happen to think that is what the drafters of the Constitution had in mind, to return to the Founders' vision, to the extent possible, of citizen legislators.

I was impressed this morning by someone's observation that one of the necessary things to represent your constituents in this Congress is to have had some experience in the private sector, to have had some experience in the real world. I think that is terribly important.

We need fundamental change that has some impact on reducing the size of Government. I think it is pretty evident that the longer you are here, the less likely you are to be enthusiastic about reducing the size of the Government. Someone mentioned this morning, and I think it is exactly right, when people first come here they seem to have objective questions. They seem to have ideas. How can we do this better? How can we change? After being here for a very long time, you are advocates for the status quo, sort of defensive about what has been going on. We do not need more of that.

I am very much in favor of term limits. I think that it is important. There is, indeed, a considerable turnover. I think the point was made this morning that 51 percent of the Senate has been here less than two terms. That is true. The same thing is true in the House. The difficulty is that you live in the seniority system, and the other 50 percent has been here a very long time. They are the ones, of course, that have all the leadership positions, so change does not come about. That is what we are talking about.

Madam President, I am delighted that we are here. I suggest to my associates here in the Senate that it is time to come to the snubbing post. We have talked about it. It is time to support what we think people have said to us or not. It is time to support change that brings about fundamental change here—smaller Government, less expensive Government, less restrictive Government. That is what we are voting on today—changing the direction that will take us into the next century. I urge support.

Mr. DOLE. Madam President, was leader's time reserved?

The PRESIDING OFFICER. It was.

Mr. DOLE. I ask for my leader time on this issue plus another issue I will speak to briefly.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOLE. Madam President, today the Senate takes a historic step on whether to move forward to pass a constitutional amendment to limit the terms of Members of both the House and the Senate. I am proud this step is one promised by the Republican Party in our last two party platforms. I am proud we made this promise in 1994. I am proud that the Republicans in the House of Representatives delivered on this promise that the Senate will have a chance to do so in about 45 minutes.

I acknowledge the fine leadership of our newer Members, such as Senators THOMPSON, ASHCROFT, INHOFE, THOMAS and others, who have joined other leaders like Senator BROWN for fighting for this reform. After years of rhetoric and stonewalling, this is a huge step forward for the American people.

I am mindful this is not the last step. While the vast majority of Republicans in both the House and the Senate support term limits, the fact is that this is a constitutional amendment. We cannot do it without substantial support on the other side of the aisle.

With President Clinton leading the opposition, it appears no such support exists on the other side of the aisle. It is pretty much like the debate on the constitutional amendment for a balanced budget we had last year. President Clinton not only has consistently opposed term limits, but he sent his Solicitor General to the U.S. Supreme Court to argue against the term limits law that passed overwhelmingly in his own State of Arkansas. He should drop his opposition to term limits and help deliver the votes necessary to pass the constitutional amendment.

Madam President, I share my view of why I believe this is important. As someone who has served this country for most of his adult life, I am not one that subscribes to the notion that this is about the people who serve in representative democracy. I know it is fashionable to attack politicians, but the truth is that those elected represent the people, at whatever level of Government, reflect both the strength and weakness of the electorate in a thousand different ways.

What this is about is the institution of representative democracy itself. I believe that the notion of a citizen legislator is an honorable one. I believe that representing your constituents to the best of your abilities is at the core of the success of the American experiment over the last 200 years. It is not an effort to tear down this relationship. Term limits certainly are not that. Instead, they are an effort to strengthen that bond.

This is an issue that not many Americans—in fact, not many legislators, not many anybody—thought about until recently. Now, I think it is clear that I have been lukewarm to the idea for some time and only started indicating 2 or 3 years that it seems to me if we want to send it back to the legislatures—the people send it back, want to ratify—that is fine.

I think we are capable also of keeping up with the American people. The American people, 75 to 80 percent, favor term limits. There clearly is a sense of something going wrong. We owe it to them and the future generation to think about whether the comfortable status quo is doing the job.

For me, it has come down to this. We are a Republic founded on the rule of law. There are many ways to define what the rule of law means, but it is the genius of republican democracy that those who make the laws also live under them. That is what the rule of law means to me. I think in some respects we sort of drifted away from that.

It was only last year in a Republican Congress that we insisted for the first time that all those laws that apply to the private sector had to apply to Congress, as well. I think that is probably a pretty good step in the right direction. When legislators leave Congress to start a business or do whatever, they will have to bear the consequence of those actions in a way that they may be insulated from if they served 15, 20, or 30 years in Congress.

Now, obviously, I feel like I understand these consequences, and I'll bet most of my colleagues do too. But, studies that show that the longer a legislator spends in Congress, the more readily he or she spends taxpayers' money, suggest that this is not always the case.

In such situations, I think it is wise to rely on the good sense of the American people. They are the ones most affected, and that brings me to my final point on why I support a constitutional amendment.

The very nature of the process surrounding a constitutional amendment is that we let the people decide. Issues that go to the core of our Republican institutions are properly the province of the people.

All we do when we pass a resolution on a constitutional amendment is allow the people in all of the States to decide—and, in fact, three-fourths of those States have to decide in the affirmative before an amendment becomes part of our Constitution.

As I have said before, the Federal Government of today is not the same as that envisioned by our Founders. We need to dust off the 10th amendment, and return power back to the States and to the people.

I say, give those we represent this opportunity to debate, consider, and decide. It is particularly appropriate that we do so, when the issue before us goes to the core of the relationship between those elected and those represented. This is not an issue we should decide alone.

Mr. President, there should be no mistake about the importance of the vote today. The vote today is about whether we move forward and give the people the opportunity to make that choice.

As with other constitutional amendments, you don't always succeed the first time. Nor should we necessarily. Constitutional amendments almost always involve great issues.

But in State after State, the American people have already indicated their views on term limits. A vote today to end debate and move toward final passage is a vote to take the American people at their word and build momentum for support.

I urge my colleagues to vote to end debate and support allowing the American people we represent the opportunity to choose for themselves.

This is an opportunity for all of us who believe in sending power back to the States, back to the people. Also, it is an indication that we listen. Yes, we can change our mind. We listen. We listen to the American people. The American people have spoken, and I believe it is time for us to speak.

I hope when the vote comes at 3:45, we will have a resounding vote for cloture—maybe 100 to 0, like we had on the last vote here at 2:15.

Mr. THOMPSON. Madam President, I thank the majority leader. The fact of the matter is that we have not had a vote such as this—a constitutional amendment on term limits—for almost 50 years in this country. Were it not for the majority leader, we still would not have a vote on a constitutional amendment for term limits. He is very right when he says this is not the last vote on it. This is really the first vote in a succession of votes. This will be with us from now on. He is also right in pointing out that you could probably measure people's desire for term limits with different fervor, but you cannot deny the fact that 75 percent of the people now are in favor of it.

What we are here about today is giving the States an option of considering whether or not they want to pass a constitutional amendment. As we know, 22 States, on their own volition and for their own good reasons, have sought to limit themselves, even without other States acting. So there can be no doubt about what the sentiment of the American people is regarding this.

With regard to a couple of earlier comments by our colleagues in opposition to term limits, a statement has been made that we need the expertise that long experience brings to us and that, if you are going to have surgery performed, you would want a surgeon with some experience. I have no quarrel with either one of those propositions. Certainly, expertise and experience in any area, standing alone, in and of itself, is not a bad thing. In most cases, it is a good thing. But what we are suffering from, I respectfully submit, in this body is not a lack of expertise. We have all of the know-how, all of the brain power that any such institution would ever hope to have.

Madam President, I simply suggest that we do not have the willpower that is necessary. It has nothing to do with expertise and experience. It has to do with motivation. It is not because of a lack of expertise that we are bankrupting this Nation. It is not because of a lack of expertise that we have the situation that Senator SIMPSON described, wherein it was demonstrated that Social Security only has another set number of days before it is going to be bankrupt and Medicare is going to be bankrupt.

Senator Danforth's comments, as he left this body when he retired, were that we are doing something terrible to

the next generation. We are bankrupting them for the sake of our own reelection. That is at the root of the problem—the motivation of those who serve here, on out into the next century. It will take years for this to be ratified, and a person would have years to serve. It is not about the Members serving today, and it is not about the Members who served before in this body. Many, many good people have done so. It is about what will equip us best to meet the challenges that we are clearly not meeting now because we do not have the willpower, because we cannot resist the temptation to do those things which are necessary for perpetual reelection. Those things usually translate into one word, and that is ''spending.'' Spending. People descend upon us from all directions, from all walks of life, each wanting their programs funded, and you do not make friends and influence people by saying ''no,'' and you do not perpetuate a professional political career by saying ''no.'' Therein lies the root of the problem.

I might also say, if I went to a surgeon, I would ask what his survival ratio was. I think if people came to this body and asked what our success rate is and looked at the numbers and what we are doing to the next generation, our inability to even take the first step to balance the budget, and even if we got everything that we on this side of the aisle wanted, at the end of the 7 years we would still be looking at a $6 trillion-plus deficit, even if we did not have a recession or a war, even if nothing really untoward happened. If we got everything we wanted—and we cannot even take the first step on that scenario, which would still put us in a hopeless situation because so much of the proposals are back-end loaded, which are simply hopes and desires that future Congresses will have the courage to do what we do not have the courage to do. We put the numbers down on the paper, saying that future Congresses, when we are long out of office, will do the right thing and, therefore, we balance the budget.

So we cannot even put this—to put it charitably—questionable approach into operation, much less go any further. That is what all this is about.

One of my colleagues mentioned the role of money. As I am sure he would agree, I have taken a very clear stance with regard to that in disagreement. But some of my colleagues on my own side of the aisle say—and I agree with them—that money plays a much too important part in our process. But money alone is not the process. The reason money is important is because money buys those television ads to tout how great we are and how lousy our opponent is. Money is what keeps us up here. It is the money and the desire for perpetual reelection that is getting us into the problem with the deficit and the debt and the ruination of the next generation.

So, if we have campaign finance reform without term limits, we will never have such reform that totally takes the role of money out of politics. There is always going to be some money involved in politics. You can have all the reform that you want, and if the motivation is still there to use whatever the system would then give you to continue to perpetuate yourself, the situation would not really improve.

On the other hand, if you had term limits without campaign finance reform—and I assure you I am for both of them—as one example, in the U.S. Senate you could serve your second term, one full term of 6 years, without having to raise a dime. What would that be like?

One of the other Members implied that if we did not have the threat of voter sanctions, we would kind of steal and pillage and do all kinds of terrible things. I do not know what his feeling is with regard to a President who is term limited and has a lame duck 4-year term when he wins his second term. But I think it would be a very beneficial thing to have Members serving in the U.S. Senate under all of the scrutiny and all of the disclosure that you would always have, but not have to worry about raising one dime from one soul. That is what term limits would do, even if you did not have campaign finance reform.

Finally, Madam President, I, again, echo the leader's comments because he gets to the heart of the problem.

He, above all—and all the other Members who have served this body so well—would not imply in any way, or reflect in any way, on the service of those Members—valiant service over the years. We are talking about the future. We are talking about a system over here that has served us pretty well for a long period of time, but now it is not working anymore. We were balancing the budget up to 1969. But we are not anymore. The pressures are too great anymore with the growth of Government, the growth of programs, and the growth of spending.

What do we do? We do what the Founding Fathers envisioned. They could not have envisioned all the technological advances, pressures, all the interest groups and the way the political parties behave, but they could envision change of circumstances that would need an amendment to the Constitution.

So we are talking about the future and something that would not diminish Congress, something that would enhance Congress and enhance Congress in the eyes of the American people because we would once again be a part of them.

I thank the Chair.

Mr. KYL. Madam President, I rise in support of Senate Joint Resolution 21, a resolution proposing an amendment to the Constitution to limit congressional terms to two in the Senate and six in the House—12 years in each body.

Madam President, I want to begin my remarks by thanking the majority leader, Senator DOLE, for making good on his promise to schedule Senate action on the term limit amendment this month. Without his support and his commitment to term limits, this initiative probably would never have seen the light of day.

It would have been easy to dodge a vote—as many opponents, no doubt, would like to have been able to do—since the House already voted down a term limit amendment last year. But Senator DOLE followed through on his commitment to ensure that there would be a full and fair debate and that we would have an opportunity to vote on the issue. The American people deserve to know where their Senators stand.

Madam President, term limits are no panacea. They will not guarantee the election of sensible and honest individuals to Congress. They will not put an end to the influence that special interests can sometimes wield on Capitol Hill. However, term limits will help.

They will help by ensuring regular turnover in Congress—guaranteeing that the people who make our laws have to live under the laws they have passed. It is too easy for legislators, who have been on Capitol Hill too long, to forget what it is like to struggle in the marketplace to survive—what it means to try to meet a payroll when the Federal Government is constantly imposing new mandates on a small business. New taxes, new regulations, more redtape. They forget what it is like for a family to try to make ends meet, when more and more is taken from their paychecks in taxes every week—higher gasoline and FICA taxes, for example.

Members of Congress have learned a lot in just the short time that the Congressional Accountability Act has been in place. The myriad of workplace laws and regulations had little meaning before last year because they never applied to Congress. When we finally had to live under the same laws and regulations as the rest of the country, the people's frustrations took on a whole new meaning.

It is that kind of connection with what people have to endure from their government on a daily basis that term limits will foster. Congressional service should not be a life-long career.

Term limits would also help to disperse some of the power that has become concentrated in the hands of a few very senior Members of both bodies. It would also help to ensure that all of us make decisions that are in accord with the views of the electorate.

Take the Federal budget, for example. The American people have been demanding less spending, lower taxes, and a balanced budget in more forceful terms every year. Newer Members of Congress tend to vote for less Federal spending than those who have served for a long time. In fact, a recent National Taxpayers Union [NTU] survey found a correlation between tenure in Congress and increased spending.

NTU found that the 88 freshmen members of the House who were elected

in 1994 voted for an average of $26 billion less in spending than non-freshmen did. The 11 new Senators elected in 1994 supported an average of $26.2 billion more in spending reduction than their senior colleagues.

That is not to say that all of the more senior Members voted for more Government spending. But as a group, newer Members more closely reflected the desires of their constituents for less spending and leaner Government. It is a trend that term limits would help to promote.

Madam President, 23 States, including my home State of Arizona, have attempted to impose term limits on their congressional delegations. But a year ago, the U.S. Supreme Court held that all State term-limit laws that apply to U.S. Senators and Congressmen are unconstitutional. The majority held that the Constitution fixes the qualifications for congressional service, and that neither Congress nor the States may supplement them. That is why we have a constitutional amendment before us today—because all other legislative avenues have been foreclosed.

More than 200 years ago, Thomas Jefferson wrote a friend suggesting ways that the newly drafted Constitution could be improved. Jefferson said three things were missing: a Bill of Rights, limits on the tenure of the Chief Executive, and term limits for Congress. Since then, we have seen Jefferson's first two ideas implemented; the resolution before us today embraces the last.

Madam President, I urge support for the term limits amendment.

Mr. GRASSLEY. Madam President, I rise today in support of term limits. By overwhelming margins, the American people support term limits for Members of Congress. In a democratic society, the people's elected officials have a responsibility to respond to what the people want. Of course, we in Washington have a duty to exercise leadership—but leadership means responding to the strongly held preferences of the American people.

Although there is a long history both at the State and Federal levels in limiting the service of executives, term limits for legislators have a short history. So, we are participating in a work in progress when we debate this amendment.

It may be that term limits enhance the power of lobbyists, as some say, or term limits may lessen the power of lobbyists. Term limits may weaken the legislative branch or they may strengthen it. Term limits may cause the loss of valuable experience or it may lead to passage of reform legislation. There's no way to tell at this point. But with fresh faces with new ideas in Congress, it seems to me that reform and common sense change are far more likely.

And of course, the Constitution was made to be amendable. Since 1791, we have amended the Constitution 17 times. Each of these amendments brought about significant changes in the nature of American Government. Similarly, I believe that a term limits amendment will make needed and beneficial changes.

Prior to the Supreme Court's Thornton decision last year, I intended to introduce a statute to set term limits. That option is no long longer possible. We are in a situation where the Supreme Court has unequivocally spoken—the Constitution as currently written does not give Congress or the States the power to impose term limits by statute. So, this is not a willy-nilly amendment we are debating. This amendment is the only way to have term limits.

If we do not vote to pass this amendment, the States won't even have the chance to pass term limits. They won't even be able to consider the idea of term limits. This is an important debate, and I think that Congress should not stand in the way. Voting to pass this amendment doesn't create term limits. It just lets the debate go forward. Let's pass this amendment. The American people want it. They deserve it, and it would do much good.

Mr. DODD. Madam President, I rise today in strong opposition to this constitutional amendment.

I understand that much of what is driving today's debate is the belief among the American people that Congress is out of touch with their needs and their concerns. And to some extent their frustration is genuine and justified.

We spend too much of our time engaging in partisan political games and not enough time working together in a bipartisan manner to craft legislation that benefits all Americans.

There are many things we could do to reform Congress and make this body work more effectively. Term limits is not one of them.

If we truly want to renew the American people's faith in democracy and return their voices to our debates in Washington then we need to remove the corrosive influences of money on our campaign system.

I believe that all the goals proponents of term limits hope to achieve through this amendment, would be realized if we simply passed genuine and comprehensive campaign finance reform.

For example, public service is more and more restricted to those Americans who have the deep pockets necessary to run for Congress. And term limits would not change that.

Even if we passed this amendment, candidates would still be forced to raise millions of dollars in order to win election. And the aspirations of public service would continue to remain unachievable for the vast majority of the American people.

In order to change the way Washington operates and level the campaign playing field, we need to remove the pervasive, almost epidemic, role of money in our political system.

That is why I have long supported steps to reform our campaign system. And it's the reason I've sponsored the McCain-Feingold campaign finance reform bill.

We need to change our campaign system and allow access to public service for the American people. But, term limits is simply not the solution.

We have term limits in this country. They're called elections. And they are already enshrined in our Constitution. Look it up, article 1, section 2; article 2, section 4; and of course the 17th amendment, which dictated the manner by which we as Senators would be chosen.

These provisions of the Constitution describe the specific process of how our elected officials are chosen. And nowhere in the Constitution is there any mention of term limits, or the amount of time a Senator or Congressman must serve.

Over the past few days, I've listened to my colleagues invoke the name of the Founding Fathers in justifying their support for this amendment.

Well, I would remind them to go back to their history books, to the Constitutional Convention of 1787, which debated the issue of term limits and see what James Madison, the father of our Constitution said about this issue:

> Frequent elections; that's the answer, that a voter should be able to decide whether he wants somebody new or whether he wants somebody with experience.

Or look to the words of Robert Livingston, who said:

> The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect is to abridge their natural rights. * * * This is an absolute abridgement of the people's rights.

A years and a half ago the American people made an overwhelming decision on who would represent them. Although I can't say that I agreed with their choice and while I would have preferred that they had selected different leaders, their ballot was a reflection of our freedoms and rights as a people and a nation to choose our leaders.

And in the past few years the American people have loudly made their voices heard. In fact, more than 50 percent of the current Members of the House of Representatives were elected in the past 6 years alone.

And, in January 1997, there will be at least 38 new Senators, elected since 1992.

That represents an enormous infusion of new people and new ideas to this Congress. And, all this change came about without term limits and without a Constitutional amendment telling voters from whom they could or could not choose to represent them.

But even with these historic changes, proponents of this amendment would still have us believe that we need term limits in order provide greater choices for the American people.

Instead, term limits would limit the alternatives of the American people,

because they would be precluded from voting for an incumbent. Abrogating the right of the American people to freely choose their leaders subverts the democratic principles and full rights of franchise that are every American's birthright.

Over the past few days, I've listened to the debate here in the Senate. And over and over I've heard the recurring notion that America needs term limits in order to prevent lawmakers from being contaminated by special interests and institutional corruption.

I've served in the Senate for 16 years and my belief in the dignity of public service has not dissipated. And when I look around this body at my fellow Senators I see other dedicated public servants.

I see men and women who withstand personal attacks on their character; I see men and women who give up both their privacy and a stable family life; I see men and women who labor tirelessly in these halls for one reason and one reason only—because they want to make America a better country.

Now, we may not agree on every issue. In fact, some of us may not agree on any issues. But whatever our personal beliefs, our goals and our reasons for being here are the same—to uphold our duty to our constituents, the Constitution and most important the American people.

And what about all those who came before us? The great leaders from both sides of the political aisle who have served in this austere body: Henry Clay, Daniel Webster, Everett Dirksen, Lyndon Johnson, Richard Russell, Sam Ervin and today ROBERT BYRD and BOB DOLE, to name a few.

Were they corrupted by their tenure in the United States Senate? Or was their experience integral in helping them pass legislation that made this nation a better place to live? I for one think it is the latter.

But, if we passed this amendment the hard-earned experience of lawmakers would be supplanted by a dramatic increase in the reliance on permanent staff, lobbyists and special interests.

Instead of ending careerism in Congress, we would create a permanent and unelected staff bureaucracy that would run the Federal Government.

They would have no responsibility to the American people because unlike the so-called career politicians they wouldn't be held accountable for their actions.

They wouldn't have to go to the town meetings, political rallies, Chamber of Commerce banquets and the other events that politicians in this body regularly attend to keep themselves in touch and culpable to their constituents.

What's more, small States like my home State of Connecticut would be irreparably weakened. Through the seniority system, elected officials from small States can make sure that their voices are heard when important policy decisions are being made.

But, if we enact term limits small States Would be shut out by larger States with greater representation in Congress.

Consider that just nine States can command a voting majority in the House of Representatives.

Those nine States, through their voting power, could assure that the vast majority of Federal spending be concentrated in their locales at the expenses of forty-one other States, with fewer representation and less clout.

I know that this amendment is popular among the American people.

But, the popular way isn't always the right way.

As Senators, we must always be cognizant and accountable to the will of our constituents. But, at the same time we are sworn to uphold the Constitution. And we owe the American people the wisdom of our best judgment in maintaining that solemn duty.

Adlai Stevenson once said that ''My definition of a free society is a society where it is safe to be unpopular.'' And I think we all need to be reminded of those words when any one of us holds a view that runs contrary to the popular opinion of the American people.

Today, I will cast a vote against the popular will of the American people not because I reject their beliefs, but because I must cast my ballot for what I think is best for the country.

I hope my colleagues join me in upholding our Constitutional oath and rejecting this amendment.

Mr. SMITH. Madam President, I rise in support of Senate Joint Resolution 21, which proposes a constitutional amendment to limit congressional terms.

Mr. President, I strongly support term limits for both U.S. Senators and Representatives. The American people want term limits because they recognize that service in Congress should not be a lifetime career, but rather a temporary stewardship. Term limits will bring fresh blood and new ideas into the Congress and dilute the power of the seniority system.

Last year's U.S. Supreme Court decision on term limits made clear that the goal of limiting congressional terms cannot be accomplished except by means of a constitutional amendment. This is consistent, of course, with the manner in which Presidential term limits were established more than four decades ago.

Madam President, I am proud to be an original cosponsor of Senate Joint Resolution 21, which, in its original form, would have amended the Constitution to limit service in the Senate to two terms of 6 years each and service in the House to three terms of 2 years each.

As we wait what I believe is the inevitable addition of a term limits amendment to the Constitution, it is important to keep in mind that term limits are already happening in different ways. Voters already can and do impose term limits in the voting booths. Moreover, voluntary retirements continue at a record pace. Already in 1996, a record 13 Senators have announced their retirements.

It is also important, Madam President, to keep in mind that term limits are not a panacea. But they are a start—a start toward a Congress that is even more representative and responsive to ''We the People.''

Mr. LEVIN. Madam President, I will vote against ending debate on the constitutional amendment to limit congressional terms. Term limits is a serious matter which deserves serious debate. Amending the Constitution of the United States is always a serious matter and should not be done without adequate deliberation. The majority leader filed a cloture petition immediately upon calling the term limits amendment up for debate even though there has been no effort to filibuster this issue. Invoking cloture at this stage would have the affect of cutting off debate.

The Senate should have a full and open debate on this matter, and fully consider amendments which have been offered and other amendments which Senators wish to propose. For example, there is no amendment before the Senate which conforms to the language contained in the Michigan Constitution which calls for a limit on Representatives of three terms in any 12-year period, and a limit on Senators of two terms in any 24-year period. That amendment would not be allowed, for instance, if cloture is invoked. Ending the debate now would also preclude other amendments from being offered, including an amendment which would count the terms of office already served by those presently in office.

Madam President, I will oppose cloture which would prematurely cut off that debate and make it impossible to offer relevant modifications to the constitutional amendment on the ground that they are not technically germane. If there is a filibuster on this amendment, I will then vote to cut off debate so that we can vote on the constitutional amendment. In the absence of a filibuster, stopping debate will unfairly restrict consideration of possible modifications and a fair consideration of the amendment itself.

Mr. MACK. Madam President, I rise today to express my strong support for a constitutional amendment to limit congressional terms. I commend the Senators from Tennessee and Missouri for their tireless efforts on behalf of this measure and I also commend the majority leader for allowing us the opportunity to vote on this amendment. This is a truly historic debate and one that the American people would do well to note and remember.

The amendment before the Senate today is very simple. It would limit future Senators and House Members to two and six terms respectively and it further outlines the procedure for Members who assume office in midterm.

This measure's simplicity, Mr. President, is only matched by its popularity in the country and its exceeding difficulty to pass. The American people have consistently indicated their overwhelming support for term limits. This support remains solid regardless of who controls the Congress or how much the issue is debated. I remain amazed that the people's representatives continually refuse to do their bidding on this issue.

This is not the first time the Senate has considered this measure, nor will it likely be the last. The first proposal to limit congressional terms was offered in 1789. In the modern era, hearings on term limits were held in 1945, and the only straightforward Senate vote on a term limits amendment in history occurred in 1947.

It is interesting to note, Mr. President, that Republicans controlled the Senate at that time as well. At no time since have the Democrats attempted to constructively deal with the term limits issue. It is only because of the Republican majority that we stand here today. We made the commitment to the American people in the last election to bring this measure to the floor and we are keeping our word.

In the past year, we have seen several measures come and go on this floor that—in one way or another—have attempted to curb Senators' and Representatives' appetites for continual public service. All failed.

Due to the utter lack of Democratic support for the concept of term limits, it appears that the measure before us today will fail as well. This is one more battle, however, in a larger—and longer—fight. In the end, I remain confident that a meaningful, binding term limits amendment will be passed by Congress and ratified by the necessary number of States.

Mr. President, we live in a democracy that thrives on the free exchange of innovative ideas. These ideas are the lifeblood of our progress and it is critical to bring them into the political process and into the public arena. Term limits will ensure that the people's representatives continually bring fresh, new perspectives to public service and create a more responsible and respected government.

We suffer not from a dearth of new ideas in America, Mr. President; we are lacking only in the opportunity to express them in public service. The amendment before us today will change that, and I again offer it my unqualified support.

Mr. CONRAD. Madam President, today, the Senate considers a constitutional amendment regarding term limits for Members of Congress. The debate over the term limits constitutional amendment has shown that both sides of this issue are passionate about the importance of congressional service. The proponents of the term limits amendment argue that it is time to change our Constitution to address the length of congressional service. The opponents of the term limits amendment respond that not only is a term limits constitutional amendment unnecessary, it threatens the foundation of our system of government and principles of democracy. I cast my vote against the term limits constitutional amendment.

My service in the Senate began as a result of an election held in North Dakota in the fall of 1986. I won election to the U.S. Senate by defeating an incumbent who served North Dakota for 6 years in the Senate and 17 years in the House. Because of this election, I can appreciate arguments about the power of incumbency. However, most importantly, I appreciate the power of the voters. Voters have the power to vote for the candidate they feel best fits the elective office, whether the person is an incumbent or a challenger. It concerns me that a term limits constitutional amendment would limit the voters' choice to only those persons who are not disqualified because of this amendment.

It is my view that in a democracy, voters should be able to choose whomever they want to represent them. We should not deny voters the opportunity to vote for someone they believe best represents their interests simply because that person has been in the office for 12 years. According to the Congressional Research Service, at the beginning of the 104th Congress, the average length of service of a Member of the House of Representatives was 7.75 years, while the average length of service of a Member of the Senate was 10.2 years. So despite the lack of a constitutional term limits amendment of 12 years, the voters have successfully managed their own system of term limits, commonly known as the elective system.

Term limitations might be more detrimental than beneficial. It takes time to develop real expertise and experience on the wide variety of issues that come before Congress. Term limitations could result in the loss of this experience. In a sense, the voters already have the power of term limits in their hands: they can vote their elected representatives out of office at any election, from their local sheriff to their U.S. Senator. Additionally, the loss of the seniority system would prevent small States such as North Dakota from getting and keeping clout in Congress. Large State delegations would dominate the leadership and become even more powerful, and small States would be hurt as a result. California has 54 seats in Congress; New York has 33; Texas has 32; Florida has 25; and Pennsylvania has 23. North Dakota has only three.

Rather than impose arbitrary term limits, I believe we should focus our attention on campaign finance reform to allow a larger number of people to enter congressional races. I supported campaign reform in past legislative sessions, and I will continue to support campaign reform in the 104th Congress.

Mr. McCONNELL. Mr. President, congressional term limits are the most toxic of the seemingly magical elixirs called reform. Alluring in their simplicity. Enticing in their popularity. Term limits are the blunt ax of political reforms.

Conveniently, the term limits would not kick in until most current Senators, under recent rates of attrition, were long gone from this Chamber. Prospective term limits such as are before us today have a buy now, pay later appeal as nearly two decades would elapse between their passage, ratification, and the moment at which they began to clear the decks in Washington.

If term limits are the medicine for what ails the Nation, it is ludicrous to wait so long for their curative powers. Retroactive limits would be in order.

Dissenting from the majority in my party is not something I relish. While I have often observed, with some irritation, that in the eyes of the media it seems the only thoughtful Republican is a dissenting Republican, it is not a role I seek. My colleagues, with whom I disagree on this issue, arrived at their positions for a host of reasons. It is not my place or privilege, nor would I presume, to cast aspersion on motives. But I must disagree as strongly and forcefully as decorum, and facility with the English language, will allow.

Never more than in this instance, am I conscious of Edmund Burke's eloquent assertion that: ''Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion.'' All of us exercise this wisdom, though rarely all in the same way, at the same time or on the same issue. Sometimes our judgment and popular opinion converge. Sometimes not. And we answer to the voters, in any event. On this issue, the polls and my judgment are at variance.

Mr. President, in a bit of an aside but touching on the climate of cynicism in which term limit polls are conducted, I would like to draw attention to an article David Shaw wrote in the Los Angeles Times on April 17 entitled ''A Negative Spin on the News.'' The subtitle is: ''Many journalists are worried that cynicism is poisoning their profession. Displaying such an attitude may erode respect for their craft and also harm confidence in public institutions.'' A telling passage from the article:

> The most scathing—and most widely publicized—indictment of the news media by the news media has come from James Fallows, Washington editor of the Atlantic Monthly, in his book ''Breaking the News.''
>
> ''Step by step,'' he writes, ''mainstream journalism has fallen into the habit of portraying public life in America as a race to the bottom, in which one group of conniving, insincere politicians ceaselessly tries to outmaneuver another.''
>
> The journalistic implication—and often it's more than an implication—that all politicians are liars and hypocrites who invariably act out of self-interest and self-aggrandizement rather than out of a commitment to the public good, has created a self-fulfilling phenomenon.

As Fallows puts it: ''By choosing to present public life as a contest between scheming political leaders, all of whom the public should view with suspicion, the news media brings about that very result.''

Mr. President, political reform debates, especially term limits and campaign finance, should carry an advisory—''Warning: profoundly disturbing to impressionable Americans who thought democracy was a good thing.'' Term limits and campaign finance reform proponents wrongly assume democracy as we have known it for 200 years, has failed. They may characterize their proposals as fine-tuning democracy but I and others see it as far more serious than that. Quite simply, we have gone with such proposals from Let Freedom Ring to Rein Freedom In—in the name of reform.

For the past few years, there has been a furious race to embrace the disaffected, disgusted and dissatisfied. Thoroughly probed by prolific pollsters, the prognosis is in: people hate politicians, so go with it. Pander or perish. This destructive phenomenon is not the exclusive province of any party. The essential point is that having for so long been a convenient receptacle for hateful bile from within and out, it should surprise no one that all who serve in Congress are sullied. We are reaping what we have sown, with ample assistance from a cynical media.

Having examined the climate of cynicism which breeds demand for term limits, I turn now to the merits of the proposal before us. What term limits would do is restrict the freedom of voters to elect whomever they please. Like them or not, term limits undeniably, fundamentally restrict freedom. A Senator in the 21st century may be Daniel Webster reincarnate, but under two terms-and-out limits, merit, performance and voter sentiment matter not after the first term.

Under term limits, merit, performance and voter sentiment hold no sway in the second term except to the extent Members are guided by their own morals and sense of place in history. That is sufficient restraint for most Members now, and probably even in a term limited future. But this lack of accountability under term limits should greatly trouble people who believe that power breeds corruption.

The dominant theme of the term limit movement is populist—that term limits will wrest the system away from the career politicians and return power to the people. Yet one of the most prominent term limit advocates, conservative columnist George Will, supports term limits because they would establish a constitutional distance between people and politicians. Just this last Sunday, in the Washington Post, Will wrote that ''. . . term limits would make Congress less subservient to public opinion. . .''

There is a news flash: the revolutionary motive behind term limits is to insulate Congress from popular accountability at the ballot box. Remove all concerns about reelection, the theory goes, and Congress will do the right thing. The presumption is that the right thing must be contrary to the will of the people. This confirms how anti-populist and undemocratic term limits really are.

That is why last year I introduced a bill to repeal the 22d amendment limiting Presidents to two terms. In 1947, with great haste a Republican majority—fresh from political exile—rammed through the 22d amendment imposing presidential term limits. Fifty years ago, the zeal was in response to the unprecedented tenure of President Franklin Delano Roosevelt. Not one Republican in the House or Senate voted against that proposal. Ironically, the only Presidents since limited by it have been Dwight D. Eisenhower and Ronald Reagan.

We were very fortunate that those two-term Presidents were such honorable men. But we should consider a bleak alternative. The prospect of a second term of a scoundrel, unconcerned with reelection to a third term, is very disturbing. With the prospect of another election, even the most scurrilous are more likely to at least pretend to be thoughtful, honest, and responsive to the concerns of voters. In my view, the 22d amendment was a mistake that should be repealed, not compounded with congressional limits.

Alexander Hamilton was succinct in Federalist Paper No. 72—which presented the case against Presidential term limits:

There is an excess of refinement in the idea of disabling the people to continue in office men who had entitled themselves, in their opinion, to approbation and confidence, the advantages of which are at best speculative and equivocal, and are overbalanced by disadvantages far more certain and decisive.

Term limits make elected representatives less accountable to voters and public service less appealing to middle class citizens. Thus, would term limits engender a new elitism and create ethical quagmires. People of moderate means, with family responsibilities and promising private careers, would pass on a congressional career certain to be cut short. Only the rich could afford such a brief dilettante fling with politics. And on the other hand, those who did interrupt private pursuits for a term-limited stint in Congress would feel pressed to keep an eye on post-congressional employment—a conflict rife with ethical potholes and considered by Alexander Hamilton two centuries ago when he observed that the prospect of reelection would promote better representation than would term limits. Hamilton said, ''when a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument.''

Term limits would transform Congress into an exclusive haven for the independently wealthy, the comfortably retired, and those who see public service as nothing more than a profitable resume-builder.

I put this forth in jest, but if the goal is to make Congress older and richer, we should just raise the minimum age requirements set in the Constitution. Two hundred years ago, when the limits were set at 25 for the House and 30 for the Senate, the average life expectancy was 34. Perhaps age requirements should be doubled—just as life expectancy has—and made retroactive. An argument could be made that the problem is not that members serve too long but that they arrive too young.

Congressional term limits would make Government overall less accountable by vesting far more power in unelected and un-term limited staff, bureaucrats, the judiciary and lobbyists, rather than in the people's elected representatives. This is self-evident and surely is not a desirable effect in the minds of most Americans. As a former staffer I do not say this to denigrate staff, but it has been my experience that courage is not a staff-driven quality. Staff—in their desire to serve and protect their boss—is far more likely to opt to trim the political sails, so to speak. This is conjecture on my part but certainly warrants serious consideration when increasing staff influence is contemplated.

As a Senator from Kentucky, I am very concerned about the power shift from small and medium-sized States to more populous States, resulting from the diminution of seniority under term limits. Since the power of small States is greatly amplified by the Senate's seniority system, they stand to lose the most when the sheer size of a State's House delegation becomes the principal congressional power gauge. David Broder explored this side effect in the Washington Post (12/6/95):

Large-state delegations are not nearly as subject to the caprice of resignation or political defeat. Their leverage lies in their numbers, and they would not be nearly as disadvantaged should term limits be imposed someday. Indeed, there is good reason to speculate that, in the constant bargaining for leadership positions that would probably take place in a term-limited Congress, the mega states like California and Texas would use their numbers to grab off the best spots for themselves and install their allies in the rest.

You can make a selfish argument for term limits if you come from one of the mega states. But there is every reason for small- and medium-sized states to oppose that change in the Constitution.

Mr. President, term limits are premised on an illusion of rampant careerism. The fact is, voters already are limiting tenure—selectively. And many members have bowed out voluntarily. Over half of the House of Representatives arrived since 1990 and over half of the Senate was elected since 1984. The right to vote is the right to limit tenure. Much ado is made over the high reelection rates of those incumbents who choose to run for reelection. However, this ignores the self-selection element inherent in those rates. Some members—it can only be speculated which ones—choose to retire rather than risk defeat. Particularly, those wounded by

scandal. Moreover, incumbents—but for the few who were first appointed to office—were first elected as challengers or in open seats. It stands to reason that the qualities which made them admirable in their first election would often propel them to victory in subsequent elections.

And what of competition, post-term limits? It is persuasively argued that competition would actually decrease because able candidates would bide their time until a seat opened up rather than risk an uphill fight against an incumbent. This is a phenomenon we see on occasion in the current system. I expect the frequency would increase dramatically under term limits.

People should not be denied the right to vote for someone simply because of an arbitrary term limit. As Robert Livingston noted two centuries ago: ''The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.''

Yet at its root, term limits conclude that people are capable of only limited self-governance. I wonder, do people in these polls that are cited fault themselves in their support of term limits or are they passing judgment on the irresponsibility of other electorates, in states and districts other than their own? It has been argued by term limit proponents that voters' inability to vote against candidates in other states and districts cries out for arbitrary term limits. Evidently, voters in other states and districts are not trustworthy. Take that premise and run with it.

Perhaps Americans should be able to vote in every election everywhere because lawmakers at all levels of Government can increasingly affect people outside the scope of their own electorate. That is a reform that surely, and correctly, would be rejected. In any event, citizens in one State can affect election outcomes in another by participating in politics through campaign contributions. That is a laudable, legal and constitutional manner in which to hold accountable lawmakers one cannot legally vote against.

In hindsight, among the most interesting observations made by term limit supporters two hundred years ago was that they were necessary because the Federal City would be an Eden from which Members and their families could not bear to part.

The reality hardly needs elaborating. At best, Washington, DC—with its crime, potholes, filth, and corruption—has become a sort of purgatory from which most of us can hardly wait to flee and go home to our States.

Where is the logic in the absurd notion that Government is the only arena in which experience is a bad thing? Experience is desirable in every other venue—professional and otherwise—that I am aware of. Experience certainly did not impair Henry Clay, John Sherman Cooper, Howard Baker, Everett Dirksen, Sam Rayburn, Arthur Vandenburg, and Sam Ervin's commitment to serve the national interest. To name just a few.

There are many in this Senate today who have served far more than two terms whose service has been nothing short of heroic. Experience has made them better and braver. It steels them against many shortsighted proposals. But I will not name names because in this environment to highlight a Member's lengthy service on national television could be construed as a rule 19 transgression. In a term limited future, we would see fewer of their caliber.

God willing, the Senate will never again be confronted with a war resolution. But if it is in, say, another generation, I hope there are some Members who experienced the Persian Gulf war debate. And who had to cast that vote. It was a debate which itself benefited from the presence of Members who served in the Vietnam-era Senate.

Senators, no matter how bright, educated, eager, or accomplished, do not know anywhere near all they need to when they arrive here. Parliamentary procedure is mastered with experience. Defense, commerce, finance, environment, energy, and agriculture issues take time to learn. Does any nonincumbent candidate even know upon which committees they will serve?

Term limits, however well-intentioned, are terribly dangerous. We would do the American people no favor in passing this constitutional amendment and would cause great harm in the future. Constitutional amendments such as this one are forever. Only one—the 18th instituting prohibition—has ever been repealed. And we cannot presume to ever be missed so much as Americans missed their bourbon.

Mr. FEINGOLD. Madam President, I want to begin by commending the Senator from Tennessee, the Senator from Missouri, and others, who I believe are sincere in their belief on the need for fundamental reforms in Congress.

I disagree with their approach on this issue, but it would be nearly impossible to dispute that the American people expect the Congress to pass meaningful reforms of this institution and they are expecting those reforms soon.

Madam President, it is a troubling reality that more and more Americans are finding it difficult to trust their Government and their elected officials. Trusting your Government and having faith in your elected leaders is perhaps the most fundamental tenet of American democracy.

Unfortunately, this trust and faith has been shattered by a culture of special interest influence that has convinced the American people that their elected representatives are no longer working in the people's interest, but rather for their own and special interests.

But the proposed solution to changing those negative perceptions that we are debating today would, I believe, represent a profound retreat from the principle of representative government itself.

Moreover, what we are debating is yet another proposed fundamental change to the U.S. Constitution. Consider that already in the 104th Congress we have debated and voted on a constitutional amendment to balance the budget and a constitutional amendment to prohibit individuals from dishonoring the American flag.

It should be pointed out that in the entire 209-year history of our Nation that, excluding the Bill of Rights, we have amended the Constitution just 17 times. Just 17 times Mr. President, in over 200 years.

And yet in the 104th Congress alone, almost 140 constitutional amendments have been introduced, from issues ranging from the balanced budget, to tax increases, to flag burning, to school prayer, to the abortion issue and so on.

Madam President, I do not believe that we should seek to solve every social ill in our country by making radical alterations to a document that was so carefully crafted 200 years ago and that has provided remarkable guidance to our Nation for so long. We must find alternative solutions.

It has, in fact, been well established that the Framers of the Constitution did not believe congressional term limits would be beneficial to the new nation.

Let me quote James Madison, the architect of the Constitution, in Federalist Paper No. 53. He wrote the following about his vision of a Congress:

> A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of public business. . . . The greater the proportion of new members and the less the information of the bulk of the members, the more apt they will be to fall into the snares that may be laid for them.

It is this point of Madison's that I would like to underscore and that I believe illustrates why it is so important to have a mix of individuals—some experienced and seasoned, others newly elected—serving in the U.S. Senate. Moreover, it is important for us to consider how the history of the U.S. Senate and this Nation might have been different had term limitations been in effect for the past 200 years.

We have had some truly outstanding individuals serve in the U.S. Senate. Republican or Democratic, Conservative, or Liberal, these individuals, whether you agreed with them or not, were defined not only by their tremendous legislative accomplishments but also by their character and the principles they often stood and fought for.

Had we had term limits, a great number of these individuals would have been needlessly forced out of office.

I am sure that all of my colleagues at one time or another have spent time in the Senate reception room, just outside this Chamber, and noticed the magnificent portraits hanging in that room.

In 1955, the U.S. Senate established a commission headed by Senator John F.

Kennedy, charging that commission with the responsibility of designating the five greatest U.S. Senators in our Nation's history.

After substantial input from other Senators and the academic community, the commission chose Henry Clay, Daniel Webster, John C. Calhoun, Robert M. LaFollette, Sr., and Robert A. Taft, Sr., Portraits of these five Senators are hanging today in the Senate reception room.

Clearly, the great legislative and oratory skills exercised by these great figures can be directly attributed to their extended years of service in the U.S. Senate. Interestingly, not a single one of these five greatest Senators served in the Senate for less than 12 years. Taft was the novice, having served only 14 years. Calhoun served 19 years, LaFollette served 22 years and Clay and Webster each served 24 years.

And these five Senators are certainly not alone. The history books are full of names such as Humphrey, Dirksen, Goldwater, Hart, and so on.

I believe that having experienced Senators in this body is not only healthy for our democracy, but critical to our ability to responsibly carry out the constitutional duties of the legislative branch of Government.

Madam President, as a relatively new Member to this body, it has been personally beneficial and an honor to serve with some of the more senior Members, such as the senior Senator from West Virginia, whose mere presence reminds us all of the importance of maintaining a sense of respect and civility and the need to pay deference to this institution and the traditions associated with it that have enduring value.

And think about so many effective and honorable Members of the current U.S. Senate whose services would be lost if a term limits law was in effect.

In all, 44 current Members of this body—almost half—would not have the ability to continue as U.S. Senators because they have been here for more than 12 years.

Mr. President, judging an elected official's commitment, their dedication and their competence by an arbitrary time limit is senseless. Term limits supporters seem to suggest that representing the people is the one profession in America in which having experience makes you underqualified for the job.

We must remember that what term limits supporters are asking us to do is to take away the cornerstone of a representative democracy—the right to vote for the candidate of your choice. More than anything else, the freedoms associated with the right to vote are what make Americans the envy of the modern world. We should not take that right away from the American people.

We have heard a lot of talk, Mr. President, during this Congress about the importance of devolution, and returning control over local matters to State and local governments. The majority leader wants to ''dust off the 10th amendment'' and we have been told time after time that the Federal Government should stay out of State and local decisionmaking.

Well, Mr. President, the legislation before us today makes a mockery out of that principle. The legislation before us provides that the Federal Government will automatically disqualify certain individuals from representing their States and local communities.

I believe, and the Framers clearly believed, that neither residents of other States nor elected representatives of other States have the right to tell the people of Wisconsin who they can and cannot vote for, other than the qualifications that are enumerated in the Constitution.

And that is what term limits is all about—telling the American people that they are prohibited from voting for a particular representative because that individual has bumped up against some arbitrary deadline.

Supporters of term limits argue that if elected officials know that they are only serving for a set amount of time and do not have to be concerned with frequent campaigning, these representatives will be more apt to work in the public's interest, and not their own.

Quite frankly, I find this hard to believe. Numerous historical documents demonstrate that the Framers included the concept of frequent elections to the Congress to make representatives directly accountable to those they represent.

The rationale was, if a legislator did his job, and adequately represented his constituents and advanced what was in their collective best interests, that representative would be rewarded by reelection. If the legislator was irresponsible, did not perform or fulfill his duties, the voters would exercise their right to replace that particular representative. The ballot box, as it was intended to be by the Framers, is essentially a job performance review for Members of Congress.

But term limits would nullify this check, taking these sort of decisions out of the hands of the voters.

Moreover, if a Senator is in their final term, knowing they cannot be reelected, it would seem to me that they would be less likely to represent the best interests of their constituents and more likely to represent their own self-interests.

After all, they can no longer serve in Congress, they will have to seek future outside employment—maybe with a Washington DC, special interest group or lobbying firm. The argument that term limits would make elected officials more responsible legislators was raised over 200 years ago at the New York ratification convention, to which Alexander Hamilton replied, ''When a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument.''

Supporters would have us believe that our current system would be supplanted with a class of citizen-legislators, who are less concerned about a career of politics and more concerned about being a truly deliberative body than they are with responding to the whims of the electorate.

This line of reasoning sounds like an attempt to reinvent the wheel. First of all, the Congress of the United States is already comprised of a diverse groups of individuals with unique backgrounds in a variety of fields, including education, law, business, journalism, medicine, and yes, politics. Virtually every one of us held jobs in the private sector before we ran for public office, and we will all eventually return to the private sector either when we decide to retire or when our employers, the voters, believe we have overstayed our welcome.

I would like to briefly respond to those who suggest that seeking a career in public service is somehow an inherent character flaw. First, let me say that the list of ''professional politicians'' begins with names such as Madison and Jefferson, and ends with figures such as Roosevelt and Kennedy. We should remember that these individuals were truly public servants, and gave little thought to what Alexander Hamilton referred to as ''personal emolument.''

They inspired many of us to enter into public service because we too thought it was a noble and honorable thing to do.

Madam President, as I said from the outset, I agree with many of the assumptions and concerns that term limits supporters put forth in their arguments.

The election scales today are unquestionably weighted unevenly toward incumbents, and challengers do not have an adequate opportunity to unseat sitting Members of Congress.

One very viable alternative to term limits that does not require amending the Constitution—and what I believe represents one of the most important issues facing us today—is the opportunity to reform our campaign finance laws. I am convinced that fundamental campaign finance reform would cure the ills of incumbency that have been derided by term limits supporters and what have unquestionably contributed to the deterioration of fair and competitive congressional elections.

That is why I have joined others, including some very noted term limits supporters such as the senior Senator from Arizona, Senator MCCAIN, the Senator from Tennessee, Senator THOMPSON, and others in offering the first bipartisan and bicameral campaign finance reform bill in nearly a decade.

This bill has an enormously broad range of bipartisan support. Fifty-six Members of the 104th Congress, including 25 Republicans and 31 Democrats, have signed on to the House and Senate bills. The President supports it. The Ross Perot organization supports it. Common Cause, Public Citizen and

newspaper editorials from around the country have endorsed the McCain-Feingold-Thompson legislation.

And while only 45 Senators voted earlier this year for a sense of the Senate that we should consider term limits legislation, 57 Senators voted for the resolution I offered last year stating that we should consider campaign finance reform legislation prior to the conclusion of the 104th Congress.

This body recently demonstrated on the issue of health reform that Senators from the two parties can set aside their partisan and ideological differences, compromise when necessary and produce a meaningful piece of legislation that will help a great number of people.

Campaign finance reform is no different, and I am convinced that there are enough Senators who care about this issue, including many of the supporters of term limits, who can come together and pass a meaningful and comprehensive reform bill.

Term limits are no doubt a popular idea, but so is comprehensive campaign finance reform. And if we can solve a problem that all parties seem to agree exists—that is, the unfair advantages held by incumbents—by means other than a constitutional amendment, we should aggressively pursue that avenue before considering such a fundamental change to our Constitution.

In a society that considers the right to vote its national treasure and most sacred natural resource, term limits may be the ultimate form of an intrusive and overreaching Federal Government. I urge my colleague to reject this latest proposed change to our Constitution.

Mr. KEMPTHORNE. Mr. President, I rise today in support of Senate Joint Resolution 21 proposing a constitutional amendment to limit the terms for Members of Congress to two terms in the Senate and six terms in the House of Representatives.

This Congress has passed some critical pieces of legislation, many of which effectively limit the role of the Federal Government in the everyday lives of citizens and shift power back to the States. Members on both sides of the aisle worked together in a bipartisan manner to enact legislation such as the Congressional Accountability Act, the Unfunded Mandate Reform Act, and even the Line-Item Veto Act, all which improve the responsiveness of Congress to the people. In this same vein of limited government, accountability, and States rights I strongly support passage of Senate Joint Resolution 21 before us today.

Term limit legislation is an important issue to the voters of Idaho. Since 1990, 23 States, including Idaho, have clearly voiced their support for limiting congressional terms. In 1994, Idahoans overwhelmingly approved a ballot measure supporting term limits. However, on May 22, 1995, the U.S. Supreme Court, in U.S. Term Limits versus Thorton ruled that State-imposed term limits are unconstitutional. With the Supreme Court decision against State-imposed term limits, the only avenue left to implement the will of the people is through passage of a constitutional amendment.

Our Founding Fathers envisioned a citizen legislature where Members would do their civic duty and then return home. Individuals from all walks of life could bring new ideas and special talents to this body. The natural rotation in office was what was expected by the public and demonstrated by the public servants. But over the years, this practice has changed.

The Framers of our Constitution pictured private citizens—not career politicians—who took time to serve their country. A rotation of service in Congress allows for new people to participate in the legislative process. As Thomas Jefferson stated about tenure for congressional Members, he said, ''(m)y reason for fixing them for a term of years, rather than life, was that they might have an idea that they were at a certain period to return into the mass of the people and become the governed instead of the governors * * *.''

Far too many Members stay in our Nation's Capital too long, losing touch with their constituency. The time is here for Congress to pass legislation to constitutionally limit the tenure of Members of Congress. I believe we should let the States have the opportunity to ratify a constitutional amendment to limit the terms of Members of Congress.

As we discuss term limitations, we are not without precedent for Federal term limitations. We are a co-equal branch of Government with the executive branch. But with the ratification of the 22d amendment in 1957, the American people imposed term limits on the executive branch. If service for the President of the United States should be limited, why shouldn't the legislative branch be treated equally?

In 1992, on the 4th of July, in fact, as a candidate for the U.S. Senate, I pledged my support to constitutionally limit the length of time a citizen may serve in the U.S. House of Representatives and the U.S. Senate. I have kept my promise. During my first year in the U.S. Senate I cosponsored term limit legislation. And last year, I cosponsored Senate Joint Resolution 21, which is before us today, to propose a constitutional amendment to limit the terms of Members of Congress.

Not only do I believe I have kept my promise to the people of Idaho, I believe I have kept an unspoken promise to the Framers of our Constitution.

In fact, as presented in the Federalist Papers, No. 57, James Madison wrote,

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and * * * to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public office.

James Madison continued to write, that the most effective way to prevent degeneracy of representation is that ''a limitation of the term of appointments * * * will maintain a proper responsibility to the people.''

In conclusion, I believe we can achieve this ideal envisioned by our Founding Fathers by enacting 12-year term limits within each Chamber of Congress—two terms in the Senate and six terms in the House. It is this Senator's view that term limits would improve the efficiency of the Congress and make it more responsible to the people of this great Nation. Let us pass Senate Joint Resolution 21 and give the States the power to decide if there ought to be term limitations on Members of Congress.

Mr. THOMPSON. Madam President, how much time do we have remaining?

The PRESIDING OFFICER. Twenty-two minutes.

Mr. LEAHY. How much time is on this side, Madam President?

The PRESIDING OFFICER. I am told it is 22 on the Democratic side, and 12 minutes and 15 seconds on the Republican side.

Mr. LEAHY. Madam President, if the Senator from Tennessee and the Senator from Missouri do not mind, I will yield myself 5 minutes.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I hope that the American people are not being fooled by what is going on in connection with Senate ''nonconsideration'' of this proposed constitutional amendment to impose term limits. Basically, the way it was zipped through the Judiciary Committee and called up here with a protective series of amendments and a cloture petition was done in such a way that you cannot even attempt to amend it. It is bumper-sticker politics. It is campaign fodder. But it is not a serious debate. I say that meaning no disrespect for the handful of Senators—and it really is only a handful of Senators—in this body who actually do want a constitutional amendment on term limits.

The way this has been set up almost guarantees that there will be no cloture voted. Certainly guarantees that my amendment, which would make it apply to each of us and thus make it real term limits, could not be voted on. Some want to be able to stand up and say, ''I was for term limits. Gosh, what a shame we did not get to vote on it.'' And they will blame everybody else.

I suspect that we will probably see the Whitewater prosecutor coming in and blaming the President and the First Lady for this. Lord knows, he is blamed for just about everything else, from tornadoes to whether they made $1,000 or lost $1,000.

Frankly, I feel sorry for my good friend from Tennessee, whom I know does believe strongly in favor of term limits but is being put through a charade. The charade is this: In the first 5 minutes of consideration last Friday,

the Republican leadership acted to ensure two things—that the proposal would not be fully debatable and amendable, and that there would be no votes on the merits in the Senate this year.

I regret that the American people have to endure this surreal display by a body that is yet to complete action on the budget, or appropriations, for the fiscal year that is more than half over.

Debate has been cut out. This constitutional amendment is really an incumbent's protection limit bill. Understand, Madam President, what it means. The American people think that we are voting for term limits. We are not.

If we were to pass this in the House and Senate and send it to the States for ratification, do you know what this means? It means that a five-term Senator in this body who voted for term limits could have three more terms. They are not limited to two. They could have eight. I know that there are Senators who say they are for term limits, and apparently, on at least one occasion, have been for term limits before I was born. But they will keep on being here. They will keep on running. This does not limit them.

For example, consider a fourth-term Senator under this provision. The Senator could have at the very least two more terms and probably have three more terms under this amendment for a total of six or seven, not just two terms. That Senator could end up voting for term limits and become a seven-term Senator.

What the proposed amendment does say is that somewhere way out into the next century those men and women running for office could be limited, but not those of us who are here. We protect ourselves under this.

What we have is a case where you could say you are voting for a constitutional amendment to consider limits on everybody else, but we end up protecting ourselves.

So it is like Moliere's ''Tartuffe.'' In that play, a hypocrite succeeds for a time in fooling others and profiting from their naivete and trust. In the play, as here, in the end the hypocrisy is revealed and justice is done.

The fundamental hypocrisy in this term limits debate is that is has been orchestrated to include a special exemption for current Members of Congress. It has been designed expressly to disregard the full terms of service of current Members. This is guaranteed.

For example—I only take these out as examples—I have great respect for our distinguished President pro tempore who was first elected to the Senate some 40 years ago—some 40 years ago, when I was 15, and has served in the Senate since I was 15. He would be able to run for at least three more terms. Knowing him, I suspect that he would be healthy enough to do it.

Our Judiciary Chairman observed in his additional views to the Committee report: ''[I] have no personal interest in the prospects of such an amendment. Even were it to be passed by Congress and ratified by the States in relatively short order, it likely would not bar me from running for reelection until the year 2012, when I would be a spry 78 years of age. There are many things that I hope to be doing in the year 2012. Running for reelection is not on the list.''

I want to commend the House Judiciary Committee Chairman and our Senate Judiciary Committee Chairman for being honest in their views and declaring their opposition to term limits from the outset. Chairman Hyde made an impassioned speech on the House floor during their debate last year and Chairman HATCH observed in his additional views in the Committee report his ''strong reservations'' against the proposal and his reasons for them.

I just worry that what much of the Senate is saying is one thing but what we are doing is something entirely different. In his column over the last weekend, George Will may have said it best when he noted that the Republican majority is ''deceiving the country about a principle of constitutional dimension.''

If people really want to take this seriously, they would be moving to vote on the Leahy amendment, which would say any constitutional amendment would take effect immediately upon ratification without a special exemption for sitting Members. Obviously, you could finish serving the term you were in, but if that was your second or greater term, you could not run again. Instead, the way this is set up, a Senator can be in his fourth or fifth term, and run for as many as three more terms.

If we intend to consider term limits, let us make it a real term limit. If not, then what we are doing is simply playing games.

When I look at my own State, my predecessor Republican was elected the year I was born and served until I got here. The people in each of our States make up their minds about what makes sense in term limits. As the representative of a small State, I am acutely aware that we fulfil the purposes of the Senate and the best interests of our States when we obtain a bit of seniority and a track record on the issues. I urge all of our colleagues from smaller States to consider on this point the additional views of Senator BIDEN and Senator HATCH from the Committee report. As Senator BIDEN eloquently noted, the Connecticut Compromise and the equality of small States are put at issue by this proposed constitutional amendment. Term limits were viewed by the Founders as both ''pernicious'' and ''ill-founded''.

I have an enormous amount of respect for the distinguished majority leader. I have served with him throughout my whole Senate career. But he would have had to leave at the end of my first term had there been a 2-term limit in effect. The distinguished majority leader is one of the most able legislators of either party with whom I have served. I think that the country is better off because he is here. I hope that does not hurt his standing back home, but I mean it most sincerely.

This could be said of all of the majority and minority leaders we have had here in both parties. These have been extremely able people—Senator Mansfield, Senator Baker, Senator BYRD, Senator Mitchell, Senator DOLE, and Senator Scott. These are people that we would not have seen under term limits.

I must oppose what I perceive to be a growing fascination with laying waste to our Constitutions and the protections that have served us well for over 200 years. The First Amendment, separation of powers, the power of the purse, the right of the people to elect their representatives, should be supported and defended. That is the oath that we swore when we entered this public service. That is our duty to those who forged this great document, our commitment to our constituents and our legacy to those who will succeed us.

The Constitution should not be amended by sound bite. This proposed constitutional amendment evidences a distrust not just of congressional representatives but of those who sent us here, the people of our States. Term limits would restrict the freedom of the electorate to choose and are based on disdain for their unfettered judgment. These are not so much term limits as limits on the electorate to choose their representatives.

To those who argue that this proposal will embolden us or provide us added independence because we will not be concerned about reelection, I would argue that you are turning our democracy on its head. This proposal would have the effect of eliminating accountability, not increasing it.

It is precisely when we stand for reelection that the people, our constituents, have the opportunity to hold us accountable. This proposal would eliminate that accountability by removing opportunities for the people to reaffirm or reject our representation. It would make each of us a lame duck immediately upon reelection.

My fundamental objection to the proposed constitutional amendment is this: It is, at base, distrustful of the electorate. It does not limit candidates so much as it limits the rights of the people to choose whoever they want to represent them. We should be acting to legislate more responsively and responsibly, not to close off elections by making some candidates off limits to the voters. I will put my faith in the people of Vermont and keep faith with them to uphold the Constitution.

Now, let me ask, Madam President, I would like the opportunity to call up my amendment. I filed it to the underlying bill and to the variety of procedural alternatives filed by the Republican majority. It is my understanding

that in the procedural posture that we have been put, I cannot call up my amendment as Leahy amendment Nos. 3700, 3701, 3702, or the four second-degree amendments I filed earlier this afternoon.

Is my understanding correct that no Leahy amendment is in order?

The PRESIDING OFFICER. At this point, there is no amendment in order, and the Senator's time has expired.

Mr. LEAHY. I yield myself 1 more minute.

Madam President, would my amendments be in order if cloture was voted?

The PRESIDING OFFICER. Until an amendment is acted upon, no further amendment is in order.

Mr. LEAHY. At some time, Madam President, when my amendments are still pending and all other amendments have been acted on, would they be in order under cloture?

The PRESIDING OFFICER. If the pending amendments are not acted on within the 30 hours, no other amendments would be in order.

Mr. LEAHY. Is it the Chair's ruling that if you had an amendment pending and the 30 hours ran out, that it would not be voted on even though there was no time for debate?

The PRESIDING OFFICER. All of the pending amendments could be acted on but no further amendment could be called up.

Mr. LEAHY. Madam President, what the Chair is saying, for a layman, is that the Republican leadership has set up a way to make sure that nobody would be able to vote on a true term limit amendment, that is, one that was retroactive in the sense that it would apply to us. Rather, the situation we are in is one in which we could only vote on something that would allow a fourth or fifth or sixth-term Senator to still run for as many as three more terms.

I yield the floor. I reserve the remainder of my time.

Mr. THOMPSON. Madam President, I yield the remaining time to the Senator from Missouri.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. ASHCROFT. Madam President, I thank you very much for this opportunity to speak. I express my deep appreciation to the majority leader for scheduling this historic opportunity for the Senate to act in a way which will allow the States to make a decision about whether or not to amend the Constitution of the United States to limit the terms of those of us who serve in the Congress.

Senator DOLE, by bringing this issue to the floor when no other leader has been willing to do so for the last several decades, has staked himself clearly on the side of the American people, the 70 to 80 percent of the American people who have endorsed term limits. And they have done so knowingly. They have done so having had experience. They understand that the President of the United States has been term limited since the early 1950's, that the Governors of 41 States are term limited, that legislatures in a number of States are term limited, that city councils are term limited from New York to Los Angeles and many cities in between, and State officials in addition to the Governor. What we find is that there is a tremendous exception that has been carved out for the Congress.

The suggestion that somehow the proposal before the Congress today does not involve real term limits because they are not retroactive really flies in the face of what the people across this country have done regarding term limits at home, for their city councils, for their Governors, for their State legislatures. It flies in the face of their efforts because none of their efforts really provide for all this retroactivity.

When the people have spoken, they have decided that our laws should operate prospectively. This amendment would say that after its enactment, if it were to be embraced by the States, no person could be elected more than twice.

I believe that is a step in the right direction. It is a step in the right direction, and it is a necessary step because it reflects the will of the people. We need to accord to the people the opportunity to make a judgment about whether they want to amend the Constitution of the United States so as to impose term limits on the Congress.

There have been those who have come to say that this is an idea of passionate demagogs, who as a result of frustration in the body politic have now somehow embraced this issue because it is one for demagogs.

This issue was close to the heart of Thomas Jefferson. It was close to the heart of Richard Henry Lee. It was part of the debate at the founding of our Republic. And then when they find out they do not want to call Thomas Jefferson a demagog and they do not want to say that Richard Henry Lee was a passionate individual just trying to play upon the passions of the voters, they say, well, they decided against term limits for the Senate and House and therefore the decision has been made and we must respect it.

In all honesty, we have to understand that the Senate is a different body than it was when the Founding Fathers created it. When the Founding Fathers assembled our Constitution and when it was embraced by the colonies which were States, the Senate was not composed of people elected in popular elections. It was composed of individuals who were sent here by the State legislatures. None of the problems with elections, none of the problems with campaign financing, none of the incredible value to incumbents had surfaced. The Founding Fathers could not possibly have anticipated that the Senate would need term limits because none of them really anticipated the popular election of Senators.

So for us to say that we need to give States the opportunity to implement or employ term limits is for us to allow the people of the United States to fine tune a change they have already made to the Constitution. The change already made was to provide for the popular election of Senators which resulted in the campaigns we see, resulted in the influence of resources in the campaigns, and it is high time that we be able to correct an adjustment which we already made.

It is an adjustment which has tilted the playing field so dramatically toward incumbents that incumbency is a virtual guarantee of reelection. Nine out of every 10 incumbents end up being reelected. It is no wonder then when there are incumbencies the number of people who are running for office is constricted. People do not bother to try to get involved. That offends a fundamental value of America which is access and participation.

It is kind of interesting to look back. Two years ago I was running for the Senate. One of my opponents was a Member of the House. In the year before he chose to step down and run for the Senate, there were only two candidates. This year there are only two candidates for his seat. But in the year it was an open seat, there were 11 candidates. Some people say that to have term limits would reduce the number of choices. If you reduce it from 11 to 2, I think it is an exponential explosion in the number of choices. So the real choice would be expanded by term limits, not limited.

Then there are those who say we have to have experience in the House and Senate. Nothing would keep us from having experience. People who are experienced in State government, people experienced in the House move to the Senate. People experienced in the Senate move to the House. They would not have the value of incumbency to tilt the playing field.

More importantly, I think it is essential that we recognize there is experience in this life that counts every bit as much as experience in the House or the Senate, and the people of America know about that experience. It is the experience of raising families. It is the experience of living under the laws. It is the experience of the private sector.

One of our colleagues said that we needed the experience of one Senator who is particularly good in the area of scientific awareness. Well, for Heaven's sake, the Senate is not the repository of science in America. We need to welcome people from outside who know about science. And as I think about my colleague from Tennessee, who is a surgeon in heart transplantation, that is the kind of experience you cannot get in the Senate. When we talk about things relating to medical challenges and how we are going to solve problems of access for people regarding health care, we have to listen carefully to experience that comes from beyond Government. People of America know that

the future of this country is far too important to trust to Government alone or to those who are experienced in Government alone. We need to welcome experience from far beyond just the governmental sector. I think it is important to listen to what George Washington said. Washington said:

> Nor can the Members of Congress exempt themselves from consequences of any unjust and tyrannical acts which they may impose upon others for in a short time they will mingle with the mass of the people.

It was anticipated that Members of the Congress would shortly mingle with the mass of the people. One of those who has debated in this Chamber suggested that the anticipation of mingling with the mass of the people might somehow undermine the commitment of a person for service.

George Washington saw it absolutely opposite. He thought that people who knew they were going to have to go out there and live with the people would render better service, not render lesser service; that their service would be more noble. And how do you measure nobility? By whether or not it makes it better for the general public, whether it elevates the general welfare. George Washington said beware because you will have to be mingling with the public. I think every Member of the House and Senate should look forward to mingling with the public. They should look forward to going home. They should look forward to being in a situation at a time and place when they live under the laws that we not only propose but under the laws which we enact.

So we have a tremendous opportunity. It is an opportunity which will reinforce fundamental values of America,

The people's will must be served. Let me just reinforce this point. Seventy to 80 percent of Americans, with the knowledge of 50 years of experience of term limits, say, ''It is something we want, we like.''

I think we ought to represent the people to the extent we are saying, ''If you think you like that, let us give you a choice,'' not impose term limits on them, but let us send it out to the States and create a great debate about it and let States determine whether or not they want term limits. Let the people participate.

Seventy-four percent of the American people, according to one poll, support term limits. Twenty-three States, almost all of which had the initiative so that people could start the movement for term limits themselves with petitions, have enacted term limits.

We have the new ''electronics to petition the Congress.'' Over 50,000 people visited the home page for term limits here in the U.S. Senate. Well over 7,000 people signed the petition. Of those—it was overwhelmingly in favor of term limits.

I believe that, in a democracy, we should accord to the people the opportunity to make decisions. We should trust them.

Then there is this idea, ''Oh, somehow we have to be careful that we do not find ourselves absent the talent.'' There has been a wonderful parade of public figures oratorically through the Chamber of all the people who were here and who might not have been able to serve for life or for extended periods had we had term limits.

If George Washington had thought that he was the only person who could lead America, he would not have walked away after two terms. If Thomas Jefferson had thought that there was a limited pool of talent, that the American people were a very shallow pool and you could not trust anyone else but them, he would not have walked away. President after President walked away for the first 100 years of this Republic because they had a different kind of confidence in the American people than we have heard expressed all too often here. They had a confidence that there was greatness in this Republic and it was not limited to a few who had been elected.

I was interested in what those people who wrote me on the Internet had to say. One was ''7100'' who communicated, who said:

> I see that you're a Republican. I'm not. This is one issue, however, more important to me than the success of any party.

Another said:

> Serving the public was never meant to be a way to amass power and money. Our Founding Fathers would be ashamed. Please stop the insanity and pass term limits now.

I think what we have is a great opportunity to say to the people, ''We welcome your participation in Government.'' We hope that more people will find their way into elections, and they will if there are fewer incumbencies that are extremely well funded. We hope that more people will find their way into office to bring the wisdom of America to Washington, DC.

We do not distrust the talent of the American people. We think there are plenty of people who are capable of serving.

We think that the nature of real choice will be expanded, and we think that there will be the evidence of a discipline in the Senate which will come from individuals who expect to return to mingle with the public.

There are those who have said, ''Well, unless we make term limits retroactive so that we will virtually say anybody who has already served two terms will be out from the date of enactment forward, we will not have real term limits.'' Let me tell you, that is not the way term limits have ever worked. The American people know how term limits work. They have seen it work in their city councils, they have seen it work in their States, they have seen it work for 40-plus Governors, and they have seen it work for the President of the United States. The truth of the matter is, so many of those individuals who suggest they want that kind of term limits are opposing term limits altogether.

Madam President, I ask unanimous consent for 1 minute in which to conclude.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ASHCROFT. Madam President, the fundamental values of the American people compel us to accord them the opportunity to evaluate an amendment to the Constitution proposing term limits, the value of choice, the value of representing the people, the value of access and participation in politics and the value of limited power.

All of these components of American history, all of these principles by which we have stood are the principles which call upon us now in the voices of 70 to 80 percent of the population in saying to us, ''Give us the opportunity to participate in Government by ratifying an amendment to the U.S. Constitution which would limit terms of Members of the U.S. Congress.''

I thank the Chair.

The PRESIDING OFFICER. All time has expired for the majority side. Is there anyone seeking recognition from the minority side?

Mr. THOMPSON. Madam President, I am informed that we have permission to yield back the time of the minority.

CLOTURE MOTION

The PRESIDING OFFICER. All time having been yielded back, under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the committee substitute to Calendar No. 201, Senate Joint Resolution 21, a joint resolution proposing a constitutional amendment to limit Congressional terms.

Bob Dole, Fred Thompson, Spence Abraham, Rod Grams, Mike DeWine, John Ashcroft, Craig Thomas, Jon Kyl, Trent Lott, John McCain, Slade Gorton, Rick Santorum, Bill Frist, Larry E. Craig, Paul Coverdell, Lauch Faircloth.

CALL OF THE ROLL

The PRESIDING OFFICER. The mandatory quorum call has been waived.

VOTE

The PRESIDING OFFICER. The question is, Is it the sense of the Senate that debate on the committee substitute to Senate Joint Resolution 21, a joint resolution proposing a constitutional amendment to limit congressional terms, shall be brought to a close?

The yeas and nays are required. The clerk will call the roll.

The assistant legislative clerk called the roll.

The yeas and nays resulted—yeas 58, nays 42, as follows:

[Rollcall Vote No. 79 Leg.]

YEAS—58

Abraham	Frist	McCain
Ashcroft	Gorton	McConnell
Bennett	Graham	Murkowski
Bond	Gramm	Nickles
Brown	Grams	Pressler
Burns	Grassley	Roth
Campbell	Gregg	Santorum
Chafee	Hatch	Shelby
Coats	Hatfield	Simpson
Cochran	Helms	Smith
Cohen	Hutchison	Snowe
Coverdell	Inhofe	Specter
Craig	Jeffords	Stevens
D'Amato	Kassebaum	Thomas
DeWine	Kempthorne	Thompson
Dole	Kohl	Thurmond
Domenici	Kyl	Warner
Exon	Lott	Wellstone
Faircloth	Lugar	
Feinstein	Mack	

NAYS—42

Akaka	Feingold	Lieberman
Baucus	Ford	Mikulski
Biden	Glenn	Moseley-Braun
Bingaman	Harkin	Moynihan
Boxer	Heflin	Murray
Bradley	Hollings	Nunn
Breaux	Inouye	Pell
Bryan	Johnston	Pryor
Bumpers	Kennedy	Reid
Byrd	Kerrey	Robb
Conrad	Kerry	Rockefeller
Daschle	Lautenberg	Sarbanes
Dodd	Leahy	Simon
Dorgan	Levin	Wyden

The PRESIDING OFFICER (Mr. COVERDELL). On this vote, the yeas are 58, the nays are 42. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

Mr. DASCHLE. I move to reconsider the vote.

Ms. MOSELEY–BRAUN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LOTT. Mr. President, I suggest the absence of a quorum.

Mr. President, I withdraw that request. I understand the Senator from Maryland has some remarks he would like to make.

The PRESIDING OFFICER. The Chair recognizes the Senator from Maryland.

A TRIBUTE TO CHRISTINE MIKULSKI

Mr. SARBANES. Mr. President, as I think most of our colleagues know, Mrs. Christine Mikulski, the mother of our dear friend and colleague, Senator BARBARA MIKULSKI, passed away on March 31, during our Easter recess.

My wife and I were fortunate to know ''Miss Chris,'' as she was known to all, for many years, and were privileged to call her our friend.

Miss Chris was enormously proud of the accomplishments of her daughter, our colleague, Senator BARBARA MIKULSKI, as indeed are we all. Miss Chris played a key role in all of BARBARA's campaigns, and a key role in BARBARA's life, to really be very explicit about it. She was an effective and enthusiastic volunteer in Senator MIKULSKI's constituent service office in her home neighborhood of Highlandtown in east Baltimore. Indeed, she became known as Miss Chris, the First Lady of Highlandtown. And, indeed, she was a first lady.

Miss Chris was an extraordinary woman beloved by her family and friends. She was part of that immigrant generation—her father was born in Poland—that built our Nation over the early decades of this century. She reflected that determination of spirit, courage and strength of character, which are exactly the values we hold out to our young people to emulate today.

In an eloquent and heartfelt tribute at the funeral service on Wednesday, April 3, Senator MIKULSKI spoke movingly about her mother and about the many ways in which her mother was so special to her family, her community, her church, and all who were privileged to know her. I simply wanted to take this opportunity to share with my colleagues Senator MIKULSKI's eloquent tribute to her mother on that occasion.

I ask unanimous consent that her tribute be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows

REMARKS OF SENATOR BARBARA A. MIKULSKI

My mother would have been pleased by this gathering. She would have been honored that so many people came today. She would have been pleased to have her family here today. She would have been honored that the Governor and the mayor were here.

My mother would have been honored that Senator Paul Sarbanes, members of Congress, and the Baltimore City Council were here today. She would have loved that members of her clubs and organizations were here.

She would have also loved the fact that she made the headlines in the Baltimore Sun and the Washington Post. That she was on radio and television. That Richard Scher announced her favorite name—the First Lady of Highlandtown.

She would have been touched by the fact that the President of the United States called to express his condolences and that Vice President Al Gore called because he very much wanted me to bring my mother to lunch at their home in Washington. He was sorry that he and Tipper never met my mother.

My mother, as you know was a very determined lady. She always planned ahead. She had very specific instructions about today and the way she wanted to be remembered. In her final days, with the illness fast overtaking her, she gave me some very specific instructions about today.

One of those was to be sure to thank everybody. You know my mother was an enormously courteous and considerate woman. So there were certain thank you's she wanted me to give for her. I'd also like to say they are from me and my family.

First she said be sure to thank the priests. Thank the priests of Loyola College. Other priests in the audience.

My mother particularly wanted me to thank the priest of Holy Rosary, where she was baptized, went to school, and married. She also wanted me to thank the priests here at Sacred Heart, her home parish for more than 50 years. She said say thanks to the priests at Sacred Heart for their prayers, where we made our first communion, graduation, and where we went to school.

Father Ed Foley, she particularly wanted me to thank you for bringing her communion every day throughout the days she was shut-in. As she would always say to you when you left, ''Father, I am very grateful.''

She wanted me particularly to thank the nuns. All of those who are here, who taught my sisters and me. The holy nuns who ran the day care center, she wanted to say thanks to you all for the good work that you do and for what you meant to our family.

My mother wanted me to thank the Sisters of Mercy. The Sisters of Mercy who educated my sisters and me, who ran the hospital where my sisters and me were born. My mother said thank you. It was there that we were born, it was there that she died. It was there she went during so many emergencies and was rescued. And she was very grateful for your comfort until the end. So she asked me to thank you.

She also said to say thank you to the Polish Women's Alliance ladies, who were her honorary pall bearers today. She loved being a member of the Alliance. She was very proud of her Polish heritage. She was very proud to be a member of a Polish Heritage Association. She loved the friendship. She loved the fellowship. She loved the bingo. She loved you, Lorraine. She loved your mother, Miss Viki.

She asked me to remind you that when she was 16 years old, she won an essay contest run by the Polish Falcons. The prize was a trip to Poland. She was very proud of that and very thankful for the opportunity to go to the land of her heritage.

She wanted me to thank the ladies at the Altor Society, who gave her a candle light honor guard today. She wanted me to give a special thanks to the ''Cheer-up Club,'' of which she was a perpetual member.

My mother also wanted me to thank the neighbors. To Rosie, to Pat, to Mel—thanks for helping out and being there during the hard days. But, she said, remember the good days and the grocery store.

As you know my mother and my father, Willie, ran a grocery store in Highland. They saw many people through hard times. My mother asked me to thank all the people for coming to the store. There were so many of you who told so many stories to me about going to the store.

My mother was Miss Chris and my father was Mr. Willie. My sisters and I were known as little Willies. We heard all the stories about the extra candy my mother distributed to the children. She was known a the lollipop lady. Also she was the lady who, along with my father, would give extra store credit to families during those hard times.

My mother would stand at the back of the store by the cash register and give tips to the homemakers and favorite recipes. She always pretended she liked to cook, but as my sisters and I know, my mother really liked carry out. She was a woman of the 90's—in the 1950's and the 1960's.

She and my father were a fantastic team running that grocery store. And as you know, they brought a tremendous amount of goodness and generosity into this community.

My mother and father were also wonderful parents. My sisters and I could not have had a better mother than our mother. She saw to it that we had a good home.

They worked very hard so that we would have a good education, and that we would also have the extras. Whether it was the ballet lessons or whether it was the trip for leadership training. Whatever it was—slumber parties, the prom, all of those things—they wanted us to have a very good life. They didn't realize though that the greatest gift they gave us was themselves and their love.

My mother really loved her family. She loved her husband, her daughters, her brothers, her sisters, her in-laws.

She remembered the great times when we would all go down to my grandfather's shore. We played scrabble and canasta. My mother loved the lottery. You have to know that over the last days, my mother had five of us buying her little lotto tickets. Why? Not because she liked to gamble. She liked the action. She loved being involved.

When our grocery store closed in the 1970's, mother volunteered in my office. That's where she got the great name—Miss Chris, The First Lady of Highlandtown.

She helped run my neighborhood office. She worked with me in the City Hall when I served on the City Council. Then she worked in my Congressional office on Eastern Avenue and then my Senate office on Highland Avenue.

She ran my neighborhood office. Whenever people would call she would say, ''Hi. I'm Barb's mother. What can I do to help you?''

If anyone asked where I was, my mother would say, ''Don't worry about. I'll take care of it. I'll tell her tonight, because I talk to her everyday.'' And she did.

When I looked at the flowers at the funeral home, I noticed that many of the flowers were from workers. They were from the workers at General Motors. They came from the workers at the Coast Guard Yard. They came from the workers at Goddard. Why? Not because of me, but because many of them knew her. They often spoke to her on the phone.

When Congress threatened to close Goddard, the workers called my mother looking for me. They came last night to the funeral home. They brought a poem. They told me they had a great time talking to my mother. She told them I loved the space program. My mother didn't know I ever loved the space program, but she made them feel special, feel valued and reassured like she did for so many.

Well for all of us, my sister, her grandchildren, she always loved us. She would leave us little messages on the answering machine. She would leave us little notes. She would send us notes in the mail that said, ''Be aware.'' And then she would ask about them.

My mother would also send us prayers. Because she believed that for every problem, there wasn't always a solution, but for every problem, there was always a prayer that helped us get to the solution. She was devoutly religious. It was her faith and her prayers that sustained her.

Mother had a very keen mind, incredible attention to detail, and was a superb organizer. She had an enormously strong presence.

Now, as we come close to the end, and we can all think back to the wonderful days and years we had together. She was a wonderful neighbor. She was always taking care of someone. She was always taking care of her family. She was always taking care of people in need.

But I want you also to know that our mother was a lot of fun. She had a great sense of humor. She loved getting out with her friends. She loved family outings and social occasions. She loved going to political events.

My mother loved hearing about the new restaurants with names like ''Wild Mushroom.'' And she loved the old favorites that she and my father went to like Haussner's. She loved going to Eastern House with her friend Ethel.

Mother was so outgoing. She was so strong. She had incredible presence. And because of this presence and because of her outgoingness, we all wondered with some apprehension how she would cope with being a shut in.

Two years after my father's death, she was so ill, she could no longer go out. Diabetes had given her diabetic neuropathy. Illness had taken its toll. She was to stay at home—most often in a wheelchair.

Once more, our mother surprised us. She amazed us. And she inspired us. Though she had to give up going out or going to the office, she just didn't give up. Her presence was strong to the end.

In her wheel chair, or welcoming visitors or being on the phone, she was full of great cheer. She called me to tell us what was happening and always wanted us to do the same.

My mother was intellectually inquisitive until the last days, reading The Paper. She wanted a subscription to People magazine so she could be ''up on it'' and be able to talk to her grandsons and granddaughters. Even when her eyes were going, she would read with a magnifying glass with a light so that she could be involved.

My mother faced her illness the way she faced life itself—with great dignity and with great courage. My mother was incredible. She had great spirit, great stamina and great spunk.

She insisted on being self-sufficient. Whenever we wanted to help, she would say, ''let me do it myself, that's how I keep going.'' And she did, right up to the end.

Mother's faith inspired us all. She adopted a prayer ministry when she was at home with her illness, praying for the sick, for a special intention someone had requested, for her family, friends and her country.

She took it very seriously. Like everything else, she believed in doing her duty. She did it with a combination of great determination, great devotion and great love.

My mother had a good life. She celebrated her 50th wedding anniversary with my father, who was still well enough to participate. She saw my two sisters, Chris and Fran, marry two wonderful men, both named Ed. She had five fantastic grandchildren. One is a Captain in the United States military. She has a granddaughter who is a nurse at Johns Hopkins. Another soon will be a nurse. A grandson planning on medical school. And another grandson contemplating about what he can do to bring about social change.

She saw me elected to the United States Senate. She was very proud that I was the first women of Polish heritage ever elected to Congress and the first Democratic woman elected to the Senate in her own right. So she saw many good things. She loved life.

So in closing, we ask you to remember our mother. We ask you to remember the good times. To her friends of many years, remember her young and dancing. To those who were her neighbors and her constituents, remember her at the store and at the office, helping out with a helping hand.

We, her family, will remember her playing with us, playing with her grandchildren. We'll remember her playing cards and just having a good time. We'll remember her being there for us in so many ways.

We ask that you remember her during the holidays and the Holy days. She and my father would have been getting ready now for Easter. Now she is with her own mother, and with our dear father. I know she will remember us in paradise.

Ms. MIKULSKI. Mr. President, I want to, in the most heartfelt way, thank Senator SARBANES for the very kind words he said about my mother and for his gracious generosity in putting that statement in the RECORD. My mother thought the world of Senator SARBANES, but she also thought the world of the U.S. Senate and was very honored that I was in it. I thank the Senate for its courtesy at this moment.

I yield the floor.

Mr. SARBANES. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONSTITUTIONAL AMENDMENT TO LIMIT CONGRESSIONAL TERMS

The Senate continued with the consideration of the joint resolution.

Mr. DOLE. Mr. President, we have just had a very historic vote. I commend my colleagues on both sides for this bipartisan vote. I think it was 58 to 42. But it is an indication that term limits will not go away. I want to commend my colleagues, as I have done before, particularly the freshmen on this side, many of whom have pledged to serve only two terms. They have made their point. They have made it in a very objective way and a nonpartisan way. They have listened to the American people.

I congratulate Senator THOMPSON, Senator ASHCROFT, Senator THOMAS, and others who worked so hard, and also Senator BROWN, who has been pursuing this matter for some time, and thank all of my colleagues who voted, in effect, with us on cloture.

That would not have determined whether or not we would have term limits, but we could have gone on to the debate on term limits.

Perhaps there will be another day. There will be another day, not ''perhaps.'' There will be another day. I believe the American people can now sift through the records and make a determination on who was for and who was against even debating or going to term limits.

I think that is very significant. I think the vote just held in the U.S. Senate is a most significant vote, and it will have a far-reaching impact.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRAHAM. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRAHAM. Mr. President, I ask unanimous consent for permission to proceed as if in morning business.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. GRAHAM. Thank you, Mr. President.

HAITI

Mr. GRAHAM. Mr. President, a week ago today the last of the United States troops who had been sent to Haiti came

home. These brave soldiers, as well as others from countries around the world, helped bring enormous changes to that troubled nation, that troubled neighbor of the United States. Last Tuesday's withdrawal provides us an opportunity to reflect upon what has been accomplished, what is left to be done, and what special role the United States—and particularly those of us who have a responsibility in the National Government of the United States—will play in this next series of chapters of the nation of Haiti.

There has been considerable attention focused on the problems that remain in Haiti, and any observer would admit that there are very substantial challenges yet to be overcome in that nation. But I believe that an analysis would also require some comparison of what is the circumstance in Haiti today, in April of 1996, as compared to the recent past.

Let us take the period of 1993. Haiti in 1993 was a scene of anarchy and lawlessness. Haiti's military dictatorship ruled by machete. There had been an estimated 3,000 political killings per year during the reign of terror of the military dictatorship.

I remember, Mr. President, visiting a Catholic church in downtown Port-au-Prince where a Government official had been removed from a mass in front of his terrorized family and friends, taken into the street, and summarily executed.

A few weeks later, with a delegation from the United States, I had the honor of placing a wreath at the point at which that brave citizen of Haiti gave his life. For that action and others, I was declared persona non grata and was not allowed to reenter Haiti as long as the military dictatorship was in control.

Haiti continues as a violent society. It has been a violent society since the establishment of the republic, the second republic—second only to the United States of America—in the Western Hemisphere.

But since the arrival of United States troops and other international military and civilian participants in an effort to restore democracy to Haiti, 30,000 weapons have been removed from the streets. Today there is the fledgling beginnings of civilian law enforcement and a judicial system.

In 1993, there was no independent law enforcement capability in Haiti. Law enforcement was an adjunct of a corrupt military. There was no semblance of an independent judiciary. The judiciary was subservient to the autocratic military dictatorship. While there is a long road to travel to bring Haiti to a mature justice system, the first steps have been taken.

In 1993 and again in 1994, thousands of refugees left Haiti headed for the United States in man-made rafts. Mr. President, 25,600 persons were rescued at sea during the first half of 1994 alone—25,600 persons rescued at sea during a 6-month period. Countless others were less fortunate. They died of dehydration or were eaten by sharks.

After the United States-led operation, the flow of refugees from Haiti has plummeted. In 1995, the Coast Guard intercepted only 5 percent of the number that had been intercepted in 1994, the first 9 months of 1994 having been under the rule of the military regime. The total numbers intercepted in 1995 were 1,204 individuals.

On democracy, Haiti has been an independent Republic with the pretense of democracy for 192 years. But during the first 191 of those 192 years, there has never been in the history of the country a transition of power peacefully from one democratically elected President to a successor democratically elected President—191 years in which the democratically elected President was either toppled by a military regime, beheaded, forced into exile, or in some other manner involuntarily relinquished political responsibility and another, often nondemocratically elected, successor took his place.

In February of this year, for the first time, that historic event occurred. President Aristide voluntarily, peacefully, pursuant to the Haitian Constitution, transferred the power to the new President. The United States, during an equivalent period of time of our history as a Republic, had 40 peaceful democratic changes of administration. This was the first time that had occurred in the history of Haiti.

So, Mr. President, as we talk about the things yet to be done, I think we as a democratic nation, we as a nation which has had a long and intimate history with Haiti, we as a nation which decided that it was intolerable to have old-style military autocratic regimes using their power of the machete, power of the sword, and power of the gun in order to displace a democratically elected government, we who are willing to organize the international community in an effective effort to restore democracy to Haiti, I think should take some pride in the changes that have occurred and the steps, beginning though they may be, toward respect for human rights and democracy in Haiti.

But much remains to be done. Since Operation Restore Hope, the United States troops and their civilian counterparts have given the people in Haiti the chance to rebuild their country. Some of the things that remain to be done include poverty and unemployment, which continue to plague the Haitian people. The estimates are that unemployment now is in the range of 80 percent plus. With an uncertain future, the Haitian people lack a sense of optimism for what the future holds for themselves and their children. International investors have been wary about returning to Haiti and continuing the rebuilding of the economy.

I applaud those of my colleagues who are dissatisfied with actions that have occurred in Haiti such as the limited investigation of some of the political killings. We must insist upon continued progress in this area. This Congress and this Federal Government have special responsibilities to help the Haitian people maintain their momentum toward democracy and respect for human rights and an improved economic future.

Some of the things that are particular responsibilities of this Congress include a role to play in training the new Haitian Parliament, the first Parliament that truly justifies the characterization of being an independent legislative branch in the history of the Republic of Haiti.

The Haitian police force needs continued guidance. We have assisted in selecting and training some 5,000 Haitian police officers who will be the beginnings of an independent police presence in that nation. It is like having a police force made up of 5,000 rookie police, each with approximately 4 months of training before being placed on the streets. We now have a role to play in the maturing of that police force, the development of a leadership cadre, the development of a culture of how a police force maintains itself in that democratic society.

Probably the most difficult task that we face is in assisting the Haitian people in the revitalization of their economy. We must work with President Preval, and we must assure that there is a movement toward a marketplace, privatized economy in Haiti. For too long the Haitian people have suffered under an economy which has been highly centralized, highly socialized, and enormously corrupt and inefficient. The Haitian Government must also work with international financial institutions to create a climate that will make it again receptive for foreign investment.

President Aristide established the goal of Haitian economic progress which was to move from misery to poverty with dignity. The Haitian people should have a friend and partner in the United States in that road that they have yet to walk.

Mr. President, a concern that I have at this juncture is the ability of the United States to build on the progress that has been made and to assist the Haitian people in overcoming the challenges that still remain. It has become bogged down in domestic partisan politics, and we have been less constructive than we need to be in assisting our neighbors in Haiti. We have wasted valuable energy and time trying to either establish the grandeur of the gains that we have made or to point out each shortcoming. As difficult as those shortcomings may be, they have been given a proportion which is out of relationship to the totality of the circumstances in Haiti.

Both the Congress and the administration, both Republicans and Democrats, have some legitimate opportunity to share in the successes that have been achieved in Haiti and to accept the responsibilities for the future.

We will do a disservice to the United States ability to influence the progress and future of a country which is important enough to us that we have just invested almost $2 billion and the lives of thousands of U.S. uniformed and civilian personnel, and we will have lost the opportunity to demonstrate our serious commitment to assisting a country which is trying to go through some of the most difficult transitions—from tyranny to democracy, from anarchy to a civilized society, from misery to poverty with dignity.

Those are our challenges. Those challenges are only going to be met if we do it on a bipartisan basis. This Senate met that challenge in times past. In 1948, when many felt it would be impossible for a divided Government—with a Republican-controlled Congress and a Democrat in the White House, a Democrat who appeared to be vulnerable and therefore should be exploited by emphasizing differences—men of the stature of Senator Arthur Vandenberg recognized that the American national interest was in unifying behind policies that would serve our Nation's need to constrain the expansion of communism. We followed the enlightened leadership of Senator Vandenberg, and now, 50 years later, we see the fruits of that policy by the collapse of the Soviet Union and our ability, through almost a half a century of bipartisan commitment to that policy, to have avoided the need to use nuclear power and an excessive amount of United States military force in order to achieve that objective of the collapse of the Soviet Union and communism. We need to use that example as our standard as we set our policy for Haiti.

Mr. President, there are very real consequences if we continue a policy of treating Haiti as a partisan domestic political issue rather than an American foreign policy opportunity. We do not need to ask ourselves what will happen if we allow the progress that has occurred in Haiti to wither. We have already seen what will happen. We will see it again on our beaches with the dead bodies of Haitians who tried but failed to make it to our shores. We will see it at the tarmac of Guantanamo with hundreds of tents of refugees who have been able to survive and are awaiting their fate in limbo as they were just 3 years ago. We are not playing our role today in termination of a constructive American policy toward Haiti.

I am concerned that within the Senate we see a blocking of humanitarian assistance which will be critical to this next stage of Haiti's development. Assistance in the form of health care, funding that will be needed to procure essential medical supplies, vaccines, and for the operation of health clinics throughout Haiti is being held up by this Congress. The shutting down of humanitarian programs will exacerbate adverse conditions in Haiti and could contribute to further economic and political instability.

Equally disturbing, it has become fashionable to denounce Haiti's efforts to make a transition to democracy. If the question is, were the elections that were held in 1995 a standard of perfection by a mature democracy, the answer is clearly no. If the question is, were they the fairest, most accurate reflections of the opinion of the Haitian people in the 192-year history of that country, the answer is, with as much energy and confidence, yes.

We need to build on these successes, and we must do so in a bipartisan manner. I support the efforts of Congress to assist and demand that there be performance, performance in areas such as investigation of political murders. But I also ask us to recognize the reality of the situation. We are asking a government, whose President told us in person-to-person communication in this very Capitol just a few days ago, that his government had reached the point of financial stringency, that it could not pick up the garbage. To now expect that this government is going to have American or Western European standards of sophistication in forensic investigation is to ask what is not going to exist.

We must work with the people of Haiti and with their government. If we fail to do so, we will, again, see the kind of pictures that we saw in the very recent past of U.S. Coast Guard ships picking up overladen small wooden boats with refugees reaching out for salvation. We will see, again, the pictures of the butchered citizens of Haiti, like the man dragged from the Catholic church during mass.

At that point, we will ask ourselves not whether we scored appropriate political points, but whether we serve the national interest.

It is ironic that at the very time Congress is about to turn again to the question of illegal immigration and how to frustrate its imposition on the United States, that we are close to bringing about a crisis on an island which has been the source of so much of that illegal immigration. Clearly, one of the most fundamental things that the United States can do to reduce the amount of illegal immigration is to turn serious attention to assist in the social and economic development of those countries which are the most likely sources of illegal immigration.

We have made progress on that front as it relates to Haiti. Illegal immigration is down by over 20 times in the last 3 years. The question is, are we going to lose this momentum or are we going to build on the progress that we have made?

During the period of military rule in Haiti, as has been the case for decades previously, Haitians, in a time of desperation, stripped the country's hilly terrain of trees in order to make charcoal for heat and for cooking.

Today, actions by the Federal Government and the White House and the Congress threaten to cause a mud slide that will bury the progress that Haiti has made with our cooperation and assistance over the past 2 years. It is our challenge to see that we can plant trees and stabilize the soil of Haiti so that, together, the people of Haiti, the people of the Western Hemisphere, and particularly the people of the nation which has been their longest and truest friend, the United States of America, can look forward to a new century of prosperity, a new century in which at least the people of Haiti have realized the goal of moving from misery to poverty with dignity.

Thank you, Mr. President. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRASSLEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRASSLEY. Mr. President, are we in morning business?

The PRESIDING OFFICER. We are considering Senate Joint Resolution 21.

Mr. GRASSLEY. Mr. President, I ask unanimous consent to speak as in morning business for 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

PRESIDENT CLINTON'S PERFORMANCE

Mr. GRASSLEY. Mr. President, since March 19, I have been delivering a series of statements on the Senate floor. The common thread of my statements is my observation of the President's performance in office. I have concluded that he is not setting a good example for the people whom he serves. Basically, I mean that he does not perform in office commensurate with the rhetoric.

This also soon becomes an issue of the failure to show moral leadership, which basically means that you do what you say you are going to do. It is the single most important attribute of any President. I have quoted Franklin Delano Roosevelt on the floor of this Senate on this issue many, many times. One of his President leadership flaws is the fact that he says one thing and yet does another.

Last night, I had an opportunity to talk about a clue that I discovered as to why the President of the United States might say one thing and do another. I quoted from last week's Time magazine article, which quoted the President's senior adviser, George Stephanopoulos. His quote was just three words: ''Words are actions.'' So if the President says something, that means that is what people know he is going to do. In other words, you say something, the President either thinks it is happening or he wants us to think it is happening. I have not quite discovered which one it is, Mr. President.

Yesterday provided a further case in point to illustrate what I am saying.

Yesterday, we celebrated Earth Day across the country. There is nothing wrong with celebrating Earth Day. There has been great progress made in this country on the environment, and maybe it would not have been made without annually remembering the things that come about through Earth Day and the movements connected with them.

Also, it has become kind of a political event, as well. The TV news shows were full of slick photo ops of President Clinton and Vice President GORE cleaning up the C&O Canal outside of Washington and visiting a national park. They also took the opportunity to campaign against Republicans on the issue of the environment.

Never have I seen an Earth Day used for such pure politics as it was yesterday by the President. The President would have us believe that the only thing standing between the public and dirty air and dirty water is President Clinton himself. If you would listen long enough to the President, you would think that his environmental record is unblemished. Unfortunately for the President, the facts belie the image that he is trying to present.

I want to briefly show this by discussing two items that were brought to my attention yesterday that clearly illustrate that President Clinton's deeds are different from his rhetoric. First, the director of the Iowa Department of Natural Resources, Mr. Larry Wilson, sent a letter to my office regarding President Clinton's fiscal year budget proposals for the Army Corps of Engineers. The letter states: ''The President's proposal will have substantial adverse impacts on several environmental programs important to my State. One of these programs focuses on habitat restoration, which is vital to supporting endangered species. This program will be shut down due to the President's administration budget proposals.'' This is an environmental issue, and the President is cutting the budget. That belies the fact that yesterday he was out saying the great things he was doing about the environment.

As President Clinton demagogs against Republican programs to reform the Endangered Species Act, he is shutting down an existing program that has actually been successful in saving endangered species. Again, his rhetoric does not match his words.

Other programs that will be shut down affect the wetlands in my State. There are several wetland restoration and enhancement projects that will be terminated if the President's budget is adopted. According to the Iowa Department of Natural Resources, these projects not only provide critical habitat for wildlife, but they also provide hunting, fishing, and other outdoor recreational opportunities for all Iowans. As the President talks about his initiative to protect national parks, he is jeopardizing these same resources in Iowa with his budget proposals.

The second item that I will discuss concerns an article in this morning's Washington Post. It says that the President, out on the C&O Canal, talking abut the good he does for the environment, is saying one thing, but there is an Agency of his Government, in his administration, that is causing environmental damage in another place.

This is where the Sierra Club alleges that the U.S. Government is responsible for illegal dumping of PCB's, lead, mercury, and arsenic in the Anacostia River right here in Washington, DC. The Sierra Club is a group that often supports the President on his environmental initiatives and is often critical of Republican proposals. So, it is very unusual that this organization would question this administration on an environmental issue.

Yet, the Sierra Club is alleging that the Washington Navy Yard and Southeast Federal Center are violating the Clean Water Act and polluting this local river.

Mr. President, I can tell you that if a family farmer was thought to have violated the Clean Water Act, that farm would be shut down immediately. I know of cases in Iowa where the EPA showed up armed and without warning to close down small businesses because of potential violations of environmental laws. Yet, the Federal Government remains the biggest polluter in the country and is not subject to the same rules that apply to small businesses and family farms. This is hypocrisy. This is a double standard.

President Clinton should stop playing politics with the environment. The public health is too important to be used as a campaign issue. The more politics he plays, the less he is able to bring fairness and uniformity to our Nation's environmental laws. I urge the American people to look behind the political demagoguery that was characterized on Earth Day and take a good look at the deeds of this administration. You my find that, once again, President Clinton's action falls short of his rhetoric.

This country is suffering from a severe bout of cynicism. That is exactly why we have this legislation on the floor regarding term limits, because term limits are the people's expression of dissatisfaction with Washington, DC, with the Congress, and with other institutions of Government. The cause of this is that politicians say one thing and do another. This has reflected an absence of moral leadership over time of our elected officials. Usually the public does not discover this until they have come and gone. I want to lay the record out right now because we need accountability right now. We need leadership right now.

What we do not need now is the same old ''say one thing and do another'' routine. To stop the growth of cynicism and the fact that we must restore trust of the American people in our institutions of Government, we in Washington need to show the American people that they can trust our words, that our words not only can be trusted, but our words are followed up by actions.

Mr. President, I ask unanimous consent that two documents I referred to be printed in the RECORD, the newspaper article and the letter from the director of the Iowa Department of Natural Resources.

There being no objection, the material was ordered to be printed in the RECORD as follows:

[From the New York Times, Apr. 23, 1996]

NEW MEDICARE TRUST FUND DATA SHOW UNUSUALLY LARGE SHORTFALL

WASHINGTON, April 22,—Medicare's Hospital Insurance Trust Fund lost $4.2 billion in the first half of the current fiscal year, according to new Government data, which suggest that the financial condition of the program is worse than projected by Administration officials last year.

The trust fund, which pays hospital bills for the elderly and disabled, lost money last year for the first time since 1972. But the loss for all of last year was only $35.7 million.

The new data show that the losses are growing. In the first half of the current fiscal year, from October 1995 through March of this year, the trust fund spent $60.5 billion and took in $56.3 billion, a shortfall of $4.2 billion, the Treasury said.

There is little chance that the trust fund will actually run out of money. It still contains more than $120 billion, and Congress would almost surely act to rescue the program before it ran out of money. But the new data provide fresh evidence that, after months of acrimonious debate between the White House and Congress, Medicare remains a budget problem of immense and growing proportions.

Chris Jennings, a special assistant to President Clinton for health policy, said today that the new numbers were not surprising. ''They indicate the need to move forward, balance the budget and enact some changes in Medicare that will strengthen the trust fund,'' he said. ''Republicans and Democrats should work together to address the problem.''

In a letter to Congress last week, Treasury Secretary Robert E. Rubin suggested that Congress and the Administration resume discussions to reach an agreement on Medicare and the budget.

Republicans proposed many changes in Medicare last year to help control costs, but President Clinton said the changes would hurt beneficiaries. Republicans may hesitate to put forward new proposals after they were bloodied in that battle. Representative Bill Archer, the Texas Republican who is chairman of the Ways and Means Committee, said, ''The President preferred to scare seniors and play politics instead of saving Medicare.''

It is not entirely clear why the hospital trust fund is running out of money faster than expected. One factor, Administration officials said, is an unanticipated increase in the number of admissions of Medicare patients to hospitals, but that does not explain all of the discrepancy.

The new losses accelerate a trend that started several years ago, when spending by the hospital trust fund began to increase faster than the money coming into the fund. The Administration had predicted that the amount of money in the trust fund would increase by $4.7 billion in the 1995 fiscal year, which ended Sept. 30, but instead the trust fund spent $35.7 million more than it took in.

Likewise, the Administration predicted last April that the trust fund would take in

$45 million more than it would spend in the current fiscal year. But that now appears highly unlikely. Treasury Department data show that the trust fund has lost money in five of the last six months.

In the first half of the last fiscal year, from October 1994 to March 1995, the trust fund lost $135 million.

Any trust fund money not immediately needed to pay hospital bills is invested in Government securities. The amount of such holdings has declined, to $126.1 billion on March 31 from $129.9 billion on Oct. 1, 1995.

If nothing is done to change the financing and design of Medicare, losses from the trust fund are expected to grow from year to year. Payroll taxes account for most of the trust fund's income, and no tax increases are scheduled under current law. Unless President Clinton and Congress arrive at a long-term budget deal, Federal officials said, there is no reason to expect a significant reduction in the rate of growth of Medicare spending.

But no such deal is in sight. In this election year, lawmakers and Administration officials are wary of any action that might offend elderly voters by restricting Medicare spending.

Last year, Republicans proposed vast changes in Medicare to slow the program's growth. But the proposals were included in a bill to balance the Federal budget, and Mr. Clinton vetoed that bill in December, saying it contained ''the biggest Medicare and Medicaid cuts in history.''

Republicans said their proposals were needed to prevent Medicare from going bankrupt, but Democrats said the changes would devastate the program and push beneficiaries into health maintenance organizations.

The new Treasury data do not indicate when Medicare's Hospital Insurance Trust Fund will run out of money. In April 1995, the Administration predicted that the trust fund would be depleted at some point from October to December 2002, but it now appears that the money could run out earlier because the trust fund is spending more than expected and is taking in less than expected.

Senator Pete V. Domenici, the New Mexico Republican who is chairman of the Budget Committee, said he believed that the trust fund would run out of money by May 2001.

Roland E. King, former chief actuary of the Health Care Financing Administration, which runs Medicare, said today that he believed the Hospital Insurance Trust Fund ''will run out in late 2000 or early 2001.'' Richard S. Foster, who succeeded Mr. King as chief actuary, said he could not discuss the financial condition of Medicare without permission from top officials at the Department of Health and Human Services, and such permission was not given today.

Under Federal law, the trustees of the Medicare trust fund, including four Administration officials, were supposed to submit a report to Congress on the financial condition of the program by April 1. But Administration officials say that report has been delayed because of Government shutdowns and snowstorms last winter and will probably not be issued until late May or early June.

Some Democrats have played down the significance of the losses from Medicare's Hospital Insurance Trust Fund. Representative Pete Stark, Democrat of California, said, ''The past is littered with inaccurate forecasts of Medicare's demise.'' Moreover, he said, ''The Democrats will not let Medicare go insolvent.''

Hospital executives and Medicare officials said they were puzzled by the recent increase in admissions. James D. Bentley, senior vice president of the American Hospital Association, said tonight, ''Hospital admissions of Medicare patients are rising more than could be explained by growth in the number of beneficiaries—but not enough to account for all of the unexpected increase in Medicare spending.''

[From the U.S. Senate—Republican Policy Committee, Apr. 23, 1996]

TODAY'S NEW YORK TIMES DEMONSTRATES URGENT NEED TO SOLVE MEDICARE'S IMPENDING CRISIS, NOW

Today's New York Times front-page article (on the reverse side) once again reveals the Medicare Part A trust fund's uncontrolled hemorrhaging. It remains uncontrolled because the Clinton Administration decided to play ''Medi-Scare'' with Medicare last year. Clinton vetoed the plan from Congress that would have allowed it to grow at twice the rate of inflation and would have kept it solvent for the next generation. In contrast, President Clinton's latest unbalanced budget—his ninth, scored last week by CBO—would barely keep the current trust fund solvent through fiscal year 2002.

Medicare's Hospital Insurance trust fund, commonly known as ''Part A,'' has lost $4.2 billion in the first half of FY 96 [says the New York Times, citing government data].

This compares with a loss in the first half of FY 95 of $135 million, and the Clinton Administration's prediction that Part A would run a $45 million surplus for FY 96.

These losses indicate that Medicare's bankruptcy is even closer than the 2002 date the Administration reported April 3, 1995.

Because the Administration has still not produced a report this year, we must rely on outside estimates. Budget Committee Chairman Domenici has stated Part A could be bankrupt by May of 2001; former chief HCFA actuary Roland King predicts bankruptcy as soon as late 2000.

Clinton's latest budget would only push bankruptcy back a year beyond its last year's estimate. According to CBO under his budget—without utilizing for gimmick of cost-shifting $60 billion to the taxpayer—Part A would be barely solvent in FY 2002 ($1.5 billion) and would be bankrupt by FY 2003.

In contrast, Congress' Balanced Budget Act would have preserved Part A beyond 2010—when Baby Boomers begin retiring—while allowing spending to grow at twice the inflation rate.

While the Republican party in Congress wants to protect Medicare for the next generation, Clinton wants to abandon it to the next Administration.

DEPARTMENT OF NATURAL RESOURCES,
Des Moines, IA,, April 10, 1996.

Re Mississippi River Environmental Management Program (EMP) and Missouri River Fish and Wildlife (F&W) Mitigation—Affects in Iowa of the President's FY 1997 Budget Request.

Hon. CHARLES E. GRASSLEY,
Hart Senate Office Building, Washington, DC.

DEAR SENATOR GRASSLEY: I want to alert you to the impacts that the Administration's FY 1997 budget proposal will have in Iowa with regard to two programs administered by the U.S. Army Corps of Engineers: (1) Missouri River Fish and Wildlife Mitigation and (2) Mississippi River EMP. The President's proposal will have substantial adverse impacts on both of these programs which in recent years have been operating at close to full authorized funding and providing long-awaited benefits to Iowans. I urge you to do whatever you can to restore the appropriations in FY 1997 to levels that equal or at least come closer to the amounts available in prior years.

The Corps has explained their priorities for funding which are navigation, flood control, and environment projects. While we understand how the Corps developed these priorities, their application results in a disproportionate impact on projects that are important to Iowa. For example, funding of only $100,000 for mitigation projects on the Missouri in the Omaha District, means projects on hold for years while habitat restoration is viewed as a key way to resolve historic conflicts between uses while enhancing support for endangered species. The Mississippi River EMP is slated for cuts of nearly $4 million in FY 97, and projections are for cuts of about $7 million for FY 98 and nearly $11 million in future years. These levels will delay projects for years while threatening the viability of an essential long-term monitoring effort.

It has been difficult for us to obtain information as to whether the Administration's budget cuts are greater for the North Central and Omaha Divisions than for other regions. If these divisions suffered proportionally greater reductions than other divisions, it could help to explain the difficulty that they have had trying to meet all of their obligations and ensure the timely completion of Iowa projects.

MISSOURI RIVER FISH AND WILDLIFE MITIGATION

Mitigation was authorized in the Water Resources Development Act of 1986 to satisfy the federal requirement to mitigate for the loss of fish and wildlife habitat with the construction of the navigation and flood control works on the river in Iowa and the other lower basin states. Appropriations commenced in 1989. While the program includes land acquisition, that has been less important in Iowa than habitat development. The state already owns numerous sites along the river that can be improved by the mitigation program. The Corps of Engineers has purchased some land adjacent to existing public land as required to make the habitat development projects work. Mitigation is critical on the Missouri River if the Corps is going to make progress in supporting endangered species. There is a terrible shortage of fisheries habitat in the lower river. These conditions have economic consequences as well, since the lack of habitat reduces the quality of the fishery. The net result is less recreational opportunity on the river, which impacts businesses that provide goods and services along the river.

Missouri River Fish and Wildlife Mitigation has received as much as $8 million a year, which was fairly evenly split between the Kansas City and Omaha Corps Districts. The administration's budget for FY 1997 includes $1.6 million for mitigation, of which $1.5 million is programmed for the Kansas City District and only $100,000 for the Omaha District. Iowa projects are in the Omaha District, so Missouri River fish and wildlife mitigation will essentially come to a halt in Iowa. The discrepancy among the two districts is based upon individual district priorities. Fish and wildlife mitigation requires more than a token $100,000 in the Omaha District.

The following are the specific projects programmed for work in FY 97 that will not happen if current funding levels remain:

Blackbird/Tieville/Decatur Bend near Onawa is an $8.8 million project that includes 3,500 acres and 11.8 miles of wetlands and river side channels. The definite project report (DPR) is complete, design and engineering is near completion, and construction was programmed in begin in Fall 1996 and be completed during FY 97.

California Bend near Missouri Valley just north of Council Bluffs is a $785,000 project to restore a running side chute connected to the Missouri River. The plans and specifications are close to completion and construction was scheduled for FY 96 and 97.

Winnebago Bend near Sloan is a $1.3 million project to add water into a rapidly disappearing wetland. It too was programmed for FY 96 & 97 construction.

In addition to the improvement or creation of critical habitat, all of these projects would provide hunting, angling and outdoor recreation opportunities to Iowans along the Missouri River.

The Corps' report proposing these projects was completed in 1981. With nearly two decades of delays, the lack of habitat continues to frustrate efforts to maintain several fish species. It would be most unfortunate to lose the momentum that has developed as these projects have moved this close to construction.

MISSISSIPPI RIVER ENVIRONMENTAL MANAGEMENT PROGRAM (EMP)

EMP was also authorized in the Water Resources Development Act of 1986 and has become a model program for the restoration of fish and wildlife on big rivers. Its authorized funding is $19.4 million per year and it has been receiving that amount in recent years. It too is a program that has taken a long time to attain solid momentum, but is now providing increasing benefits. EMP contains two primary components; (1) habitat rehabilitation and enhancement projects (HREP) and (2) long-term resource monitoring (LTRM). The Administration's budget contains $15.6 million for EMP in FY 97, which is not devastating in itself. Our concern lies with the Corps' projections in FY 98, 99, and 00, which are $12.4 million, $8.7 million, and $9.8 million, respectively. Reductions of that magnitude will have serious adverse implications in Iowa.

EXAMPLES OF COMPLETED HREPS IN IOWA ARE:

Bussey Lake dredging near Guttenberg—Dredging will improve the fishery by providing deeper water, diversity of habitat and wintering-over areas.

Brown's Lake restoration near Green Island—This area has been protected from sedimentation by dike improvements and a water control structure. A deeper channel through the project and dredging in the lake have improved the fishery, while the dredge spoil was collected on site to create terrestrial habitat. This project along with the improvements at Green Island will be beneficial for both hunting and fishing.

Big Timber backwater rehabilitation and pothole creation near Muscatine—Dredging at this site restored an area that was nearly completely filled in with sediment.

Lansing Big Lake side channel closures—This project is designed to decrease sedimentation and flow rates in the lake to maintain its currently very popular panfishery. We are currently proposing some follow-up work in Lansing Big Lake to further assure project objectives are obtained.

Iowa's Princeton HREP project near Princeton is hit the hardest by the proposed change in funding. This project is designed to create new wetlands and improve the dike system for waterfowl management. The construction contract was close to being let to a minority contractor. Our local DNR biologist was ready to issue a news release explaining to local hunters that Princeton would be closed this fall due to construction. The Corps is considering delaying construction until late 1997. Making this decision at the last minute is inefficient and will cost time and money if the Corps decides to shelve the project. Because of great interest in this project by local hunters and others who live along the river, the delay will cause many to become extremely upset.

Iowa's Lake Odessa EMP project near Wapello is currently undergoing planning, engineering, and design. The Corps has informed us that it will complete this work, but will not construct the project under current EMP authorization. The Lake Odessa HREP project would therefore only become reality if authorization for EMP is extended beyond 2002.

HREP projects for Huron Island near Burlington, Molo Slough near Dubuque, and Peosta Channel also near Dubuque were also programmed to be completed under the current EMP authorization. The Corps is now considering deletion of these projects completely from EMP.

The Long-Term Resource Monitoring (LTRM) element of EMP is collecting data on Mississippi River water quality, aquatic and floodplain habitat, microinvertebrates, and fisheries. LTRM also evaluates the physical, chemical, and biological responses of habitat projects. This program was designed to identify trends and support decisions about river management including such projects as the current navigation study.

Iowa DNR operates one of six monitoring stations that are located throughout the river. Iowa's station is in Bellevue and is staffed by six permanent employees and typically hires up to five seasonal workers during summer months. These are all state employees, but funding for their salaries and operations comes totally from federal EMP dollars. Reductions in the LTRM budget will likely occur because of overall EMP cutbacks, which means that Iowa's station in Bellevue and its employees will be affected. It is important that data gathering not be curtailed to the extent that the integrity of the data base created over the past several years is jeopardized. In addition, the loss of jobs at the station will impact the economy in Bellevue due to the loss of employment. Bellevue along with other cities along the Mississippi will see reduced recreational activity as the maintenance of the natural resources of the river are neglected.

Budget reductions are difficult, and we understand that there will be some impacts on programs that we believe to be important to the long term viability of the natural river systems. It appears that the Missouri River Fish and Wildlife Mitigation and Mississippi River Environmental Management Programs are expected by the Administration to bear proportionally greater budget reductions than other programs. We also fear that the North Central and Missouri River Divisions are taking a greater share of cuts than those in other parts of the country. This further harms Iowa projects. If budget reductions that are currently being proposed happen, Missouri River Fish and Wildlife Mitigation in Iowa will come to a complete halt, Mississippi River EMP habitat projects in Iowa will be delayed and some will be eliminated. The Bellevue monitoring station will face cuts that could mean its demise with the added cuts proposed in future years. As noted above, reductions in these efforts will have economic as well as natural resource consequences that should not be underestimated given the Corps' own study showing an annual value of recreation in the Upper Mississippi River basin of over $1 billion. We ask for your help to do whatever you can to assure these programs and their respective projects in Iowa are not forced to take on more than their fair share of setbacks.

Sincerely,

LARRY J. WILSON,
Director.

Mr. GRASSLEY. Mr. President, I ask unanimous consent for 5 additional minutes. How much time do I have left?

The PRESIDING OFFICER. Eight minutes 56 seconds.

Mr. GRASSLEY. I ask unanimous consent for 5 additional minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

MEDICARE

Mr. GRASSLEY. Mr. President, about a year ago the President appointed trustees for the Medicare fund to study Medicare, to project its problems, its solvency, and everything like that. A year ago, six trustees of the Medicare fund—and these are four people in the President's Cabinet and two citizens, one Republican and one Democrat, so altogether there would be five Democrats and one Republican—unanimously said that the Medicare program would be bankrupt in the year 2002. They also said that Congress should take immediate action to keep the long-term viability of Medicare. They asked the Republican Congress to take action to do that. We did that.

The Balanced Budget Act of 1995 is this 1,800-page bill, which took 13 committees over an 8-month period of time to put together, the first Balanced Budget Act passed by Congress in a quarter of a century, to balance the budget in 7 years. Part of this document is not only doing what President Clinton's trustees of the Medicare system asked us to do, to save it from bankruptcy, but we also gave senior citizens of America a choice that if they did not want to have traditional Medicare, we would pay for other forms of health care delivery. We would take their money and pay for it, so that they could have something if they wanted something different than Medicare. That is all in this document.

In November of last year, we presented the President of the United States not only the balanced budget, but also provisions to save Medicare, to strengthen Medicare, and to give people on Medicare, for the first time in 30 years, a choice of their medical care.

The President vetoed it. The President vetoed those Medicare reforms. He wanted people to believe that we were cutting Medicare. He was on television every day on these paid ads saying that ''Republicans are cutting Medicare.'' Under the Balanced Budget Act, Medicare would have grown at 7 percent every year. What we are spending on Medicare per beneficiary is $4,900 this year, and in 7 years we would have been spending $6,700 per Medicare recipient. Maybe it is even closer to $7,000 per Medicare recipient. So, obviously, we were not cutting anything. We were saving Medicare from bankruptcy. We were extending the life of it for another 9 or 10 years.

Well, the President vetoed it. One person is standing in the way of doing what his trustees said should be done, what the people want done, and what the Congress did. The President of the United States vetoed the first balanced budget act passed in a quarter of a century, balancing the budget in 7 years, and saving Medicare, as his trustees said. Well, the President kind of ignored what his trustees said.

But, more importantly, even before last year was out, we were finding out that Medicare was coming up short of expectations of what the income and outgo of it was, to a point of where it was going to be broke before the year 2002.

Senator PETE DOMENICI says that it is going to be May of the year 2001, just 6 years from now. Roland King, former chief actuary of the Health Care Financing Administration, says that it will run out in late 2000—that is 4 years from now—or early 2001, 5 years from now. There is a Richard S. Foster, who succeeded Mr. King as chief actuary, who said that the top officials at the Department of Health and Human Services would not give him permission to talk about this issue. What I am referring to here, Mr. President, is the New York Times article of today that is headlined ''New Medicare Trust Fund Data Shows Unusually Large Shortfalls.'' The subheadline is: ''Program is Solvent, But Gap Shows Weakening.''

What has happened in the 12 months since the last report? Instead of Medicare starting to spend out more than the income in 1996, it actually started to happen in 1995, and it is happening at a much faster rate than we anticipated. So, Medicare will be broke not in 7 years, not in 6 years, but maybe in 5 years.

What is kind of special about this article is this. Normally this report would be out in April every year by the trustees. It is not out yet, I imagine because it is an election year. This is bad news for this administration, which was told 12 months ago that Medicare was going to be bankrupt in the year 2002, and they vetoed the only bill presented to extend the life of it. Not only that, but the situation is worse than the report said it was 12 months ago.

It says here that Chris Jennings, a special assistant to President Clinton for health policy, said today that the new numbers were not surprising: ''They indicate the need to move forward to balance the budget and enact some changes in Medicare that will strengthen the trust fund. Republicans and Democrats should work together to address the problem.''

Get that—''Republicans and Democrats should work together to address the problem.'' Immediately after Labor Day last year, constantly Senator DOLE and Speaker GINGRICH were inviting the White House to sit down and reach some sort of an agreement with us, a long time before we ever put this together and finally passed it. But, no, they did not want to sit down and talk about it. Yet, we are being admonished by the White House that ''Republicans and Democrats should work together to address the problem.''

A letter to Congress last week from Treasury Secretary Robert E. Rubin suggested that Congress and the administration resume discussions to reach an agreement on Medicare and the budget. Well, we do not have that report. They say it might come out in June or July.

Do you know what they are blaming for the delay? The fact that we had snow in January. We have snow every January in the Midwest, and it does not slow down the deadlines that we have to get reports out. But the longer this report can languish in the bureaucracy downtown, as long as some faceless bureaucrat can keep it under control, then it is less out there for public consideration and for the shots that it is going to take because of that.

Mr. President, I hope that the administration will forget the fact that we had snow in January, because what is news about that? This report that is supposed to be issued in April, that was issued in April of last year, would be issued, and I will bet we will see the same Presidential appointees to the trustees tell us that Congress should do something about it. Well, if you ever wonder as part of the cynical public about Washington, DC whether Congress will ever balance the budget, it is right here in these 1,800 pages. We passed that last year. The President vetoed it. It saved Medicare from bankruptcy. We would not have to be dealing with this issue. Instead of Senator DOMENICI saying that we will run out of money in May of the year 2001, we would be saving that deadline for another decade down the road.

I hope, Mr. President, that the President of the United States will come forth with his report. The longer you wait to make public bad news, the worse it is for the people that are giving the bad news.

It would seem to me that the right thing to do is to simply state what the facts are, and the fact is that the situation with Medicare is much worse. It could be bankrupt in 5 more years—at the most, 6 years—and the situation is deteriorating considerably because this administration vetoed the bill that we passed last year to save Medicare.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. FAIRCLOTH). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. PRYOR. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

OUR PRESIDENT AND EARTH DAY

Mr. PRYOR. Mr. President, I thank the Chair very much for recognizing me, and I will not belabor this issue very long. I know the Senate is leaving early this afternoon, and I do not want to delay the departure of our staff members who have been so loyal in helping us this afternoon and today. It has been an interesting day in the U.S. Senate.

I just was listening to one of the monitors and watching one of the monitors. I happened to note my very, very good friend from Iowa, the Honorable Senator CHARLES GRASSLEY, a wonderful long-time friend of mine, someone I have worked with very closely on the issues of oversight and overstepping of the Internal Revenue Service, of defense spending, which we thought at the time had gotten out of hand and was very unfair. We worked on several issues over these years together. I look forward to the remainder of my term in working with him further on various matters that affect our respective States and certainly our great country.

But I was a little taken aback when my friend from Iowa got up and started talking about our President, Earth Day, and what happened yesterday nearby, just a few miles away, I think, on the upper reaches of the Potomac River. My friend from Iowa sort of took our President to task and the Vice President to task I guess for even appearing at an Earth Day event. I do not know what his concern was. But if in fact the President did mention that the other political party's proposals on some of our environmental concerns were in fact lacking, then, Mr. President, I am going to have to disagree with my friend from Iowa, and I am going to have to, yes, agree with our President. For example, legislation recently circulated to rewrite the Clean Air Act by our good friends on the other side of the aisle would repeal the toxic air pollution standards and would absolutely cripple the enforcement of the Clean Air Act.

I do not think that is a piece of legislation we can go to future generations with and say we were very proud of ourselves when we attempted to cripple the enforcement of the Clean Air Act.

I think our President was right when he said that there is a difference between the two political parties and the way that they look at the environment and legislation that would perhaps undo all of the progress that has been made in cleaning up the air we breathe under the Clean Air Act over the last 25 years.

Some 25 years ago, when I first came to the House of Representatives as a young Member, as a new Member of that great body, I remember during that time I had three small sons, and from time to time on a Sunday afternoon or Saturday afternoon, perhaps, we would get a fishing pole or swimming suit and we would go down to the banks of the Potomac River, and I will never forget—and this was not long ago—there were signs up and down the banks of the Potomac River: no swimming allowed; do not eat any fish, the fish will be contaminated if caught in this river.

Mr. President, in this quarter of a century what we have done as a body, Republicans and Democrats alike, has not only helped to clean up that river, but we are helping today to clean up our air, and we cannot make a retreat, especially in a political year when it might have a short-term appeal to

some local interests, maybe some local business interests that want to compromise and that want to sacrifice the environment we have to pass on to future generations.

I think the President was right when he implied yesterday that some of the legislation as proposed—we call them riders—to the VA appropriations bill would delay the issuance of toxic standards, air standards, that is, and would allow for the exemption of industries, exempt industries—just say we are sorry; we are going to apply this to some industries, but the rest of you are going to get off; you do not have to comply with the law; you do not have to obey the law; there is no law that impacts you.

As we speak today, Fort Smith and Van Buren, AR, Sebastian and Crawford Counties in Arkansas, 48 hours ago were hit with massive tornadoes, two dead, hundreds of homes damaged. At this very moment, as we stand in the Senate Chamber and talk about clean air and clean water, because of necessity we are dumping raw sewage into the Arkansas River. We have no other option. Senator BUMPERS and I will be calling in the morning Carol Browner of the EPA to say that we have an emergency; we have to do something.

We have emergencies all over this country not caused by a recent natural disaster but emergencies that are existing today where we are polluting our streams and our air and where we have to do something about it. This generation cannot back away. Our President yesterday was talking sincerely and earnestly about what we can do together as political parties.

The Republicans, by the way, at that Earth Day event yesterday, several Republican Representatives from Congress were agreeing with our President. I hope that we can make this a nonpolitical issue and talk about the facts, those facts being we do have a difference of opinion, but we do need to join together and do what is right for the environment.

Budget cuts—and I know the Presiding Officer realizes this—and the Government shutdowns, what have they done? What have they accomplished? Have they saved any money? Probably not much. What have they really done? They have delayed the EPA's issuance of new standards for toxic industrial air pollutants—new standards for toxic industrial air pollutants. Those standards are now on hold. Why? Because of Government shutdowns and budget cuts.

The delay in the issuance of air toxic standards has resulted in the continued release of harmful chemicals—mercury, chromium, formaldehyde, and lead—into our air. More than 45 million people, Mr. President—the distinguished occupant of the chair realizes this—in our country still live in areas with unhealthy levels of ground level ozone or smog. I did not know this until just lately, but the EPA reports that the United States refineries alone, and I quote, ''emit more than 78,000 tons per year of established hazardous air pollutants, or 9 tons of toxics emitted into the air every hour nationwide.''

How can we repeal some of these rules? How can we say that some companies and some industries are exempt and do not need to comply with making progress in eliminating this unclean air and unclean water.

My good friend from Iowa also talked about another issue. I am going to come back to this issue of the environment in a moment. I was hoping that my friend from Iowa was going to be here because he made reference to not only the President of the United States, but he made reference to another gentleman, a gentleman who is very close to my heart. His name is Chris Jennings. He says, who is this man, Chris Jennings? He said that this Chris Jennings, whoever he is, said, and then he quoted something that Chris Jennings had said.

First, Chris Jennings for many years worked for the Senate Special Committee on Aging, probably one of the finest staff people who ever worked for that particular committee or has ever worked in the Senate, and I would daresay that most of the Members on this side of the aisle at one time or the other have worked closely with this so-called man named Chris Jennings. I would say that Members on the other side of the aisle have worked closely with Chris Jennings. If I could only jog the memory of my friend from Iowa, Senator GRASSLEY, who has been for years a loyal member of the Special Committee on Aging, I am sure that Mr. Jennings has not only worked for Senator GRASSLEY in many capacities, has served him in many capacities, but also I am sure that should Mr. GRASSLEY see Mr. Jennings and reacquaint himself with him, he would know him and would respect him, as all of us do in the Senate.

Chris Jennings is a remarkable individual, a splendid and dedicated servant. But, somehow or another, I did not quite appreciate the tone of my friend from Iowa. I know he did not mean in any way to be disparaging of our friend, Mr. Jennings, I am sure, today. I hope our friend, Senator GRASSLEY, will realize the dedication of this fine former member of our Senate Special Committee on Aging staff. I am sure he knows his great qualifications and his great commitment.

Our friend from Iowa was talking, of course, about the Medicare funding. We think it is very important to point this out. Absolutely. We know what the dollars and cents are. I do not think we are arguing with those figures. But I think we also need to point out there remains today over $120 billion in the trust fund for Medicare. There is no imminent danger that claims are not going to be paid—absolutely none. There is no imminent danger that these claims are not going to be paid.

The updated information should not be used to scare the 37 million elderly citizens in this country or people with disabilities. They should not be used for partisan political purposes. The trust fund will pay out the claims. I repeat, the trust fund will pay out the claims, at least through the turn of this century, no matter what, and much longer if the Congress would only enact the President's balanced budget proposal.

We think it is very, very important to lay on the table the facts, as I have stated. We think there is equal importance not to intentionally scare the seniors of this country and to lead them to believe, or to imply, that their checks may not be paid and their claims will go unnoticed.

We think, too, the information validates the President's position on Medicare that he has maintained during his Presidency. The latest information simply provides additional validation for the President's position that we should move forward and balance the budget to strengthen the trust fund. In fact, I have not talked to the President about this matter in a long time, but I would imagine, when the President read the Post or the New York Times or wherever this appeared this morning, about the trust fund, I imagine that the President said, ''Those are not very pretty figures, but we think that those figures will put people to thinking and start people to believing that we have to do something about our budget.''

The President has offered a proposal that achieves $124 billion in Medicare savings that would extend the life of the trust fund by at least 10 years from now. This proposal builds on the President's successes in strengthening the Medicare trust fund.

Let me say this, and I hope I will not be accused of being too partisan. In 1993, let me remind my good friend from Iowa and the distinguished Members on the other side of the aisle that in 1993, without one Republican vote, not one, the President signed into law Medicare savings and other financing charges that extended the life of the trust fund from 2 to 3 years. That was a major accomplishment.

So, as we enter now the real meat, I guess you would say, approaching a Presidential election, I think we should inform the citizenry of this wonderful country of ours that from time to time there will be skirmishes in this body because of necessity, because of beliefs, because of different ideologies. We will see those debates.

I never thought this particular Chamber should become a political convention hall. I hope it does not. But I do think it can become the proper forum for us to discharge our obligations and certainly to debate the issues of our time and our generation.

I would like to say I am sorry my friend from Iowa was not here. I do not mean in any way to be disparaging of him or question his sincerity. I just

wanted to sort of set the record straight, after I heard my good friend's remarks.

I hope in the coming days, again, we will have ample opportunity to lay these issues out on the table, out in the public, let the sunshine shine among them, and let us, at that time, bring to the people what we consider important questions of today.

Mr. President, I see no Senator seeking recognition. Therefore, I yield the floor, Mr. President, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

BOSNIA, SERBIA, AND THE WAR CRIMES TRIBUNAL IN THE HAGUE

Mr. SPECTER. Mr. President, I have sought recognition to comment briefly on a trip which I made recently, earlier this month to The Hague, Serbia, and Bosnia for the purpose of taking a look at the situation with our military forces in Bosnia and taking a look at what is happening at The Hague with the War Crimes Tribunal. I would like to highlight a few of my observations because there are a few moments available on the Senate floor this afternoon.

In visiting Tuzla on April 4, which followed the visit to Serbia on April 3 and the visit to The Hague on April 2, before returning to Paris en route back to the United States, in Tuzla, I saw the presence of the U.S. Army of which people of the United States can be very, very proud.

The United States moved in as part of the NATO force, the IFOR force, short for the Implementation Force, with an overwhelming strength to stop the fighting and preserve the peace. It is a truly remarkable scene to see an army moved halfway around the world with the power and force of the United States, really the one remaining superpower in the world.

As I have had the opportunity to travel abroad, to see the great respect and admiration in which the United States is held, it is something that we ought to focus on in this country. A mark of our power is our military force. When we spend as much as we do on the defense budget, some $243 billion this year, we see it in operations; we have gone in there with overwhelming force. All of the participants to the conflict have stopped fighting and are observing the rules and regulations set up by IFOR, the NATO forces and U.S. forces.

We had the opportunity to talk to many in the military there on a tour provided by General Cherrie. We visited a military installation on Mount Viz, 450 meters through solid mud, virtually straight up, traveling on a tracked military vehicle in order to climb an incline 60 degrees on terrain which did not seem possible to move up. But the mechanism of the military force carried us to the top where we had a briefing on the military operation where we were briefed by military personnel and where I visited with quite a number of military personnel from Pennsylvania, my State, as well as from other States. They had very high morale and were glad to see a visitor from the United States. We had an excellent lunch prepared in the field.

I talked to a young lieutenant colonel who was in command of the operation. The lieutenant colonel told us about taking over the mount from a Serbian major who talked about the killing, the military casualty of his brother-in-law in the fighting which had occurred prior to the time the United States and NATO forces took over. As a matter of fact, in a professional way, with no animus, at least by all surface indications, the Bosnian Serb major said to the U.S. colonel, ''Take care of my mountain. I intend to take it back.'' It was sort of foreboding as to what may occur after the United States and the NATO forces depart the premises.

But as of the moment, there is peace there. I had heard, and was glad to have repeated, that we have had only two casualties. Of course, two is two too many, but the casualties occurred, one from a motor vehicle accident and the other when someone was dismantling a landmine contrary to regulations.

When we arrived in Tuzla, we heard about the visit just the day before of Secretary of Commerce Ron Brown. General Cherrie, who met us on our arrival there, midmorning of April 4, told us that Secretary Brown had been there the day before, arriving at about 6:20 in the morning and departing shortly before 2 p.m. when the tragic accident occurred.

We had seen Secretary Brown the night before in Paris at a reception at the residence of Ambassador Pamela Harriman. We renewed our longstanding friendship, talked about possibly meeting in either Sarajevo or in Zagreb. Of course, that was not to be.

When I flew out of Paris on the morning of April 3 and went to Belgrade, we had planned to fly to Sarajevo. Because of the weather conditions, the very high winds, our plane was grounded. We did not undertake the flight. I think those may have been the same weather conditions which caused or related to the fatality involving Secretary BROWN, whose presence will be sorely missed, as will the presence of all those 34 people who were on board with him on that ill-fated flight.

We had an opportunity to talk to the people in Bosnia about the efforts to gather evidence, which is very important for the War Crimes Tribunal. They have drawn a fine line. That is, IFOR will protect the personnel of the War Crimes Tribunal, but they will not protect the evidence itself. But the War Crimes Tribunal personnel are engaged there and are taking a look at a lot of the grave sites, gathering evidence for prosecutions. So long as the personnel from the war crimes prosecution team are there gathering evidence, then military personnel will protect the prosecution team.

We discussed with the military personnel, General Cherrie, the issue about the potential of taking into custody the Bosnian Serb President Karadzic and General Mladic. The word was that individuals, such as those two people, under indictment would be taken into custody if the NATO and U.S. forces came upon them, but they would not be sought out or hunted.

While we were there at the headquarters at Tuzla, we saw posters, candidly not very good identifying pictures, but, as to the major people under indictment including Bosnian Serb President Karadzic and General Mladic.

We heard about an incident where IFOR forces had come upon General Mladic, but he was surrounded by many of his own military personnel, and to attempt on that occasion to take him into custody would have precipitated a battle. Since the IFOR forces were outnumbered, they did not seek to take him into custody at that time.

But I think it is very important that, ultimately, President Karadzic and General Mladic be taken into custody so they can be prosecuted at the War Crimes Tribunal. I believe prosecutions at the War Crimes Tribunal are a very, very important aspect of what the United States and NATO are doing there. That may be the event of the decade or perhaps the event of the century if international legal precedence can be established that genocide and the atrocities will not be tolerated and they will in fact be prosecuted by an international tribunal.

The establishment of the rule of law as an outgrowth of what has happened in Bosnia would be an enormous step forward in international law, and is something which has to be pursued.

I had traveled to the Hague on January 4th this year and talked to the prosecution team at that time. I found that there were a number of very serious problems and I undertook to write to the Secretary of State, the Attorney General, the Director of the FBI, the Director of the CIA, and the Secretary of Defense. Their letter replies are attached and I ask that they be printed at the conclusion of my remarks along with the full text of my statement.

A great deal has been done. The prosecution team was much more encouraged when I met with them on April 2; I was impressed with their approach back on January 4. I am pleased to say that CIA Director John Deutch has been very cooperative in working hard to make information available which is necessary to obtain the convictions of those under indictment at the War Crimes Tribunal.

Mr. President, a very fundamental issue is what will happen with Bosnia, when our forces are due to withdraw by December 1996. The Intelligence Committee, which I chair, heard from General Pat Hughes about the problems which exist there at the present time and the prognosis is that if there is not a significant improvement in the infrastructure, the economy and the local police forces in Bosnia, there is likely to be a problem of fighting erupting again. We heard about the implementation of the Dayton accord, that it is proceeding on schedule, as detailed in the statement that I will introduce into the RECORD. I was pleased to see in the press Sunday April 21, statements by the military commanders in Bosnia, Adm. Leighton Smith and Lt. Col. Ben Barry, about the compliance by the warring faction in withdrawing their military forces and complying with the Dayton accord. That is certainly good news. A great deal more has to be done in terms of fulfilling the commitments which have been made by the major Western democracies, by Japan and by other countries, to see to it that local police forces are established, that the infrastructure is built up, that the economy is supported, so that there is a realistic opportunity for peace to prevail there.

Mr. President, that is a brief summary of the highlights. I ask unanimous consent to have printed in the RECORD certain letters.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER. Mr. President, I would like to take this opportunity to report on my recent visit to the War Crimes Tribunal in The Hague on April 2, Serbia on April 3, and Bosnia on April 4. The primary purpose of this trip was to assess the progress being made on implementation of the Dayton accords, particularly the prosecution of war criminals, and the degree of intelligence support to the War Crimes Tribunal and the Implementation Force [IFOR].

Our first stop was The Hague, where the International War Crimes Tribunal sits. There, we met with Judge Antonio Cassese, the President of the Tribunal prosecuting crimes against humanity committed in the former Yugoslavia. Judge Cassese stated that the first trial of indicted war criminals will commence on the 7th of May. At this time, there are five other trials planned against six indictees—two Moslems, one Bosnian-Croat, and three Bosnian-Serbs, all of whom are being held in custody.

The Tribunal is in the somewhat delicate position of needing to maintain judicial independence while relying heavily on the political support of the former Yugoslavian adversaries and the IFOR countries. One of the issues I discussed with Judge Cassese was the role of IFOR support of the tribunal. While some progress has been made in this effort, there is apparently still some disagreement between the Court and U.S. force commanders on the degree of IFOR support. Of particular importance is the issue of United States support for the apprehension of indicted war criminals, especially Bosnia-Serb President Karadzic and General Mladic. Judge Cassese indicated that the Europeans believe that only the Americans have the capacity to arrest Karadzic and Mladic. Neither the French, British or Italians appear ready to arrest these individuals for various unspecified reasons.

President Cassese advised that he had initiated a meeting with the Russian Foreign Minister who urged the War Crimes Tribunal not to proceed against Mladic or Karadzic until after the September elections. The judge commented that he advised the Russian Minister that he would take his views into account but would not be influenced as to what action the Judicial Tribunal would take. As evidence of the conflicting pressures on the tribunal, at least one NATO country has reportedly urged that as many suspected war criminals as possible should be indicted before the elections in order to preclude their running in those elections, but that no additional suspects should be indicted after elections so that there is no risk of indicting newly elected officials.

We also met with the one American judge on the tribunal, Judge Gabrielle McDonald, formerly a U.S. District Court judge in Texas, who is currently the presiding judge on two trials. Judge McDonald highlighted the difficulties the tribunal faces in attempting to move promptly against indicted war criminals. For example, she pointed out that while the first trial is scheduled for May 7, 1996, against a Bosnian-Serb by the name of Tadic, there may be a delay if the tribunal does not receive some key equipment—simultaneous translation equipment with a 2 to 3 second broadcast time delay—by April 23 and if the U.N. fails to accept this equipment as a gift. The delayed transmission is required to ensure there is no inadvertent broadcast of names. Judge McDonald also expressed her view that there are not enough tribunal courtrooms to try all the cases and attempting to try multiple defendants won't work in this particular situation.

We also met with the prosecution team which is assisting Judge Goldstone in investigating and prosecuting the war crimes. Included in this group are representatives from the Department of Justice, Department of State, Defense Department, and the FBI. The 10 individuals with whom I met were very impressive and very dedicated to the task of trying to bring justice to this great tragedy in current history.

I had met with this team earlier this year, on January 4, 1996. After assessing their needs at that time, I wrote to the President, the Secretary of State, the Secretary of Defense, the Attorney General, the Director of the CIA, the Director of the FBI and the Ambassador to the United Nations.

When I met with the prosecution team on January 4, they were concerned with cooperation by IFOR and the various agencies of the U.S. Government in supplying personnel and assistance in carrying out the efforts of the tribunal investigators. At the April 2 meeting, attended by many of the same people who were present on January 4, there was considerably more optimism because they had received assurances of support, including replacement personnel for the team, and assistance was being given to the gathering of evidence in Bosnia.

To date the United States has been the biggest supporter of the tribunal and its chief contributor. By the end of this fiscal year 1997, the U.S. will have contributed nearly $35 million to the court. Included in this figure is $3 million in services from more than 23 prosecutors, investigators and other experts from the departments and agencies of the U.S. Government.

It is clear, however, that this U.S. support alone is not sufficient. International pressure is needed on all parties to the Dayton accords to abide by that agreement to force them to turn over indicted personnel to the tribunal. The tribunal team reported that there is a prevailing view among potential witnesses that the tribunal will not be continually supported and this is affecting witness willingness to step forward.

The prosecution team highlighted one particular set of indictments in which greater Serbian cooperation is needed. A Serbian army colonel by the name of Veselin Sljidancanin and two other Serbians have been indicted for ordering the mass killings of 260 Croatians near Vukovar, Croatia after they forcibly removed these people from a hospital on March 20, 1991. Sljidancanin is free in Serbia and there is no indication that the Serbian Government intends to extradite him to the tribunal.

I advised the prosecution team that I would raise this issue with Serbian officials. The next day, April 3, I raised the issue with Serbian Foreign Minister Milutinovic and Assistant Foreign Minister Jovanovic. I discussed the charges which had been filed against three men and gave the Foreign Minister a copy of the indictment and the transcript of the argument made by the prosecutor before the War Crimes Tribunal on this issue. I ask unanimous consent that the indictment and the transcript of the argument be inserted in the CONGRESSIONAL RECORD.

Foreign Minister Milutinovic said that Serbia could not extradite Colonel Sljivancanin because it was prohibited by the Serbian constitution. It appears that the other two men, Mrksic and Radic, are not in Serbia at the present time.

I responded to Foreign Minister Milutinovic that a legal analysis had

been made showing that the Serbian constitution only prohibited extradition to another nation but the constitution did not prohibit extradition to the War Crimes Tribunal. Foreign Minister Milutinovic showed little interest in having his government assist in bringing Colonel Sljivancanin to the trial.

I asked Foreign Minister Milutinovic if his government would cooperate in bringing Bosnian Serb President Karadzic and General Mladic to trial before the War Crimes Tribunal. While Foreign Minister Milutinovic said that Karadzic and Mladic should be ousted from power, he would not assist in taking those men into custody so they could be tried under pending indictments issued by the War Crimes Tribunal.

On April 4 we traveled to Tuzla, the headquarters of the American contingent of IFOR. Our military operation there was enormously impressive. The United States had moved an army of nearly 18,000 men and women with spectacular results. I noted that women comprised between 10 to 15 percent of the American force serving in a variety of jobs including military police and senior intelligence.

Our host was Brig. Gen. Stan Cherrie. Due to weather, we were unable to visit one of the mass grave sites that was being investigated by the War Crimes Tribunal. Instead, we visited one of the intelligence surveillance outposts at the top of Mount Vis. The purpose of our force on Mount Vis is to monitor the perimeter areas to be sure there are no violations of the accords. Getting there in knee-deep mud was accomplished riding in a track vehicle up the mountainside. This turned out to be an adventure in itself.

Foremost in my mind during this visit was what happens in December 1996 when U.S. forces, which make up approximately one-third of the Implementation Force, are scheduled to withdraw from the region. By coming in with overwhelming force, IFOR has been able to dominate the entire scene. The United States has suffered only two deaths; one was an individual who was dismantling a mine without following instructions and the other was a motor vehicle fatality. It is problematic what will happen when IFOR leaves.

Of particular concern is the prospect that while IFOR may have completed its mission to stabilize the area militarily and allow political, economic and law enforcement initiatives to generate peace to the region, the civil mission to rebuild the economy and infrastructure will not have made sufficient progress.

In testimony on March 27, 1996, before the Senate Select Committee on Intelligence, Gen. Pat Hughes, the Director of the Defense Intelligence Agency, stated that violence is likely to resume in Bosnia unless allied forces quickly help improve living conditions and provide the basis for a stable economy.

The message I heard in Bosnia was similar: there is a need for economic development to take hold. One senior military officer highlighted the danger of not providing sufficient incentive to maintain the peace, noting that the region is marked by the greatest level of hatred and distrust that he has ever seen. There is some evidence that the fighting forces on all sides are tired. There are other indications that fighting will resume once IFOR leaves. Many at the scene predict that stability can be maintained if the economy and infrastructure are developed and the local authorities are able to put their police forces into operation.

Some of our military personnel in Bosnia were more optimistic about Bosnia's future. One ranking officer noted that if the September elections result in moderates replacing the current corrupt regime, then the prospects for peace were good. He further advised that the schedule of confidence-building measures is proceeding according to the Dayton accords. On day 1, a one kilometer zone of separation was established. On days 30 to 45, both factions—Bosnians and Bosnians Serbs—gave the locations of their heavy weapons to the United States and to each other. On D+90, the Dayton accords called for the consolidation of air-defense weapons systems into approved sites. Seventy-five percent of those weapons were located and moved into those sites by the deadline. Now it's up to 90 percent. On D+120 days, which will be on April 20, all armed forces are to be in their containment and barrack areas. Inspection teams will visit those areas. Any deployments from containment areas will give IFOR a warning of intentions to initiate possible military action.

I raised with General Cherrie the role of IFOR in assisting the War Crimes Tribunal. He stated what he understood to be IFOR's mission: U.S. forces in IFOR would not seek out those indicated, such as General Mladic, for example, but would be prepared to arrest him if IFOR forces came upon him. All checkpoints have picture posters of those indicted. We saw one of those posters. Regrettably, the photographs on many of them are nearly impossible to make a clear identification.

I also asked General Cherrie for more details on IFOR's tasking in regard to support for the War Crimes Tribunal investigators examining the sites of atrocities. He answered that it was to protect the War Crimes Tribunal personnel but not the war crimes sites. When War Crimes Tribunal personnel leave a site, IFOR will leave. If the War Crimes Tribunal personnel were to remain overnight, then IFOR would remain to protect them.

At the top of Mount Vis we were treated to lunch with the military personnel. There we found their morale to be very high. They are doing an excellent job under an extraordinarily difficult situation. Wherever we turned, the mud was ankle deep. One quip which seemed particularly appropriate was that Bosnia was Latin for mud.

I also had a chance to meet several soldiers from Pennsylvania; including one young man from Philadelphia, S.Sgt. Michael J. Smith, another from Pittsburgh, Christopher Klauer, and a third from Allentown, M.Sgt. Douglas Sleeth.

We departed Tuzla by 2:15 p.m. and headed for Aviano Air base in Italy where we received an operational and intelligence brief on air support capabilities to the Bosnia area. Air support and air strikes may be one option in which military force can be brought to bear after the pullout of IFOR forces.

We had been scheduled to travel to Zagreb, where we were to meet with Croatian President Tudjman, but that part of the trip was canceled after the tragic crash of the plane carrying Secretary of Commerce Ron Brown and his delegation.

Instead, we held a series of meetings on April 5 with officials in our Embassy in Paris. These discussions also focused primarily on the situation in the former Yugoslavia, where France is a key player.

Ambassador Harriman noted that France is now probably the most important United States ally in Europe. She is concerned that a planned 40-percent cut in the U.S. embassy in Paris will severely hamper her ability to deal with the political and economic requirements of this increasingly important relationship. She noted that, in spite of press accounts to the contrary, there is excellent United States-French cooperation in the evolution of NATO, on the Former Yugoslavia, arms control issues, terrorism, and organized crime. The Ambassador further noted that the implementation of embassy cuts also will affect their ability to encourage free trade and to promote U.S. exports.

We also discussed with Ambassador Harriman the issue of economic espionage and the impact of the recent controversy when France accused the United States of using spies based at the Embassy to attempt to recruit French government officials to gather information on economic policies. We talked with the Embassy team about the history of French activities targeting United States economic information, including proprietary information of United States firms. I sought their views regarding legislation we are considering on the Intelligence Committee to criminalize theft of trade secrets, as well as a bill to prevent corrupt trade practices by foreign firms along the lines of the prohibitions currently in place for U.S. firms.

As amplified in a floor statement on April 17, we were very favorably impressed by the operation of the U.S. Embassy in Paris.

EXHIBIT 1

UNITED STATES SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC, January 18, 1996.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: When you called me on November 25, 1995 seeking support for

your Bosnian policy, we had an opportunity to talk briefly about the International Criminal Tribunal for the former Yugoslavia.

On January 4, I had an opportunity to meet with the prosecution team in The Hague and was enormously impressed with what they are doing.

In my view, these prosecutions are of historic importance. I strongly believe that the United States government should do everything in its power to assist in the prosecutions. Toward that end, I have written the various Department and Agency heads urging cooperation in a number of specific ways. I believe that support by the American people and by the Congress could be enhanced by successful prosecutions by the War Crimes Tribunal.

I am sending to your National Security Council head, Tony Lake, a copy of this letter and copies of my letters to the respective Department and Agency heads.

I look forward to an opportunity to discuss this issue with your further at your earliest convenience.

My best.

Sincerely,

ARLEN SPECTER

THE WHITE HOUSE,
Washington, DC, February 21, 1996.

Hon. ARLEN SPECTER,
U.S. Senate,
Washington, DC.

DEAR SENATOR SPECTER: Thank you for your recent letter expressing your support for the International Criminal Tribunal for the former Yugoslavia. I agree with you that its work is of historic importance. The United States government will continue to assist the Tribunal in its work.

The United States already has contributed more to the Tribunal than any other nation—upwards of $14 million. This includes the services of more than 22 prosecutors, investigators and other experts. Assistant Secretary of State for Democracy, Human Rights and Labor John Shattuck has traveled to the former Yugoslavia eight times since July 1995—most recently in January 1996—to investigate and communicate news of the serious violations of human rights that occurred around Srebrenica and Zepa last summer.

The IFOR Commander, Admiral Leighton Smith, and Justice Goldstone met on January 22 and agreed on how they can coordinate their respective missions under the Dayton Accords. Admiral Smith expressed his satisfaction that IFOR will be able to provide appropriate assistance to ensure security for Tribunal teams carrying out investigations at mass grave sites. Justice Goldstone expressed his satisfaction with the level of support offered by Admiral Smith recently when he met with my National Security Advisor, Anthony Lake.

Your continuing support and ideas are greatly appreciated, as always. I look forward to discussing with you the implementation of human rights in the former Yugoslavia as we work together to restore peace to the Balkans.

Sincerely,

BILL CLINTON.

U.S. DEPARTMENT OF STATE,
Washington, DC, March 26, 1996.

Hon. ARLEN SPECTER,
Chairman, Select Committee on Intelligence, U.S. Senate.

DEAR MR. CHAIRMAN: We regret the delayed response to your letters of January 18, 1996 to Secretary Christopher and Ambassador Albright, in which you underline the importance of pursuing defendants indicted by the International Tribunal for the former Yugoslavia.

Demanding an accounting for injustices perpetrated in the former Yugoslavia is a fundamental tenet of our policy there. In the long term, peace can be secured only through justice.

The Parties to the Dayton Agreement obliged themselves to cooperate fully in the investigation and prosecution of war crimes and other violations of international humanitarian law in Article IX of the General Framework Agreement. This obligation has been reaffirmed several times since, most recently in a meeting held among the Parties in Rome on February 18 when the Parties agree to provide unrestricted access to places, including mass grave sites, relevant to such crimes and to persons with relevant information. At this meeting, IFOR repeated its readiness to work to provide a secure environment for the completion of these tasks.

The Parties also acknowledged in Rome that persons other than those already indicted by the Tribunal, would be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Although IFOR will not pursue persons indicted by the Tribunal, it will detain any persons indicted by the International War Crimes Tribunal who come into contact with IFOR in its execution of assigned tasks and will transfer these persons to the Tribunal.

You mentioned that the Tribunal's prosecution staff expressed concerns about adequate financing and the need for the help of more U.S. Government detailees. The United States is the leading supporter of the Tribunal, having contributed since 1994 over 12 million dollars (of a total 19 million) and 22 U.S. government detailees to the Tribunal. We are arranging to send in the near future an additional investigative team of nine (seven investigators and two translator) to aid the prosecution staff of the Tribunal for Rwanda. We understand that the Department of Justice is also detailing two prosecutors to the Tribunal.

The Yugoslav Tribunal is preparing its 1996–97 budget. We understand that the preliminary two-year estimate is in excess of 85 million dollars for operations related to the former Yugoslavia. The UN has adopted a funding formula that covers half of the Tribunal's cost through unencumbered UN peacekeeping balances and half through the normal UN scale of assessments—a rate of 25 percent for the U.S. Of course, actual expenses will depend in large part on the demands placed on the Tribunal—especially trials—in the next two years. Our ability to pay our UN assessment in full in 1996 and 1997 is dependent on Congressional approval of funds for U.S. contributions to international organizations.

We appreciate your strong and ongoing commitment to the work of the Tribunal and hope this information is responsive to your concerns. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

BARBARA LARKIN,
Acting Assistant Secretary,
Legislative Affairs.

THE SECRETARY OF DEFENSE,
Washington, DC, March 9, 1996.

Hon. ARLEN SPECTER,
Chairman, Select Committee on Intelligence, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: In response to your letter of January 18, the Department of Defense (DoD) is participating with others in the Intelligence Community (IC) to provide U.S. intelligence support to the International Criminal Tribunal for the Former Yugoslavia (ICTFY). IC participation is guided by the State Department Bureau of Intelligence and Research (INR), which acts as the point of contact for the IC with the Office of the Prosecutor.

The Defense Intelligence Agency (DIA) is the focal point for DoD support to the ICTFY. The initial search of DoD data bases was designed to locate all intelligence information which might be of evidentiary value to the Office of the Prosecutor. As a result of that search, and others in response to specific requests from the Office of the Prosecutor, DIA initially identified over 3,000 documents, the majority of which were Information Intelligence Reports (IIRs). Approximately 1,000 documents were determined to be of no value to the ICTFY. Of the remainder, 444 IIRs were forwarded to State INR and have been delivered to the Office of the Prosecutor. The remaining 1,550 IIRs are undergoing review, and those with information responsive to the ICTFY requests will be delivered to the State Department by 15 March.

The Office of the Prosecutor, through State INR, has given assurance that our responses to their various requests have been concurrent with their needs. Adequate resources are assigned to the job. You may be assured we are monitoring requests from the Office of the Prosecutor, through the State Department, on a daily basis and are prepared to increase our efforts if necessary. We are committed to continuing both intelligence and Judge Advocate support to the Office of the Prosecutor within the scope of available resources.

Sincerely,

WILLIAM J. PERRY.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 29, 1996.

Hon. ARLEN SPECTER,
Chairman, Select Committee on Intelligence, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter to the Attorney General regarding the International Criminal Tribunal for the former Yugoslavia.

At the outset, I would like to convey the Department's deep appreciation for the critical role you have played in this area. We are grateful for your efforts in passing legislation that gives the United States full authority to obtain evidence for, and to extradite offenders to, the Tribunal.

The Department of Justice remains firmly committed to supporting the important work of the Tribunal. We share your pride in the work done by the Department's prosecutors currently detailed to the Tribunal, and it is our goal to carry that work forward.

In addition, as Director Freeh states in his separate letter on this topic, the Department remains committed to continuing to provide Federal Bureau of Investigation agents to the Tribunal. The United States also has already provided, and will continue to provide, information to the Tribunal.

Finally, we have on occasion been contacted by the Tribunal on witness protection issues. As you know, however, the federal Witness Security Program is designed to protect persons who are expected to testify in proceedings in the United States. While there has been one relocation of a witness in connection with Tribunal proceedings, that was a most unusual case. Yet, the Department remains willing to work with Tribunal authorities on alternative solutions to this problem.

Thank you again for you efforts and your support. Please do not hesitate to contact

this office if we can be of further assistance with regard to this or any other matter.

Sincerely,

ANDREW FOIS,
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC, February 27, 1996.

Hon. ARLEN SPECTER,
U.S. Senate,
Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter of January 18, 1996. I appreciate the interest and support that you expressed in the FBI's involvement in the United Nation's International War Crimes Tribunal at the Hague. As background, in June 1994, three FBI Special Agents were assigned to the Tribunal for a one-year assignment. The Department of State requested our investigative expertise to help in ''jump starting'' the investigative arm of the Tribunal. In June 1995, the Department of State petitioned Deputy Attorney General Jamie S. Gorelick for a one-year extension of these resources. I remain committed to continue this level of support in the work of the Tribunal.

As you are aware, the efforts of the Tribunal have yielded indictments against war criminals. I share your opinion that the work of the Tribunal must continue and they must bring the individuals responsible for these atrocities to justice.

As you are aware, the Witness Security Program is administered by the U.S. Marshals Service under the aegis of the Department of Justice. I have been informed by the U.S. Marshals Service that there is no statutory or budgetary authority to use this program for witnesses of the Tribunal. I am aware, however, that they have relocated one witness from Bosnia with the assistance of the Department of Justice and the Marshals Service. I have been advised that this relocation involved extraordinary circumstances. The FBI Special Agents assigned to the Tribunal have been advised by FBIHQ that any requests for witness assistance should be brought to the direct attention of the Criminal Division.

You may be aware that the Department of State has put forth a plan to establish an international, unarmed law enforcement contingent to develop civilian law enforcement programs in Bosnia. The protection of witnesses developed by the Tribunal may be addressed as a function of this proposed police force.

If I can be of any further assistance to you, please do not hesitate to call upon me.

Sincerely yours,

LOUIS J. FREEH,
Director.

Mr. SPECTER. Mr. President, I yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MEASURE PLACED ON CALENDAR—SENATE JOINT RESOLUTION 21

Mr. DOLE. Mr. President, I ask unanimous consent that Senate Joint Resolution 21 be placed back on the calendar.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. DOLE. Mr. President, I ask unanimous consent that there now be a period for the transaction of routine morning business, with Senators permitted to speak therein for up to 5 minutes each.

CLINTON JUDGES

Mr. DOLE. Last week, Vice President GORE stated that Republican criticism of Clinton-appointed judges was misguided—A ''smoke screen,'' as he put it, ''to hide our own poor record on crime.''

While the Vice President is off-base with his smoke screen comments, he is absolutely right to suggest that it is important to look at the record.

The record is that the number of prosecutions initiated by the Clinton Justice Department for crimes involving guns and drugs has dropped significantly since the Bush administration.

The record is that the Clinton Justice Department has virtually ignored the enforcement of the Federal death penalty, established by the 1994 crime bill.

The record is that the Clinton administration's top lawyer has actually argued in favor of narrowly interpreting and weakening the Federal child pornography laws.

The record is that President Clinton has vetoed legislation that would help stop the thousands of frivolous lawsuits filed every year by convicted criminals that serve only to clog the courts and waste millions of taxpayer dollars.

Of course, there is the Clinton record on drugs. Drug enforcement is down. Drug interdiction is down. And the antidrug bully pulpit has been all but abandoned. Just say no has become just say nothing. Not surprisingly, teenage drug use has nearly doubled since President Clinton first took office.

Yes, Vice President GORE is right: It is important to look at the record.

Then there's the issue of Federal judges. With all due respect to the Vice President, I suggest that he take a close look at the decisions of Judge Martha Craig Daughtrey, a former member of the Tennessee Supreme Court and a Clinton appointee to the Sixth Circuit Court of Appeals.

In an important search and seizure case, Judge Daughtrey ruled that the police acted improperly when they searched the trunk of a car that they had pulled over early one morning after the car made a left turn without signaling. At the time of the stop, the police suspected that the driver might have been driving under the influence of alcohol. During the search, the police frisked the car's passenger for weapons and found a cellular phone, a pocket beeper, and $2,100 in cash. The police then asked the car's driver and passenger whether they could search the trunk. The driver and the passenger consented—consented—and the police found a shopping bag containing a baggie with a large amount of crack cocaine.

Yet, Judge Daughtrey ruled that the police acted unreasonably and she voted to suppress the crack cocaine evidence. Judge Ryan, a Reagan appointee, dissented on the grounds that the police acted appropriately.

In another fourth amendment case, Judge Daughtrey dissented from a decision upholding a police search that led to the discovery of a large stash of vicious child pornography. The two Republican-appointed judges upheld the constitutionality of the search, saying that it was fully consistent with fourth amendment precedent.

Unfortunately, Judge Daughtrey is not an aberration. Last year, in an important case before the D.C. Court of Appeals, two Clinton-appointed judges dissented from the court's majority opinion upholding the FCC's regulations prohibiting the transmission of indecency on television and radio during certain hours of the day. The purpose of these regulations is, obviously, to protect our children from images that would be harmful to their moral and psychological development. Yet, the two Clinton judges on the court joined with the two Carter appointees in arguing that these regulations somehow violate the first amendment.

So while President Clinton touts the V–chip and holds high-profile White House conferences with television executives, his judges are attempting to strip the very protections that he supposedly supports. President Clinton may talk a moderate game, but his appointees to the Federal bench are attempting to stamp their own brand of stealth liberalism on America.

And that is my point: Selecting who sits on the Federal bench is one of the most critical responsibilities of any President. Long after a President has left office, the judges he appoints will leave their mark on American society. While the Vice President may say that the Clinton administration appoints judges on the basis of excellence, not ideology, the facts—regrettably—tell a much different story.

PLEASE, MR. PRESIDENT, NO UNITED STATES FORCES IN LIBERIA

Mr. HELMS. Mr. President, 2½ years ago, 18 American soldiers were gunned down in the streets of Mogadishu, Somalia. What happened October 3, 1993, in Somalia was another one of those tragic mistakes. U.S. servicemen should not be asked to risk their lives in so-called peacekeeping missions where there is really no peace, and where no U.S. national interests are at stake.

As the last of United States forces pull out of Haiti, the American people

are learning that Operation Uphold Democracy was not the resounding success President Clinton led us to believe. The bottom line, it seems to me, is that America's military cannot achieve what the people and leaders of Somalia and Haiti refuse to do. This so-called nation building is fanciful rhetoric for fleecing the American taxpayers.

I had hoped and prayed that President Clinton had learned his lesson from Somalia, and Haiti, but President Clinton has already landed several hundred Marines, from Camp Lejeune, NC, inside Liberia. More than 1,600 Marines and 1,900 sailors on warships are awaiting further orders.

But, Liberia is in, quite literally, a state of anarchy, and I fear there is little the United States can do about it. Consider, Mr. President, that since 1990, American taxpayers have given Liberia—a country of 3 million people—at least $429 million of foreign aid, according to A.I.D.—and President Clinton proposes to forgive Liberian debt to the American taxpayers. And what has all this assistance accomplished? Since the outbreak of the civil war in 1989, intensive fighting has been the cause of the United States having to evacuate Americans and others from the country on three separate occasions. tens of thousands of Liberians are dead and thousands more fled.

Tragically, the lives saved by $429 million in U.S. foreign aid are today being gunned-down at the hands of heavily armed drunken teenagers, looting the capital city of Monrovia, raping and killing for sport. The so-called leaders in Liberia, as in Somalia, are bloodthirsty warlords who are more vicious criminals than national leaders. In fact, one warlord, Charles Taylor, escaped from Plymouth County Jail in Massachusetts in 1985.

Mr. President, on April 15, the Foreign Relations Committee was assured that if United States Marines went into Liberia, they would only be protecting the United States Embassy and assisting with evacuations, although all Americans who have asked to leave are already evacuated. The Sunday Washington Times, however, reported that several hundred Marines landed in Liberia over the weekend, and that they ''would be able to provide humanitarian assistance.'' This makes me very concerned about mission creep.

Congress does not want United States Marines hunting down Liberian warlords, as in Somalia, or picking up trash on the streets of Monrovia, as in Port-au-Prince. Mr. President, there are no United States interests in Liberia worth the life of even one United States service man or woman.

I have written President Clinton to raise a number of questions about his policy. Congress and the American people deserve answers. Of course, I pray the President does not get the United States into another Somalia or Haiti.

Mr President, I ask unanimous consent that my letter to the President be printed in the RECORD at the conclusion of my remarks.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC, April 22, 1996.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: In response to the most recent outbreak of violence in Liberia and the mass evacuation that followed, I note that the Administration has undertaken a comprehensive review of its policy toward Liberia. Congress is also fully aware of the likelihood of further humanitarian tragedy in Liberia.

With the unnecessary deaths of eighteen U.S. servicemen in Somalia (October 3, 1993) lingering on our minds, the landing of several hundred U.S. Marines in Liberia over the weekend has Congress to be all the more concerned about developments in Liberia—and, frankly, the Administration's response to that crisis.

Administration officials briefed Congressional staff this past week about the situation in Liberia, but a number of important questions went unanswered. The Foreign Relations Committee will appreciate prompt answers to the following questions:

(1) What is the exit strategy for the U.S. troops currently in Liberia?

(2) Under what rules of engagement are U.S. servicemen in Liberia operating?

(3) As humanitarian concerns are necessarily incidental—as important as they may be—what the U.S. national interests in Liberia, besides protecting U.S. citizens?

(4) What interests in Liberia are worth risking the life of one American citizen?

(5) Inasmuch as Liberia is in anarchy, why should any U.S. Embassy personnel remain?

(6) To whom is the U.S. Embassy accredited?

(7) If U.S. Embassy personnel remain, what kind of security will they have?

(8) Has the U.S. Government received any assistance with evacuations or security from France, Britain or any other country?

(9) What countries have overseas bases in African countries in proximity to Liberia?

(10) How many people, and from which countries, have been evacuated from Liberia by U.S. forces?

(11) How many private Americans and U.S. citizens working at the Embassy remain in Liberia?

(12) Do any United Nations Development Program personnel remain in Liberia?

(13) Are personnel from any United Nations agency on the ground in Liberia?

(14) To date, what is the total cost of the evacuation effort?

(15) How many U.S. Navy vessels have arrived off Liberia, and how many Marines and sailors does this represent?

(16) Under what circumstances would these Marines go into Liberia?

(17) Is an expanded role for U.S. military forces being contemplated? If so, please explain.

(18) If a contingent of U.S. forces goes into Liberia, from where will they be supported?

(19) What would such an operation cost?

(20) Given the state of anarchy in Liberia, and the individuals with whom diplomats are forced to deal, how does the Administration expect to influence events?

(21) To date, how much U.S. funding has ECOMOG received, including equipment, and how effective has it been?

(22) To date, how much U.S. funding have the countries of ECOWAS received, including equipment, and how effective has it been?

(23) As Nigeria has been decertified on account of noncooperation in the fight against illegal narcotics, how does the Administration intend to provide funding to Nigerian troops, which make up a majority of ECOMOG in Liberia—will the Administration seek a waiver in order to provide funding or equipment to Nigerian forces?

(24) How much money and equipment does the Administration propose giving ECOMOG and ECOWAS, and from where will the funds come?

(25) Since the outbreak of the civil war in 1989, how much U.S. Government assistance has gone to Liberia?

(26) Since the outbreak of the civil war in 1989, what is the total amount of international assistance that has gone to Liberia, including from United Nations agencies and all international financial institutions?

(27) Have any of the Liberian warlords ever been wanted, or are currently wanted, in the United States for any violation of law? If so, please explain.

Many thanks.

Sincerely,

JESSE HELMS.

MEDICARE

Mr. DOLE. Mr. President, 2 years ago, the Medicare trustees—three of whom are members of the President's Cabinet—reported to President Clinton and Congress that Medicare would be bankrupt by the year 2002.

From the day the Medicare trustees issued their report, Republicans have worked to preserve and strengthen Medicare. We proposed to do this not by cutting Medicare—but by slowing its rate of growth. Under the Republican plan adopted by Congress, annual spending per Medicare beneficiary would increase from $4,800 this year to more than $7,200 in 2002.

If you believed what President Clinton and some of my friends on the other side of the aisle had to say, however, you would have thought that instead of increasing Medicare spending from $4,800 per beneficiary to $7,200 per beneficiary, Republicans were trying to throw America's seniors out on the streets. And to the President's credit as a public speaker, a lot of Americans believed what he was saying.

There is, however, a very big difference between leading and misleading. Republicans chose to lead—and we suffered in the polls because of it. President Clinton chose to mislead—and he gained in the polls because of it.

But as a story in this morning's New York Times makes very clear, the President's gain came at the expense of the millions and millions of Americans who depend on Medicare.

The story reveals the fact that Medicare's hospital insurance trust fund, which pays hospital bills for the elderly and disabled, lost $4.2 billion—that is billion with a ''B''—in the first half of the current fiscal year. Those losses are more than 100 times larger than the $35.7 million loss the trust fund experienced all last year.

The $4.2 billion loss is also in stark contrast to the rosy scenario coming out of the White House last year. As part of their attempt to lead the public

to believe that Republicans concern with Medicare was ''much ado about nothing,'' they predicted that the Medicare trust fund would take in $45 million more than it would spend in the current fiscal year. Obviously, the White House was as off base in its economic projections as they were in their political accusations.

The article also reports that Roland King, former chief actuary of the Health Care Financing Administration, which runs Medicare, said that after analyzing these new numbers, he believes the hospital insurance trust fund will not run out in 2002 as the trustees originally projected. Instead, it will run out in 2000 or 2001.

I am sure that a number of Republicans are tempted to say ''I told you so,'' this morning. But saying that will get us no closer to the solutions necessary to save Medicare from bankruptcy.

And so, Mr. President, this Senator stands ready to work on a bipartisan basis to save, preserve, and strengthen Medicare. It is my hope that in the face of these alarming new numbers, the President will choose the path of leading rather than the path of misleading.

SENATOR EDMUND S. MUSKIE: THE SENATE'S FIRST ENVIRONMENTAL LEADER

Mrs. BOXER. Mr. President. As all senators know, former Senator Edmund S. Muskie passed away on March 26, two days before his 82d birthday. Senator Muskie served in this body from January, 1959, until May 1980, when he resigned to become Secretary of State in the Carter administration.

As a freshman Senator, Ed Muskie ardently desired a position on the Foreign Relations Committee. He was disappointed to be appointed to the Public Works Committee instead. But his loss proved to be the Nation's gain. As a member of the Public Works Committee, later the chairman of the Environmental Pollution Subcommittee, Senator Muskie became the chief architect of America's first environmental laws.

At the funeral service for Senator Muskie, his protege and former chief of staff, George Mitchell, who took Muskie's Senate seat and went on to become the Senate majority leader, delivered a wonderful tribute to Senator Muskie's environmental leadership. I would like to share his remarks with the Senate today by asking unanimous consent that they be printed in the CONGRESSIONAL RECORD at this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

REMARKS OF GEORGE MITCHELL

Jane, Steve and Lexi, Ellen and Ernie, Melinda and Eddie, Martha, Ned and Julia, and other members of the family, Cardinal Hickey, Bishop Gerry and other members of the clergy, President and Mrs. Carter and other distinguished guests and friends of Ed Muskie. Senator Muskie once said that he didn't like being called ''Lincolnesque'' but it fit. With his lanky frame, his long and craggy face, his powerful voice, he was an imposing figure. He was loved and trusted by the people of Maine because they saw in him the qualities they most admire, independence, fairness, the lack of pretense, the willingness to speak the truth even when it hurt. He was plain spoken even blunt at times and they admired him for it. He had his faults and he made mistakes as do all human beings but he conquered his faults and he learned from his mistakes and as a result, he became the greatest public official in Maine's history and one of the most effective legislators in our nation's history. He accomplished much in a long and distinguished career. In that impressive record, nothing surpasses what he did to protect America's natural environment.

Harry Truman once said that men make history, not the other way around. In periods where there is no leadership society stands still. Progress occurs when courageous skillful leaders seize the opportunity to change things for the better. Ed Muskie changed things for the better. When he went to the Senate, there were no national environmental laws, there was no environmental movement, there was hardly an awareness of the problem. Industries and municipalties dumped their wastes into the nearest river and America's waters were, for the most part, stinking open sewers. The air was unhealthy the water polluted, Ed Muskie changed that.

It's one thing to write and pass a law, its another thing to change the way people live, it's yet another and a far more difficult thing to change the way people think. Ed Muskie did that. With knowledge, skill, determination and patience he won approval of the Clean Air Act and the Clean Water Act and America was changed forever for the better. Any American who wants to know what Ed Muskie's legacy is need only go to the nearest river. Before Ed Muskie it was almost surely not fit to drink or to swim or to fish in, because of Ed Muskie it is now almost surely clean. A source of recreation even revenue. Despite the efforts of some to turn back the clock, these landmark laws will survive because the American people know what a difference he has made in their lives

It has been said that what we do for ourselves, leaves this world with us, what we do for others remains behind. That's our legacy, our link with immortality. Ed Muskie's legacy will stand as a living memorial to his vision. It is his immortality.

Each of us could say much more about Ed Muskie's public career but we are here today to pay tribute to Ed Muskie the man, so I would like to say a few words about the man who was my hero, my mentor, my friend. Thirty-four years ago this week, I received a telephone call that changed my life. It was from Don Nicoll, Senator Muskie's Administrative Assistant and close friend who is here today. he invited me to come up to Capitol Hill to meet the Senator who was looking for someone from Maine to fill a vacancy on his staff. To help him evaluate me, Don asked that I prepare a memorandum on the legal aspects of an issue that was then being considered by the Senate. I prepared the memo and went up for the interview. I thought the memo was pretty good, but unknowingly I had made a huge mistake. I reached a conclusion that was the opposite of the Senator's. I had never met him but he didn't bother with any small talk. Within minutes of our introduction, he unleashed a ferocious cross-examination. He came out from behind his desk, he towered over me, he shook his finger at me and he took my memo apart, line by line. I was stunned, so intimidated that I couldn't control the shaking of my legs even though I was sitting down. I tried as best as I could to explain my point of view and we had what you might call a lively discussion. As I left he said the next time you come in here, you'll be better prepared. That's how I learned I'd been hired and I sure was better prepared the next time.

Ed Muskie was even more imposing intellectually than he was physically. He was the smartest person that I ever met with an incisive analytical mind that enabled him to see every aspect of a problem and instantly to identify possible solutions. He challenged everyone around him to rise to his level of excellence. No one quite reached his level, but those who took up the challenge were improved by the effort. Those who know him learned from that relationship, those of us who worked for him, most of all. just about everything I know about politics and government I learned from him. Just about everything I have accomplished in public life, can be traced to his help. No one ever had a better mentor or a better friend.

No discussion of Ed Muskie would be complete without mention of his legendary temper. After he became Secretary of State, a news magazine in an article described his temper as entirely tactical, something that he turned on and off at will to help him get his way. I saw him a few days later, he showed me the article, in fact he read it to me, and then he said laughingly, ''all these years you thought my temper was for real.'' Well, I said, you sure fooled me, and a lot of other people. I think the reality is that it was both. When he yelled at you it was terrifyingly real, but you could never be sure that it wasn't also a tactic to move you his way, to get you to do what he wanted done and that's the way he wanted it and liked it.

Almost as unnerving as one of his eruptions was the swiftness with which it passed and was forgotten. He was a passionate man and expressed himself with emotion. His point having been made, he moved on, he didn't believe in looking back or nursing grudges and maybe that's how he got past the disappointments he suffered. It surely also helped that he was a secure man, confident in, and comfortable with his values. Those values were simple, yet universal in their reach and enduring in their strength. They were faith, family and country. He was constant in his faith. He was comforted by it and he was motivated by its message. The prayer printed on the back of the program today written by Senator Muskie more than a quarter century ago with its emphasis on compassion and tolerance was the essence of his faith. He was totally devoted to his family, especially to Jane. They would have celebrated their 48th anniversary in May and for all those years, she supported him, she comforted him, she helped him. He was a passionate believer in democracy and especially in American democracy.

I have the privilege of traveling all over Maine and all this country with him. Back when I was on Senator Muskie's staff we didn't have the resources available today so we used to share a motel room in small towns all across Maine as I drove him from one appearance to another. And I can recall the many times he spoke of his Father who he greatly admired and who he was very much influenced by. His Father was a Polish immigrant who, like many others who fled from tyranny, flourished in the free air of this blessed land. No person I have ever heard and few in our history could match Ed Muskie's eloquence on the meaning of America. Once in public office, his profound respect for American democracy led him to act always with dignity and restraint, lest he dishonor those he represented. As a result, he was the ideal in pubic service, a man who accomplished much without ever compromising his principles or his dignity. Character is

what you are when you are alone in the dark as well as with others in the daylight. Ed Muskie's character was strong. Strong enough to light up other people's lives. He taught us that integrity is more important than winning. That real knowledge counts more than slogans or sound bites. That we should live our values rather than parading them for public approval.

Many years ago, Maine's greatest poet, Henry Wadsworth Longfellow, wrote of another great man these words: ''Were a star quenched on high for ages would its light still traveling downward from the sky shine on our mortal sight. So when a great man dies for years beyond our kin, the light he leaves behind him lies upon the paths of men.'' A great man has died and for years his life will shine upon our paths. Goodbye Ed, may God bless you and welcome you.

Mrs. BOXER. Finally, Mr. President, I would also like to share with my colleagues a beautiful prayer, written by Senator Muskie for the occasion of the Presidential Prayer Breakfast in January, 1969. The message of this prayer—a plea on behalf of all public officials for mutual trust and understanding, cooperation and compassion—is more relevant today than ever. I ask unanimous consent that the full text of the prayer be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

PRESIDENTIAL PRAYER

(Written by Senator Edmund S. Muskie and delivered at the Presidential Prayer Breakfast January 30, 1969—Washington, DC)

Our Father—we are gathered here this morning, perplexed and deeply troubled.

We are grateful for the many blessings You have bestowed upon us—the great resources of land and people—the freedom to apply them to uses of our own choosing—the successes which have marked our efforts.

We are preplexed that, notwithstanding these blessings, we have not succeeded in making possible a life of promise for all our people in that growing dissatisfaction threatens our unity and our progress toward peace and justice.

We are deeply troubled that we may not be able to agree upon the common purposes and the basis for mutual trust which are essential if we are to overcome these difficulties.

And so, Our Father, we turn to you for help.

Teach us to listen to one another, with the kind of attention which is receptive to other points of view, however different, with a healthy skepticism as to our own infallibility.

Teach us to understand one another with the kind of sensitivity which springs from deeply-seated sympathy and compassion.

Teach us to trust one another, beyond mere tolerance, with a willingness to take the chance on the perfectibility of our fellow men.

Teach us to help one another, beyond charity, in the kind of mutual involvement which is essential if a free society is to work.

We ask it in Jesus' name. Amen.

HONORING THE COLLARDS FOR CELEBRATING THEIR 50TH WEDDING ANNIVERSARY

Mr. ASHCROFT. Mr. President, families are the cornerstone of America. The data is undeniable: Individuals from strong families contribute to the society. In an era when nearly half of all couples married today will see their union dissolve into divorce, I believe it is both instructive and important to honor those who have taken the commitment of ''till death us do part'' seriously, demonstrating successfully the timeless principles of love, honor, and fidelity. These characteristics make our country strong.

For these important reasons, I rise today to honor James and Esther Morales of Neosho, MO who on March 9, 1996 celebrated their 50th wedding anniversary. My wife, Janet, and I look forward to the day we can celebrate a similar milestone. George and Barbara's commitment to the principles and values of their marriage deserves to be saluted and recognized. I wish them and their family all the best as they celebrate this substantial marker on their journey together.

HONORING THE MORALES FOR CELEBRATING THEIR 50TH WEDDING ANNIVERSARY

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For these important reasons, I rise today to honor George and Barbara Morales of Costa Mesa, CA who on March 29, 1996 celebrated their 50th wedding anniversary. My wife, Janet, and I look forward to the day we can celebrate a similar milestone. George and Barbara's commitment to the principles and values of their marriage deserves to be saluted and recognized. I wish them and their family all the best as they celebrate this substantial marker on their journey together.

THE BAD DEBT BOXSCORE

Mr. HELMS. Mr. President, at the close of business Monday, April 22, 1996, the Federal debt stood at $5,101,586,172,580.18.

On a per capita basis, every man, woman, and child in America owes $19,273.81 as his or her share of that debt.

TRIBUTE TO JIMMY JONES

Mr. HEFLIN. Mr. President, I am proud to pay tribute today to a dear friend to me and several members of my staff, James L. Jones. Jimmy is a long-time employee of the Senate Superintendent's Office of the Architect of the Capitol, where his friendliness, dedication, and warm personality have become familiar to many of us. On April 26, Jimmy will be retiring from his position with the Superintendent's Office after 31 years of service to the U.S. Senate. He started out working on the grounds and worked his way up to become the Senate garage attendant foreman. For many years, he has headed up the entire Senate parking garage operation.

Jimmy Jones is one of those individuals who takes extreme pride in his work and who truly loves the Senate as an institution. He and his capable staff are welcome sights to those who routinely park in the various garages in the Senate office buildings. He is fun to joke around with and he really goes the extra mile to take care of those who use the parking facilities. He is a Maryland native, and his delicious crabcakes have been most appreciated over the years. He never fails to greet us with a joke or humorous story to brighten our day, and his special brand of generosity and humor never fail to uplift our spirits and provide a welcome reprieve from the rigors of Senate business.

Jimmy Jones is one of those colorful Senate institutions who will be sorely missed after he retires. His friendliness, cheerfulness, and willingness to accommodate are genuine. He is a person of character. I join my colleagues in thanking him, commending him, and wishing him all the best as he embarks upon a well-earned retirement. I do hope he will continue to bring us his crabcakes from time to time. Since he is such an avid stock car racing fan, I also expect to see him at the Talladega International Motor Speedway on occasion after my own retirement.

TRIBUTE TO SHERIFF MEL BAILEY

Mr. HEFLIN. Mr. President, Jefferson County Sheriff Mel Bailey announced earlier this month that he will be retiring after a distinguished 33-year record as the county's chief law enforcement official. This means that for the first time since the early days of the Civil Rights Movement, Jefferson County will have a new sheriff. He is the dean of Alabama law enforcement officers.

Mel Bailey has provided outstanding leadership, guidance, and service to the State of Alabama as Jefferson County's sheriff since 1963. Throughout his terms in office, he has made tremendous strides in preparing the sheriff's department for its fight against crime and in serving the citizens who elected him. In the process, he has become known as a symbol of law and order in Alabama.

Since he has been in office, Mel Bailey has come to epitomize the office in the minds of many citizens. He joined the Birmingham Police Department in 1946 and was promoted to detective in 1953, resigning in 1962 to successfully campaign for sheriff. He didn't draw an opponent until 1978, when he still received 70 percent of the vote.

When Sheriff Bailey began his tenure, there were 77 sheriff's department employees working within a $735,000 budget. Today, the department has about 600 workers and a $28 million budget. He began the Turn in a Pusher [T.I.P.] program, the United Narcotic Detail Operation Program, and developed one of the first SWAT teams in the United States. He also initiated a countywide radio network that linked 34 cities with the sheriff's department.

Many give Sheriff Bailey credit for creating a modern, professional law enforcement agency. He put deputies in uniforms and into marked cars, and got his department to start investigating automobile accidents and keeping records. During the 1960's, he dramatically improved working conditions for deputies. In the 1970's, he established the county's substation system and the special deputies program. A training program for jailers was implemented in 1982. He worked to provide his deputies with the best equipment possible and began a standard training procedure which provided them with the expertise necessary to meet any threat. He has been instrumental in obtaining innovative equipment for use in fighting crime.

For example, he implemented a radio-controlled toy airplane which can be used to drop tear gas or small bombs to stop a sniper lodged in a protected place. He also added a robot which police agencies can send into a building to dismantle a bomb. In both of these cases, a highly dangerous problem can now be handled without threat to the life of an officer.

The outstanding contributions Sheriff Mel Bailey has made during his long tenure in office are the result of his great capabilities, his ability to delegate responsibility, and by his professional attitude. He has also surrounded himself with outstanding people who hold the same qualities of professionalism and commitment to fighting crime. He is a prominent symbol of law and order throughout Alabama. He has enjoyed the full confidence of the people of Jefferson County for good reason: his fundamental effectiveness in battling crime, as evidenced by the fact that he was named Alabama's Law Officer of the Year in 1971 and was inducted into the Alabama Peace Officers Hall of Fame in 1991.

I commend and congratulate Sheriff Mel Bailey for his many years of service to the cause of law enforcement in Alabama's most populous county. All are proud of his achievements and thankful for his long period of excellent service. He has done an outstanding job and I wish him well as he enters retirement.

TRIBUTE TO WILLIAM MANSEL LONG, SR.

Mr. HEFLIN. Mr. President, my dear friend William Mansel Long, Sr., passed away on March 31, 1996, at the age of 92. Mr. Long was an outstanding civil rights leader and senior citizens advocate and was one of the founding members of the Alabama Democratic Conference. His son, William Mansel, Jr., has been on my staff ever since I came to the Senate, and has been my legislative director for several years.

Mansel Long made his mark on society in many ways during his long life. His tenacity and accomplishments were an inspiration to so many who knew him. His was a life of struggle, but also one of extraordinary achievement spurred by an unusual devotion to duty. He dedicated himself to improving the quality of life for his fellow citizens and to enriching his community and society as a whole. His life was marked by many varied accomplishments—he excelled on both a professional and personal level. Even late in life, he continued to be a vital force in political and religious affairs.

Mr. Long received the certificate of appreciation from the Northwest Alabama Council of Local Governments Area Agency on Aging; the Quality of Life Award, presented by the Mental Health Association; the Community Leadership Award, presented by the Shoals National Bank; and awards of appreciation for his long years of service to Lesley Temple Christian Methodist Episcopal Church. He was my appointee to the 1981 White House Conference on Aging, where he helped formulate the recommendations for developing national policy on aging.

Mansel Long was a gifted orator, organizer, and a moral force in his community. Over the course of several decades, he fought for civil rights and for social and economic equality for all people. In addition to helping establish the Alabama Democratic Conference, he was a member of the board of directors of the Alabama Legal Services Corporation; served as president of the Colbert County League of Voters; a member of the Council on Human Relations; a member of the board of directors of the Young Volunteers in Action; and was chairman of the Board of Stewards and a leader of the trustee board of his beloved Lesley Temple church in Tuscumbia.

After serving for 30 years as a chemical analyst with the Tennessee Valley Authority, Mr. Long began a career as an advocate of the rights of the elderly. His record of accomplishment in this field was awesome. His many, many years of tireless leadership in the North Alabama community are unmatched in time and in scope. He commanded the respect of all those who met him and was one of the most hard-working, dedicated, and selfless individuals I have ever known. He was not only an exemplary citizen and community leader, but also a loving husband, father, grandfather, and great-grandfather. As the patriarch of his family, he passed on his legacy of community involvement and concern for others to his children and grandchildren.

One of the most moving stories about Mansel Long which I will always cherish is how he graduated from college in 1985 at the age of 81. He had entered Alabama's Talladega College in 1925 at the age of 22 after working 4 years to save enough money to pay his tuition. He studied biology and chemistry there for more than 3½ years, but had to leave to take a job in order to help his family financially. Sixty years later, his life-long goal of being a college graduate was fulfilled as he received his bachelor of arts degree.

Mansel Long was a prime example of those ideals that we hold dear in our country. He was a model to emulate and one of Tuscumbia's and Alabama's most revered citizens. He was a credit to his family, church, community, state, and country who will be solely missed by all of those fortunate to have know him. His legacy of service and duty will serve as an inspiration to many future generations.

NOTICE OF ISSUANCE OF FINAL REGULATIONS

Mr. THURMOND. Mr. President, pursuant to section 304(d) of the Congressional Accountability Act of 1995 (2 U.S.C. 1384(d)), various notices of issuance of final regulations, together with a copy of the final regulations, were submitted by the Office of Compliance, U.S. Congress. These regulations relate to the Family and Medical Leave Act of 1993, the Employee Polygraph Protection Act of 1988, the Fair Labor Standards Act of 1938, and the Worker Adjustment and Retraining Notification Act of 1988. The notices announce the issuance of final regulations on these matters with an effective date of April 16, 1996. The Congressional Accountability Act specifies that the notices and regulations be printed in the CONGRESSIONAL RECORD. Therefore, I ask unanimous consent that the notices and issued regulations be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

OFFICE OF COMPLIANCE—THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993

NOTICE OF ISSUANCE OF FINAL REGULATIONS

On January 22, 1996, the Board of Directors of the Office of Compliance adopted and submitted for publication in the Congressional Record final regulations implementing section 202 of the Congressional Accountability Act of 1995 (''CAA'') (2 U.S.C. §§1302 *et seq.*), which applies certain rights and protections of the Family and Medical Leave Act of 1993. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate agreed to resolutions approving the final regulations. Specifically, the Senate agreed to S. Res. 242, to provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate; the House agreed to H. Res. 400, to provide for the approval of final regulations that are applicable to the House and the employees of the House; and the House and the Senate agreed to S. Con. Res. 51, to provide for approval of final regulations that are applicable to employing offices and employees other than

those offices and employees of the House and the Senate. Accordingly, pursuant section 304(d) of the CAA, the Board submits these regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for issuance by publication in the Congressional Record.

Pursuant to paragraph (3) of section 304(d) of the CAA, the Board finds good cause for the regulations to become effective on April 16, 1996, rather than 60 days after issuance. Were the regulations not effective immediately upon the expiration of the interim regulations on April 15, 1996, covered employees, employing offices and the Office of Compliance would be forced to operate under the same kind of regulatory uncertainty that the Board sought to avoid by adopting interim regulations effective as of the January 23, 1996, which was the effective date of the relevant provisions of the CAA.

Signed at Washington, DC, on this 19th day of April 1996.

GLEN D. NAGER,
Chair of the Board, Office of Compliance.

[Final Regulations]

Part 825—Family and Medical Leave

825.1 Purpose and scope

Subpart A—What is the Family and Medical Leave Act, and to Whom Does it Apply under the Congressional Accountability Act?

825.100 What is the Family and Medical Leave Act?
825.101 What is the purpose of the FMLA?
825.102 When are the FMLA and the CAA effective for covered employees and employing offices?
825.103 How does the FMLA, as made applicable by the CAA, affect leave in progress on, or taken before, the effective date of the CAA?
825.104 What employing offices are covered by the FMLA, as made applicable by the CAA?
825.105 [Reserved]
825.106 How is ''joint employment'' treated under the FMLA as made applicable by the CAA?
825.107–825.109 [Reserved]
825.110 Which employees are ''eligible'' to take FMLA leave under these regulations?
825.111 [Reserved]
825.112 Under what kinds of circumstances are employing offices required to grant family or medical leave?
825.113 What do ''spouse,'' ''parent,'' and ''son or daughter'' mean for purposes of an employee qualifying to take FMLA leave?
825.114 What is a ''serious health condition'' entitling an employee to FMLA leave?
825.115 What does it mean that ''the employee is unable to perform the functions of the position of the employee''?
825.116 What does it mean that an employee is ''needed to care for'' a family member?
825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by ''the medical necessity for'' such leave?
825.118 What is a ''health care provider''?

Subpart B—What Leave Is an Employee Entitled to Take Under the Family and Medical Leave Act, as Made Applicable by the Congressional Accountability Act?

825.200 How much leave may an employee take?
825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?
825.202 How much leave may a husband and wife take if they are employed by the same employing office?
825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?
825.204 May an employing office transfer an employee to an ''alternative position'' in order to accommodate intermittent leave or a reduced leave schedule?
825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?
825.206 May an employing office deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, as made applicable by the CAA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee, or when utilizing the fluctuating workweek method for payment of overtime, under the Fair Labor Standards Act?
825.207 Is FMLA leave paid or unpaid?
825.208 Under what circumstances may an employing office designate leave, paid or unpaid, as FMLA leave and, as a result, enable leave to be counted against the employee's total FMLA leave entitlement?
825.209 Is an employee entitled to benefits while using FMLA leave?
825.210 How may employees on FMLA leave pay their share of group health benefit premiums?
825.211 What special health benefits maintenance rules apply to multi-employer health plans?
825.212 What are the consequences of an employee's failure to make timely health plan premium payments?
825.213 May an employing office recover costs it incurred for maintaining ''group health plan'' or other non-health benefits coverage during FMLA leave?
825.214 What are an employee's rights on returning to work from FMLA leave?
825.215 What is an equivalent position?
825.216 Are there any limitations on an employing office's obligation to reinstate an employee?
825.217 What is a ''key employee''?
825.218 What does ''substantial and grievous economic injury'' mean?
825.219 What are the rights of a key employee?
825.220 How are employees protected who request leave or otherwise assert FMLA rights?

Subpart C—How do Employees Learn of Their Rights and Obligations under the FMLA, as Made Applicable by the CAA, and What Can an Employing Office Require of an Employee?

825.300 [Reserved]
825.301 What notices to employees are required of employing offices under the FMLA as made applicable by the CAA?
825.302 What notice does an employee have to give an employing office when the need for FMLA leave is foreseeable?
825.303 What are the requirements for an employee to furnish notice to an employing office where the need for FMLA leave is not foreseeable?
825.304 What recourse do employing offices have if employees fail to provide the required notice?
825.305 When must an employee provide medical certification to support FMLA leave?
825.306 How much information may be required in medical certifications of a serious health condition?
825.307 What may an employing office do if it questions the adequacy of a medical certification?
825.308 Under what circumstances may an employing office request subsequent recertifications of medical conditions?
825.309 What notice may an employing office require regarding an employee's intent to return to work?
825.310 Under what circumstances may an employing office require that an employee submit a medical certification that the employee is able (or unable) to return to work (*i.e.*, a ''fitness-for-duty'' report)?
825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?
825.312 Under what circumstances may an employing office refuse to provide FMLA leave or reinstatement to eligible employees?

Subpart D—What Enforcement Mechanisms Does the CAA Provide?

825.400 What can employees do who believe that their rights under the FMLA as made applicable by the CAA have been violated?
825.401–825.404 [Reserved]

Subpart E—[Reserved]

Subpart F—What Special Rules Apply to Employees of Schools?

825.600 To whom do the special rules apply?
825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?
825.602 What limitations apply to the taking of leave near the end of an academic term?
825.603 Is all leave taken during ''periods of a particular duration'' counted against the FMLA leave entitlement?
825.604 What special rules apply to restoration to ''an equivalent position?''

Subpart G—How Do Other Laws, Employing Office Practices, and Collective Bargaining Agreements Affect Employee Rights Under the FMLA as Made Applicable by the CAA?

825.700 What if an employing office provides more generous benefits than required by FMLA as Made Applicable by the CAA?
825.701 [Reserved]
825.702 How does FMLA affect anti-discrimination laws as applied by section 201 of the CAA?

Subpart H—Definitions

825.800 Definitions.
Appendix A to Part 825—[Reserved]
Appendix B to Part 825—Certification of Physician or Practitioner
Appendix C to Part 825—[Reserved]
Appendix D to Part 825—Prototype Notice: Employing Office Response to Employee Request for Family and Medical Leave
Appendix E to Part 825—[Reserved]

§825.1 Purpose and scope

(a) Section 202 of the Congressional Accountability Act (CAA) (2 U.S.C. 1312) applies the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615) to covered employees. (The term ''covered employee'' is defined in section 101(3) of the CAA (2 U.S.C. 1301(3)). See §825.800 of these regulations for that definition.) The purpose of this part is to set forth the regulations to carry out the provisions of section 202 of the CAA.

(b) These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 202(d) and 304 of the CAA, which direct the Board to promulgate regulations implementing section 202 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the

rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA].''

(c) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

SUBPART A—WHAT IS THE FAMILY AND MEDICAL LEAVE ACT, AND TO WHOM DOES IT APPLY UNDER THE CONGRESSIONAL ACCOUNTABILITY ACT?

§825.100 What is the Family and Medical Leave Act?

(a) The Family and Medical Leave Act of 1993 (FMLA), as made applicable by the Congressional Accountability Act (CAA), allows ''eligible'' employees of an employing office to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (*see* §825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employing office or a disbursing or other financial office of *the House of Representatives or*[1] the Senate may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's immediate family member, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employing office has a right to 30 days advance notice from the employee where practicable. In addition, the employing office may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employing office may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §825.311(c)). The employing office may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§825.101 What is the purpose of the FMLA?

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the FMLA accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§825.102 When are the FMLA and the CAA effective for covered employees and employing offices?

(a) The rights and protection of sections 101 through 105 of the FMLA have applied to certain Senate employees and certain employing offices of the Senate since August 5, 1993 (*see* section 501 of FMLA).

(b) The rights and protection of sections 101 through 105 of the FMLA have applied to any employee in an employment position and any employment authority of the House of Representatives since August 5, 1993 (*see* section 502 of FMLA).

(c) The rights and protections of sections 101 through 105 of the FMLA have applied to certain employing offices and covered employees other than those referred to in paragraphs (a) and (b) of this section for certain periods since August 5, 1993 (*see, e.g.,* Title V of the FMLA, sections 501 and 502).

(d) The provisions of section 202 of the CAA that apply rights and protections of the FMLA to covered employees are effective on January 23, 1996.

(e) The period prior to the effective date of the application of FMLA rights and protections under the CAA must be considered in determining employee eligibility.

§825.103 How does the FMLA, as made applicable by the CAA, affect leave in progress on, or taken before, the effective date of the CAA?

(a) An eligible employee's right to take FMLA leave began on the date that the rights and protections of the FMLA first went into effect for the employing office and employee (*see* §825.102(a)). Any leave taken prior to the date on which the rights and protections of the FMLA first became effective for the employing office from which the leave was taken may not be counted for purposes of the FMLA as made applicable by the CAA. If leave qualifying as FMLA leave was underway prior to the effective date of the FMLA for the employing office from which the leave was taken and continued after the FMLA's effective date for that office, only that portion of leave taken on or after the FMLA's effective date may be counted against the employee's leave entitlement under the FMLA, as made applicable by the CAA.

(b) If an employing office-approved leave is underway when the application of the FMLA by the CAA takes effect, no further notice would be required of the employee unless the employee requests an extension of the leave. For leave which commenced on the effective date or shortly thereafter, such notice must have been given which was practicable, considering the foreseeability of the need for leave and the effective date.

(c) Starting on January 23, 1996, an employee is entitled to FMLA leave under these regulations if the reason for the leave is qualifying under the FMLA, as made applicable by the CAA, even if the event occasioning the need for leave (*e.g.,* the birth of a child) occurred before such date (so long as any other requirements are satisfied).

§825.104 What employing offices are covered by the FMLA, as made applicable by the CAA?

(a) The FMLA, as made applicable by the CAA, covers all employing offices. As used in the CAA, the term ''employing office'' means—

(1) the personal office of a Member of the House of Representatives or of a Senator;

(2) a committee of the House of Representatives or the Senate or a joint committee;

(3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

(b) [Reserved]

(c) Separate entities will be deemed to be parts of a single employer for purposes of the FMLA, as made applicable by the CAA, if they meet the ''integrated employer'' test. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

[1] Italicized language is in only the House and Instrumentalities versions of the regulations.

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common financial control.

§825.105 [Reserved]

§825.106 How is ''joint employment'' treated under the FMLA as made applicable by the CAA?

(a) Where two or more employing offices exercise some control over the work or working conditions of the employee, the employing offices may be joint employers under FMLA, as made applicable by the CAA. Where the employee performs work which simultaneously benefits two or more employing offices, or works for two or more employing offices at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employing offices to share an employee's services or to interchange employees;

(2) Where one employing office acts directly or indirectly in the interest of the other employing office in relation to the employee; or

(3) Where the employing offices are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employing office controls, is controlled by, or is under common control with the other employing office.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when:

(1) an employee, who is employed by an employing office other than the personal office of a Member of the House of Representatives or of a Senator, is under the actual direction and control of the Member of the House of Representatives or Senator; or

(2) two or more employing offices employ an individual to work on common issues or other matters for both or all of them.

(c) When employing offices employ a covered employee jointly, they may designate one of themselves to be the primary employing office, and the other or others to be the secondary employing office(s). Such a designation shall be made by written notice to the covered employee.

(d) If an employing office is designated a primary employing office pursuant to paragraph (c) of this section, only that employing office is responsible for giving required notices to the covered employee, providing FMLA leave, and maintenance of health benefits. Job restoration is the primary responsibility of the primary employing office, and the secondary employing office(s) may, subject to the limitations in §825.216, be responsible for accepting the employee returning from FMLA leave.

(e) If employing offices employ an employee jointly, but fail to designate a primary employing office pursuant to paragraph (c) of this section, then all of these employing offices shall be jointly and severally liable for giving required notices to the employee, for providing FMLA leave, for assuring that health benefits are maintained, and for job restoration. The employee may give notice of need for FMLA leave, as described in §§825.302 and 825.303, to whichever of these employing offices the employee chooses. If the employee makes a written request for restoration to one of these employing offices, that employing office shall be primarily responsible for job restoration, and the other employing office(s) may, subject to the limitations in §825.216, be responsible for accepting the employee returning from FMLA leave.

§825.107 [Reserved]

§825.108 [Reserved]

§825.109 [Reserved]

§825.110 Which employees are ''eligible'' to take FMLA leave under these regulations?

(a) An ''eligible employee'' under these regulations means a covered employee who has been employed in any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months.

(b) The 12 months an employee must have been employed by any employing office need not be consecutive months. If an employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals 12 months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(c) If an employee was employed by two or more employing offices, either sequentially or concurrently, the hours of service will be aggregated to determine whether the minimum of 1,250 hours has been reached. Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) , as applied by section 203 of the CAA (2 U.S.C. 1313), for determining compensable hours of work. The determining factor is the number of hours an employee has worked for one or more employing offices. The determination is not limited by methods of record-keeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employing office. Any accurate accounting of actual hours worked may be used. For this purpose, full-time teachers (*See* §825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employing office must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not ''eligible'' for FMLA leave.

(d) The determinations of whether an employee has worked for any employing office for at least 1,250 hours in the previous 12 months and has been employed by any employing office for a total of at least 12 months must be made as of the date leave commences. The ''previous 12 months'' means the 12 months immediately preceding the commencement of the leave. If an employee notifies the employing office of need for FMLA leave before the employee meets these eligibility criteria, the employing office must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employing office confirms eligibility at the time the notice for leave is received, the employing office may not subsequently challenge the employee's eligibility. In the latter case, if the employing office does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employing office does advise. If the employing office fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employing office may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employing office fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the effective date of the application of FMLA rights and protections under the CAA must be considered in determining employee's eligibility.

(f) [Reserved]

§825.111 [Reserved]

§825.112 Under what kinds of circumstances are employing offices required to grant family or medical leave?

(a) Employing offices are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child;

(2) For placement with the employee of a son or daughter for adoption or foster care;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

(b) The right to take leave under FMLA as made applicable by the CAA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child.

(c) Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave pursuant to paragraph (a)(4) of this section before the birth of the child for prenatal care or if her condition makes her unable to work.

(d) Employing offices are required to grant FMLA leave pursuant to paragraph (a)(2) of this section before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(e) Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

(f) In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

(g) FMLA leave is available for treatment for substance abuse provided the conditions of §825.114 are met. However, treatment for substance abuse does not prevent an employing office from taking employment action against an employee. The employing office may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employing office has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employing office may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

§825.113 What do ''spouse,'' ''parent,'' and ''son or daughter'' mean for purposes of an employee qualifying to take FMLA leave?

(a) Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(b) Parent means a biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a son or daughter as defined in (c) below. This term does not include parents ''in law''.

(c) Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability.''

(1) ''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) ''Physical or mental disability'' means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. See the Americans with Disabilities Act (ADA), as made applicable by section 201(a)(3) of the CAA (2 U.S.C. 1311(a)(3)).

(3) Persons who are ''*in loco parentis*'' include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) For purposes of confirmation of family relationship, the employing office may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employing office is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.

§825.114 What is a ''serious health condition'' entitling an employee to FMLA leave?

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) *Inpatient care* (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§825.115 What does it mean that ''the employee is unable to perform the functions of the position of the employee''?

An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as made applicable by section 201(a)(3) of the CAA (2 U.S.C. 1311(a)(3)). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employing office has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

§825.116 What does it mean that an employee is ''needed to care for'' a family member?

(a) The medical certification provision that an employee is ''needed to care for'' a family member encompasses both physical and psychological care. It includes situations

where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

§825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by ''the medical necessity for'' such leave?

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (*See* §825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employing office's operations. In addition, an employing office may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

§825.118 What is a ''health care provider''?

(a)(1) The term ''health care provider'' means:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Office of Compliance to be capable of providing health care services.

(2) In making a determination referred to in subparagraph (1)(ii), and absent good cause shown to do otherwise, the Office of Compliance will follow any determination made by the Secretary of Labor (under section 101(6)(B) of the FMLA, 29 U.S.C. 2611(6)(B)) that a person is capable of providing health care services, provided the Secretary s determination was not made at the request of a person who was then a covered employee.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(4) Any health care provider from whom an employing office or the employing office's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.

SUBPART B—WHAT LEAVE IS AN EMPLOYEE ENTITLED TO TAKE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT?

§825.200 How much leave may an employee take?

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and,

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employing office is permitted to choose any one of the following methods for determining the ''12-month period'' in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month ''leave year,'' such as a fiscal year or a year starting on an employee's ''anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before the date on which the application of FMLA rights and protections first becomes effective for the employing office; see §825.102).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1997, four weeks beginning June 1, 1997, and four weeks beginning December 1, 1997, the employee would not be entitled to any additional leave until February 1, 1998. However, beginning on February 1, 1998, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, *etc.*

(d)(1) Employing offices will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employing office wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the CAA's FMLA leave requirements.

(2) [Reserved]

(e) If an employing office fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employing office may subsequently select an option only by providing the 60-day notice to all employees of the option the employing office intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employing office may implement the selected option.

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employing office's activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.*, a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employing office closing the office for repairs), the days the employing office's activities have ceased do *not* count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in §825.205.

(g)(1) If employing offices jointly employ an employee, and if they designate a primary employer pursuant to §825.106(c), the primary employer may choose any one of the alternatives in paragraph (b) of this section for measuring the 12-month period, provided that the alternative chosen is applied consistently and uniformly to all employees of the primary employer including the jointly employed employee.

(2) If employing offices fail to designated a primary employer pursuant to §825.106(c), an employee jointly employed by the employing offices may, by so notifying one of the employing offices, select that employing office to be the primary employer of the employee for purposes of the application of paragraphs (d) and (e) of this section.

§825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?

An employee's entitlement to leave for a birth or placement for adoption or foster

care expires at the end of the 12-month period beginning on the date of the birth or placement, unless the employing office permits leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period.

§ 825.202 How much leave may a husband and wife take if they are employed by the same employing office?

(a) A husband and wife who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken:

(1) for birth of the employee's son or daughter or to care for the child after birth;

(2) for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement; or

(3) to care for the employee's parent with a serious health condition.

(b) This limitation on the total weeks of leave applies to leave taken for the reasons specified in paragraph (a) of this section as long as a husband and wife are employed by the ''same employing office.'' It would apply, for example, even though the spouses are employed at two different worksites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave.

(c) Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the purposes in paragraph (a) of this section, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than those contained in paragraph (a) of this section. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

§ 825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?

(a) FMLA leave may be taken ''intermittently or on a reduced leave schedule'' under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employing office agrees. Such a schedule reduction might occur, for example, where an employee, with the employing office's agreement, works part-time after the birth of a child, or takes leave in several segments. The employing office's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employing office may limit leave increments to the shortest period of time that the employing office's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in §§ 825.601 and 825.602.

§ 825.204 May an employing office transfer an employee to an ''alternative position'' in order to accommodate intermittent leave or a reduced leave schedule?

(a) If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. See § 825.601 for special rules applicable to instructional employees of schools.

(b) Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and any applicable law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

(c) The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employing office may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employing office may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employing office may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employing office may proportionately reduce benefits such as vacation leave where an employing office's normal practice is to base such benefits on the number of hours worked.

(d) An employing office may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employing office to make such a transfer will be held to be contrary to the prohibited-acts provisions of the FMLA, as made applicable by the CAA.

(e) When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

(a) If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use ½ week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employing office has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

§825.206 May an employing office deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, as made applicable by the CAA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee, or when utilizing the fluctuating workweek method for payment of overtime, under the Fair Labor Standards Act?

(a) Leave taken under FMLA, as made applicable by the CAA, may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), as made applicable by the CAA, as a salaried executive, administrative, or professional employee (under regulations issued by the Board, at part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employing office may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employing office provides FMLA leave, whether paid or unpaid, or maintains any records regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of the Board's regulations at part 541.

(b) For an employee paid in accordance with a fluctuating workweek method of payment for overtime, where permitted by section 203 of the CAA (2 U.S.C. 1313), the employing office, *during the period* in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employing office chooses to follow this exception from the fluctuating workweek method of payment, the employing office must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employing office does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis.

(c) This special exception to the ''salary basis'' requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of employing offices who are eligible for FMLA leave, and to leave which qualifies as (one of the four types of) FMLA leave. Hourly or other deductions which are not in accordance with the Board's regulations at part 541 or with a permissible fluctuating workweek method of payment for overtime may not be taken, for example, where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by the Board's regulations at part 541 or by a permissible fluctuating workweek method of payment for overtime be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under an employing office's policy or practice for a reason which does not qualify as FMLA leave, *e.g.*, leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition; or for leave which is more generous than provided by FMLA as made applicable by the CAA, such as leave in excess of 12 weeks in a year. The employing office may comply with the employing office's own policy practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an ''hourly'' employee and pay overtime premium pay for hours worked over 40 in a workweek.

§825.207 Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA, as made applicable by the CAA, permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employing office may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term ''family leave'' as used in FMLA refers to paid leave provided by the employing office covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employing office's leave plan allows use of family leave to care for a child but not for a parent, the employing office is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employing office's usual requirements for the use of sick/medical leave. An employing office is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave ''in any situation'' where the employing office's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employing office's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employing office's leave plan.

(d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA as made applicable by the CAA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employing office may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employing office's temporary disability plan are more stringent than those of FMLA as made applicable by the CAA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(2) The FMLA as made applicable by the CAA provides that a serious health condition may result from injury to the employee ''on or off'' the job. If the employing office designates the leave as FMLA leave in accordance with §825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employing office's offer of a ''light duty job''. As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employing office may require the use of accrued paid leave. *See* also §§825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702 (d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing ''paid time off,'' may be substituted, at either the employee's or the employing office's option, for any qualified FMLA leave. No limitations may be placed by the employing office on substitution of paid vacation or personal leave for these purposes.

(f) If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employing office's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employing office elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employing office's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA as made applicable by the CAA (*e.g.*, notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employing office's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA as made applicable by the CAA. However, where accrued paid vacation or personal leave is substituted for

unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employing office's sick leave program. *See* §§825.302(g), 825.305(e) and 825.306(c).

(i) Compensatory time off, if any is authorized under applicable law, is not a form of accrued paid leave that an employing office may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employing office permits the accrual of compensatory time to be used in compliance with applicable Board regulations, the absence which is paid from the employee's accrued compensatory time ''account'' may not be counted against the employee's FMLA leave entitlement.

§825.208 Under what circumstances may an employing office designate leave, paid or unpaid, as FMLA leave and, as a result, enable leave to be counted against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employing office's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employing office's designation decision must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employing office of the need to take FMLA leave). In any circumstance where the employing office does not have sufficient information about the reason for an employee's use of paid leave, the employing office should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA- qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employing office to determine that the leave qualifies under the FMLA, as made applicable by the CAA. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employing office to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in §825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the FMLA as made applicable by the CAA or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employing office of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave consistent with the employing office's established policy or practice and the employing office denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employing office is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employing office may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employing office has acquired knowledge that the leave is being taken for an FMLA required reason, the employing office must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employing office and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(2) The employing office's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employing office requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employing office within two business days of the time the employee gives notice of the need for leave, or, where the employing office does not initially have sufficient information to make a determination, when the employing office determines that the leave qualifies as FMLA leave if this happens later. The employing office's designation must be made before the leave starts, unless the employing office does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employing office has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employing office may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the FMLA, as made applicable by the CAA, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employing office learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employing office for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employing office may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (*e.g.*, bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employing offices may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employing office did not learn the reason for the absence until the employee's return (*e.g.*, where the employee was absent for only a brief period), the employing office may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employing office was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employing office within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employing office knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employing office has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employing office should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employing office must withdraw the designation (with written notice to the employee).

(f) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office, except that, if the FMLA leave began after the effective of these regulations (or if the FMLA leave was subject to other applicable requirement under which the employing office was to have designated the leave as FMLA leave), the prior employing office must have properly designated the leave as FMLA under these regulations or other applicable requirement.

§825.209 Is an employee entitled to benefits while using FMLA leave?

(a) During any FMLA leave, the employing office must maintain the employee's coverage under the Federal Employees Health Benefits Program or any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employing offices are subject to the requirements of the FMLA, as made applicable by the CAA, to maintain health coverage. The definition of ''group health plan'' is set forth in §825.800. For purposes of FMLA, the term

''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) no contributions are made by the employing office;

(2) participation in the program is completely voluntary for employees;

(3) the sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) the employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, *etc.*, must be maintained during leave if provided in an employing office's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employing office provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employing office changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employing office.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc. *See* §825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) or 5 U.S.C. 8905a, whichever is applicable, and for ''key'' employees (as discussed below), an employing office's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.*, if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employing office of his or her intent not to return from leave (including before starting the leave if the employing office is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ''key employee'' (*See* §825.218) does not return from leave when notified by the employing office that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employing office that the employee does not desire restoration to employment at the end of the leave period, or FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employing office's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

§825.210 How may employees on FMLA leave pay their share of group health benefit premiums?

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employing office's group health plan, as described in §825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employing office has a number of options for obtaining payment from the employee. The employing office may require that payment be made to the employing office or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employing office may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA or 5 U.S.C. 8905a, whichever is applicable;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employing office's existing rules for payment by employees on ''leave without pay'' would be followed, provided that such rules do not require prepayment (*i.e.*, prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employing office and the employee, which may include prepayment of premiums (*e.g.*, through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employing office must provide the employee with advance written notice of the terms and conditions under which these payments must be made. (*See* §825.301.)

(e) An employing office may not require more of an employee using FMLA leave than the employing office requires of other employees on ''leave without pay.''

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employing office for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. *See* paragraph (c) of this section and §825.207(d)(2).

§825.211 What special health benefits maintenance rules apply to multi-employer health plans?

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employing office under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use ''banked'' hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in §825.209(f), group health plan coverage must be maintained for an employee on FMLA leave until:

(1) the employee's FMLA leave entitlement is exhausted;

(2) the employing office can show that the employee would have been laid off and the employment relationship terminated; or,

(3) the employee provides unequivocal notice of intent not to return to work.

§825.212 What are the consequences of an employee's failure to make timely health plan premium payments?

(a)(1) In the absence of an established employing office policy providing a longer grace period, an employing office's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employing office must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employing office has established policies regarding other forms of unpaid leave that provide for the employing office to cease coverage retroactively to the date the unpaid premium payment was due, the employing office may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of

the 30-day grace period, where the required 15-day notice has been provided.

(2) An employing office has no obligation regarding the maintenance of a health insurance policy which is not a ''group health plan.'' See §825.209(a).

(3) All other obligations of an employing office under FMLA would continue; for example, the employing office continues to have an obligation to reinstate an employee upon return from leave.

(b) The employing office may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employing office maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employing office must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. See §825.215(d)(1)–(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.

§825.213 May an employing office recover costs it incurred for maintaining ''group health plan'' or other non-health benefits coverage during FMLA leave?

(a) In addition to the circumstances discussed in §825.212(b), the share of health plan premiums paid by or on behalf of the employing office during a period of unpaid FMLA leave may be recovered from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of ''other circumstances beyond the employee's control'' are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a ''key employee'' who decides not to return to work upon being notified of the employing office's intention to deny restoration because of substantial and grievous economic injury to the employing office's operations and is not reinstated by the employing office. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employing office from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition. Such certification is not required unless requested by the employing office. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employing office's request. For purposes of medical certification, the employee may use the optional form developed for this purpose (see §825.306(a) and Appendix B of this part). If the employing office requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employing office may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employing office may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.*, by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employing office can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employing office elects to maintain such benefits during the leave, at the conclusion of leave, the employing office is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have ''returned'' to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employing office requires paid leave to be substituted for FMLA leave, the employing office may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employing offices may recover is limited to only the employing office's share of allowable ''premiums'' as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employing office to recover are a debt owed by the non-returning employee to the employing office. The existence of this debt caused by the employee's failure to return to work does not alter the employing office's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employing office may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, *etc.*), provided such deductions do not otherwise violate applicable wage payment or other laws. Alternatively, the employing office may initiate legal action against the employee to recover such costs.

§825.214 What are an employee's rights on returning to work from FMLA leave?

(a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See* also §825.106(e) for the obligations of employing offices that are joint employing offices.

(b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employing office's obligations may be governed by the Americans with Disabilities Act (ADA), as made applicable by the CAA. *See* §825.702.

§825.215 What is an equivalent position?

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, *etc.*, as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent Pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employing office's policy or practice to do so with respect to other employees on ''leave without pay.'' In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, *etc.*, excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employing offices pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. *See* §825.220 (b) and (c). A monthly production bonus, on the other hand, does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). *See* paragraph (d)(2) of this section.

(d) *Equivalent Benefits.* ''Benefits'' include all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave,

educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office through an employee benefit plan.

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire work force, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employing offices may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* §825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.*, paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employing office is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employing office has no established policy, the employee and the employing office are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, §825.209 addresses health benefits.)

(e) *Equivalent Terms and Conditions of Employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employing office transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employing office from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employing office to accept a different position against the employee's wishes.

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to *de minimis* or intangible, unmeasurable aspects of the job. However, restoration to a job slated for lay-off, when the employee's original position is not, would not meet the requirements of an equivalent position.

§825.216 Are there any limitations on an employing office's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employing office must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employing office's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee ceases at the time the employee is laid off, provided the employing office has no continuing obligations under a collective bargaining agreement or otherwise. An employing office would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employing office has no obligation to restore the employee if the employment term or project is over and the employing office would not otherwise have continued to employ the employee.

(c) In addition to the circumstances explained above, an employing office may deny job restoration to salaried eligible employees (''key employees,'' as defined in paragraph (c) of §825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in §825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA, as made applicable by the CAA, for any relief or protections.

§825.217 What is a ''key employee''?

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite.

(b) The term ''salaried'' means paid on a salary basis, within the meaning of the Board's regulations at part 541, implementing section 203 of the CAA (2 U.S.C. 1313) (regarding employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA, as executive, administrative, and professional employees).

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees both salaried and non-salaried, eligible and—ineligible—who are employed by the employing office within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employing office's employees within 75 miles of the worksite may be ''key employees.''

§825.218 What does ''substantial and grievous economic injury'' mean?

(a) In order to deny restoration to a key employee, an employing office must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employing office, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employing office may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the employing office of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employing office which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the employing office, that would constitute ''substantial and grievous economic injury.'' A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employing office would experience in the normal course would certainly not constitute ''substantial and grievous economic injury.''

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (see, also §825.702).

§825.219 What are the rights of a key employee?

(a) An employing office which believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employing office must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employing office should determine that substantial and grievous economic injury to the employing office's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employing office who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employing office makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employing office shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employing office will ordinarily be able to give such notice prior to the employee starting leave. The employing office must serve this notice either in person or by certified mail. This notice must explain the basis for the employing office's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employing office's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employing office may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until either the employee gives notice that he or she no longer wishes to return to work, or the employing office actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employing office's notice. The employing office must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employing office shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA, as made applicable by the CAA, prohibits interference with an employees' rights under the law, and with legal proceedings or inquiries relating to an employees' rights. More specifically, the law contains the following employee protections:

(1) An employing office is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the FMLA as made applicable by the CAA.

(2) An employing office is prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) for opposing or complaining about any unlawful practice under the FMLA as made applicable by the CAA.

(3) All employing offices are prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) because that covered employee has

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to the FMLA, as made applicable by the CAA;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA.

(b) Any violations of the FMLA, as made applicable by the CAA, or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA as made applicable by the CAA. ''Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by covered an employing office to avoid responsibilities under FMLA, for example:

(1) [Reserved];

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employing office is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employing offices cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ''no fault'' attendance policies.

(d) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot ''trade off'' the right to take FMLA leave against some other benefit offered by the employing office. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment while recovering from a serious health condition (*see* §825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of ''light duty.''

(e) Covered employees, and not merely eligible employees, are protected from retaliation for opposing (*e.g.*, file a complaint about) any practice which is unlawful under the FMLA, as made applicable by the CAA. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the FMLA, as made applicable by the CAA or regulations.

SUBPART C—HOW DO EMPLOYEES LEARN OF THEIR RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA, AND WHAT CAN AN EMPLOYING OFFICE REQUIRE OF AN EMPLOYEE?

§825.300 [Reserved]

§825.301 What notices to employees are required of employing offices under the FMLA as made applicable by the CAA?

(a)(1) If an employing office has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning both entitlements and employee obligations under the FMLA, as made applicable by the CAA, must be included in the handbook or other document. For example, if an employing office provides an employee handbook to all employees that describes the employing office's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employing office's policies regarding the FMLA, as made applicable by the CAA. Informational publications describing the provisions of the FMLA as made applicable by the CAA are available from the Office of Compliance and may be incorporated in such employing office handbooks or written policies.

(2) If such an employing office does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA as made applicable by the CAA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employing offices may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Office of Compliance to provide such guidance.

(b)(1) The employing office shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate. Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see §825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see §825.305);

(iii) the employee's right to substitute paid leave and whether the employing office will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see §825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see §825.310);

(vi) the employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* §825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§825.214 and 825.604); and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employing office during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see §825.213).

(2) The specific notice may include other information—*e.g.*, whether the employing office will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from the Office of Compliance, which employing offices may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employing office shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employing office may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employing office is requiring medical certification or a ''fitness-for-duty'' report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-month period *and* the employing office handbook or other written documents (if any) describing the employing office's leave policies, clearly provided that certification or a ''fitness-for-duty'' report would be required (*e.g.*, by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a ''fitness-for-duty'' report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. (*See* §825.305(a).)

(d) Employing offices are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA as made applicable under the CAA.

(e) Employing offices furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under law.

(f) If an employing office fails to provide notice in accordance with the provisions of this section, the employing office may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

§825.302 What notice does an employee have to give an employing office when the need for FMLA leave is foreseeable?

(a) An employee must provide the employing office at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employing office as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) ''As soon as practicable'' means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, ''as soon as practicable'' ordinarily would mean at least verbal notification to the employing office within one or two business days of when the need for leave becomes known to the employee.

(c) An employee shall provide at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA as made applicable by the CAA, or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employing office should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employing office may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see §825.305).

(d) An employing office may also require an employee to comply with the employing office's usual and customary notice and procedural requirements for requesting leave. For example, an employing office may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employing office procedures will not permit an employing office to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee must consult with the employing office and make a reasonable effort to schedule the leave so as not to disrupt unduly the employing office's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employing offices prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employing office and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employing office to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employing office's operations, the employing office may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employing office, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employing office shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employing office's operations, subject to the approval of the health care provider.

(g) An employing office may waive employees' FMLA notice requirements. In addition, an employing office may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement or applicable leave plan allow less advance notice to the employing office. For example, if an employee (or employing office) elects to substitute paid vacation leave for unpaid FMLA leave (see §825.207), and the employing office's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employing office imposes lesser notice requirements on employees taking leave without pay.

§825.303 What are the requirements for an employee to furnish notice to an employing office where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employing office of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employing office within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employing office's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employing office either in person or by telephone, telegraph, facsimile (''fax'') machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA, but may only state that leave is needed. The employing office will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§ 825.304 What recourse do employing offices have if employees fail to provide the required notice?

(a) An employing office may waive employees' FMLA notice obligations or the employing office's own internal rules on leave notice requirements.

(b) If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employing office may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employing office of the need for FMLA leave.

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employing office's proper posting, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2) of the CAA, 2 U.S.C. 1381(h)(2)) by the Office of Compliance to the employing office in a manner suitable for posting. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

§ 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employing office may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employing office must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employing office's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employing office should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employing office may request certification at some later date if the employing office later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employing office requests certification, the employing office must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employing office shall advise an employee whenever the employing office finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employing office's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employing office elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* § 825.207), only the employing office's less stringent sick leave certification requirements may be imposed.

§ 825.306 How much information may be required in medical certifications of a serious health condition?

(a) The Office of Compliance has made available an optional form (''Certification of Physician or Practitioner'') for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (*See* Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

(b) The Certification of Physician or Practitioner form is modeled closely on Form WH–380, as revised, which was developed by the Department of Labor (*see* 29 C.F.R. Part 825, Appendix B). The employing office may use the Office of Compliance's form, or Form WH–380, as revised, or another form containing the same basic information; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of ''serious health condition'' (see § 825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2)(i) The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

(ii) Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (*i.e.*, part-time) as a result of the serious health condition (see § 825.117 and § 825.203), and if so, the probable duration of such schedule.

(iii) If the condition is pregnancy or a chronic condition within the meaning of § 825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(3)(i)(A) If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

(B) If the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

(ii) If any of the treatments referred to in subparagraph (i) will be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.

(iii) If a regimen of continuing treatment by the patient is required under the supervision of the health care provider, a general description of the regimen (see § 825.114(b)).

(4) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:

(i) is unable to perform work of any kind;

(ii) is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (see § 825.115), based on either information provided on a statement from the employing office of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

(iii) must be absent from work for treatment.

(5)(i) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

(ii) If the employee's family member will need care only intermittently or on a reduced leave schedule basis (*i.e.*, part-time), the probable duration of the need.

(c) If the employing office's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements of these regulations, and the employee or employing office elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employing office's lesser sick leave certification requirements may be imposed.

§ 825.307 What may an employing office do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employing office may not request additional information from the employee's health care provider. However, a health care provider representing the employing office may contact the employee's health care provider, with the employee's permission, for purposes of *clarification* and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employing office or the employing office's representative to have direct contact with the employee's workers' compensation health care provider, the employing office may follow the workers' compensation provisions.

(2) An employing office that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employing office's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the FMLA as made applicable by the CAA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employing office's established leave policies. The employing office is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employing office. See also paragraphs (e) and (f) of this section.

(b) The employing office may not regularly contract with or otherwise regularly utilize

the services of the health care provider furnishing the second opinion unless the employing office is located in an area where access to health care is extremely limited (*e.g.,* a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employing office's designated health care providers differ, the employing office may require the employee to obtain certification from a third health care provider, again at the employing office's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employing office and the employee. The employing office and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employing office does not attempt in good faith to reach agreement, the employing office will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employing office that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

(d) The employing office is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

(e) If the employing office requires the employee to obtain either a second or third opinion the employing office must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employing office may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employing office shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

§ 825.308 Under what circumstances may an employing office request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in § 825.114(a)(2) (ii), (iii) or (iv)), an employing office may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (*e.g.,* the duration or frequency of absences, the severity of the condition, complications); or

(2) The employing office receives information that casts doubt upon the employee's stated reason for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employing office may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c) (1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employing office may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c) (1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employing office may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.,* the duration of the illness, the nature of the illness, complications); or

(3) The employing office receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employing office shall be at the employee's expense unless the employing office provides otherwise. No second or third opinion on recertification may be required.

§ 825.309 What notice may an employing office require regarding an employee's intent to return to work?

(a) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employing office's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employing office's obligations under FMLA, as made applicable by the CAA, to maintain health benefits (subject to requirements of COBRA or 5 U.S.C. 8905a, whichever is applicable) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employing office may require that the employee provide the employing office reasonable notice (*i.e.,* within two business days) of the changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

§ 825.310 Under what circumstances may an employing office require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a ''fitness-for-duty'' report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employing office may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.,* same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA), as made applicable by the CAA, that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employing office may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employing office may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employing office may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employing office may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) The notice that employing offices are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations as made applicable by the CAA (see § 825.301) shall advise the employee if the employing office will require fitness-for-duty certification to return to work. If the employing office has a handbook explaining employment policies and benefits, the handbook should explain the employing office's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time notice of the need for leave is given or immediately after leave commences and the employing office is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employing office's practice or policy. No second or third fitness-for-duty certification may be required.

(f) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notices required in paragraph (e) of this section.

(g) An employing office is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in § 825.203.

(h) When an employee is unable to return to work after FMLA leave because of the continuation, recurrence, or onset of the employee's or family member's serious health

condition, thereby preventing the employing office from recovering its share of health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition. (*See* §825.213(a)(3).) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

§825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?

(a) In the case of foreseeable leave, an employing office may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employing office to furnish such certification (*i.e.,* within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the time frame requested by the employing office (which must allow at least 15 days after the employing office's request) *or* as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employing office may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employing office pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see §825.310(a)) if the employing office has provided the required notice (see §825.301(c); the employing office may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also §825.213(a)(3).

§825.312 Under what circumstances may an employing office refuse to provide FMLA leave or reinstatement to eligible employees?

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employing office may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employing office of the need for FMLA leave. (*See* §825.302.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employing office may delay continuation of FMLA leave until an employee submits the certificate. (*See* §§825.305 and 825.311.) If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employing office may delay restoration until the employee submits the certificate. (*See* §§825.310 and 825.311.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Thus, an employee's rights to continued leave, maintenance of health benefits, and restoration cease under FMLA, as made applicable by the CAA, if and when the employment relationship terminates (*e.g.,* layoff), unless that relationship continues, for example, by the employee remaining on *paid* FMLA leave. If the employee is recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason. An employing office must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (*See* §825.216.)

(e) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (See §825.309.) If an employee unequivocally advises the employing office either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on *paid* leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employing office two business days notice where feasible; the employing office is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(f) An employing office may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible employee only under the terms of the ''key employee'' exemption. Denial of reinstatement must be necessary to prevent ''substantial and grievous economic injury'' to the employing office's operations. The employing office must notify the employee of the employee's status as a ''key employee'' and of the employing office's intent to deny reinstatement on that basis when the employing office makes these determinations. If leave has started, the employee must be given a reasonable opportunity to return to work after being so notified. (See §825.219.)

(g) An employee who fraudulently obtains FMLA leave from an employing office is not protected by job restoration or maintenance of health benefits provisions of the FMLA as made applicable by the CAA.

(h) If the employing office has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA as made applicable by the CAA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section.

SUBPART D—WHAT ENFORCEMENT MECHANISMS DOES THE CAA PROVIDE?

§825.400 What can employees do who believe that their rights under the FMLA as made applicable by the CAA have been violated?

(a) To commence a proceeding, a covered employee alleging a violation of the rights and protections of the FMLA made applicable by the CAA must request counseling by the Office of Compliance not later than 180 days after the date of the alleged violation. If a covered employee misses this deadline, the covered employee will be unable to obtain a remedy under the CAA.

(b) The following procedures are available under title IV of the CAA for covered employees who believe that their rights under FMLA as made applicable by the CAA have been violated:

(1) counseling;

(2) mediation; and

(3) election of either—

(A) a formal complaint, filed with the Office of Compliance, and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(c) Regulations of the Office of Compliance describing and governing these procedures are found at [proposed rules can be found at 141 Cong. Rec. S17012 (November 14, 1995)].

§825.401 [Reserved]

§825.402 [Reserved]

§825.403 [Reserved]

§825.404 [Reserved]

SUBPART E—[RESERVED]

SUBPART F—WHAT SPECIAL RULES APPLY TO EMPLOYEES OF SCHOOLS?

§825.600 To whom do the special rules apply?

(a) Certain special rules apply to employees of ''local educational agencies,'' including public school boards and elementary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA as made applicable by the CAA (and these special rules). The usual requirements for employees to be ''eligible'' apply.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. ''Instructional employees'' are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20

percent of the total number of working days over the period the leave would extend, the employing office may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. ''Periods of a particular duration'' means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (see §825.302) to be taken intermittently or on a reduced leave schedule, the employing office may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employing office may require the employee to delay the taking of leave until the notice provision is met. See §825.207(h).

§825.602 What limitations apply to the taking of leave near the end of an academic term?

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave for a purpose other than the employee's own serious health condition *during* the five-week period before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave for a purpose other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last more than five working days. The employing office may require the employee to continue taking leave until the end of the term.

(b) For purposes of these provisions, ''academic term'' means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA as made applicable by the CAA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employing office could require the employee to stay out on leave until the end of the term.

§825.603 Is all leave taken during ''periods of a particular duration'' counted against the FMLA leave entitlement?

(a) If an employee chooses to take leave for ''periods of a particular duration'' in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employing office has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employing office to the end of the school term is not counted as FMLA leave; however, the employing office shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§825.604 What special rules apply to restoration to ''an equivalent position?''

The determination of how an employee is to be restored to ''an equivalent position'' upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to ''an equivalent position'' must provide substantially the same protections as provided in the FMLA, as made applicable by the CAA, for reinstated employees. See §825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an ''equivalent position'' with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

SUBPART G—HOW DO OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS AFFECT EMPLOYEE RIGHTS UNDER THE FMLA AS MADE APPLICABLE BY THE CAA?

§825.700 What if an employing office provides more generous benefits than required by FMLA as Made Applicable by the CAA?

(a) An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA, as made applicable by the CAA, may not be diminished by any employment benefit program or plan. For example, a provision of a collective bargaining agreement (CBA) which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employing office provides greater unpaid family leave rights than are afforded by FMLA, the employing office is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA or 5 U.S.C. 8905a, whichever is applicable), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employing office does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in the FMLA, as made applicable by the CAA, prevents an employing office from amending existing leave and employee benefit programs, provided they comply with FMLA as made applicable by the CAA. However, nothing in the FMLA, as made applicable by the CAA, is intended to discourage employing offices from adopting or retaining more generous leave policies.

(c) [Reserved]

§825.701 [Reserved]

§825.702 How does FMLA affect anti-discrimination laws as applied by section 201 of the CAA?

(a) Nothing in FMLA modifies or affects any applicable law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act), as made applicable by the CAA. FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA] . . . or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employing offices within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employing office must therefore provide leave under whichever statutory provision provides the greater rights to employees.

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employing office must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employing office must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employing offices to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employing office did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employing office to temporarily transfer an employee who is taking leave intermittently

or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an ''eligible employee'' entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employing office grants because it is not an undue hardship. The employing office advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the *same* job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employing office maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employing office policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the employee would be shielded from FMLA's provision for temporary assignment to a different alternative position. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employing office to part-time employees.

(4) At the end of the FMLA leave entitlement, an employing office is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employing office's FMLA obligations would be satisfied if the employing office offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employing office to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employing office may not, in lieu of FMLA leave entitlement, *require* an employee to take a job with a reasonable accommodation. However, ADA may require that an employing office offer an employee the opportunity to take such a position. An employing office may not change the essential functions of the job in order to deny FMLA leave. See §825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employing office). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a ''light duty'' position. If the employing office offers such a position, the employee is permitted but not required to accept the position (*see* §825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See §825.207(d)(2). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employing office requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by any employing office (and, therefore, not an ''eligible'' employee under FMLA, as made applicable by the CAA) may *not* be denied maternity leave if the employing office normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) For further information on Federal anti-discrimination laws applied by section 201 of the CAA (2 U.S.C. 1311), including Title VII, the Rehabilitation Act, and the ADA, individuals are encouraged to contact the Office of Compliance.

SUBPART H—DEFINITIONS

§825.800 Definitions.

For purposes of this part:

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*).

CAA means the Congressional Accountability Act of 1995 (Pub. Law 104–1, 109 Stat. 3, 2 U.S.C. 1301 *et seq.*).

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 (Pub. Law 99–272, title X, section 10002; 100 Stat. 227; as amended; 29 U.S.C. 1161–1168).

Continuing treatment means: A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(1) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(2) Any period of incapacity due to pregnancy, or for prenatal care.

(3) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(4) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

Covered employee—The term ''covered employee'', as defined in the CAA, means any employee of—(1) the House of Representatives; (2) the Senate; (3) the Capitol Guide Service; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Compliance; or (9) the Office of Technology Assessment.

Eligible employee—The term ''eligible employee'', as defined in the CAA, means a covered employee who has been employed in any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months.

Employ means to suffer or permit to work.

Employee means an employee as defined in the CAA and includes an applicant for employment and a former employee.

Employee employed in an instructional capacity. See Teacher.

Employee of the Capitol Police—The term ''employee of the Capitol Police'' includes any member or officer of the Capitol Police.

Employee of the House of Representatives—The term ''employee of the House of Representatives'' includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) under ''covered employee'' above.

Employee of the Office of the Architect of the Capitol—The term ''employee of the Office of the Architect of the Capitol'' includes any employee of the Office of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants.

Employee of the Senate—The term ''employee of the Senate'' includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (9) under ''covered employee'' above.

Employing Office—The term ''employing office'', as defined in the CAA, means:

(1) the personal office of a Member of the House of Representatives or of a Senator;

(2) a committee of the House of Representatives or the Senate or a joint committee;

(3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

Employment benefits means all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office or through an employee benefit plan. The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (See § 825.209(a)).

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

FMLA means the Family and Medical Leave Act of 1993, Public Law 103-3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq.*).

Group health plan means the Federal Employees Health Benefits Program and any other plan of, or contributed to by, an employing office (including a self-insured plan) to provide health care (directly or otherwise) to the employing office's employees, former employees, or the families of such employees or former employees. For purposes of FMLA, as made applicable by the CAA, the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) no contributions are made by the employing office;

(2) participation in the program is completely voluntary for employees;

(3) the sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) the employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices; or

(2) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; and

(3) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; and

(4) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

(5) Any health care provider from whom an employing office or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.

(6) A health care provider as defined above who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country.

''*Incapable of self-care*'' means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See *Teacher.*

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Mental disability: See *Physical or mental disability.*

Office of Compliance means the independent office established in the legislative branch under section 301 of the CAA (2 U.S.C. 1381).

Parent means the biological parent of an employee or an individual who stands or stood in loco parentis to an employee when the employee was a child.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. See the Americans with Disabilities Act (ADA), as made applicable by section 201(a)(3) of the CAA (2 U.S.C. 1311(a)(3)).

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Secretary means the Secretary of Labor or authorized representative.

Serious health condition entitling an employee to FMLA leave means: (1) an illness, injury, impairment, or physical or mental condition that involves:

(i) *Inpatient care* (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(ii) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes:

(A) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(*1*) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(*2*) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(B) Any period of incapacity due to pregnancy, or for prenatal care.

(C) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(*1*) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(*2*) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(*3*) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(D) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(E) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(2) Treatment for purposes of paragraph (1) of this definition includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (1)(ii)(A)(2) of this definition, a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(3) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear

aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(4) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(5) Absences attributable to incapacity under paragraphs (1)(ii)(B) or (C) of this definition qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis,* who is under 18 years of age or 18 years of age *or* older and incapable of self-care because of a mental or physical disability.

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or *employee employed in an instructional capacity,* or *instructional employee*) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

APPENDIX A TO PART 825—[RESERVED]

APPENDIX B TO PART 825—CERTIFICATION OF PHYSICIAN OR PRACTITIONER

CERTIFICATION OF HEALTH CARE PROVIDER (FAMILY AND MEDICAL LEAVE ACT OF 1993 AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995)

1. Employee's Name:

2. Patient's Name (if different from employee):

3. The attached sheet describes what is meant by a ''serious health condition'' under the Family and Medical Leave Act as made applicable by the Congressional Accountability Act. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.

(1)___ (2)___ (3)___ (4)___ (5)___ (6)___, or None of the above ___

4. Describe the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5.a. State the approximate date the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present incapacity if different):

b. Will it be necessary for the employee to take work only intermittently or to work on a less than full schedule as a result of the condition (including for treatment described in Item 6 below)? _____

If yes, give probable duration:

c. If the condition is a chronic condition (condition #4) or pregnancy, state whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

6.a. If additional treatments will be required for the condition, provide an estimate of the probable number of such treatments:

If the patient will be absent from work or other daily activities because of treatment on an intermittent or part-time basis, also provide an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by another provider of health services (e.g., physical therapist), please state the nature of the treatments:

c. If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7.a. If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind? _____

b. If able to perform some work, is the employee unable to perform any one or more of the essential functions of the employee's job (the employee or the employer should supply you with information about the essential job functions)? ___ If yes, please list the essential functions the employee is unable to perform:

c. If neither a. nor b. applies, is it necessary for the employee to be absent from work for treatment? _____

8.a. If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation? _____

b. If no, would the employee's presence to provide psychological comfort be beneficial to the patient or assist in the patient's recovery? _____

c. If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:

(Signature of Health Care Provider):

(Address):

(Type of Practice):

(Telephone number):

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

(Employee signature):

(Date):

A ''Serious Health Condition'' means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. *Hospital Care:* Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care.

2. *Absence Plus Treatment:*

(a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider: or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

3. *Pregnancy:* Any period of incapacity due to pregnancy, or for prenatal care.

4. *Chronic Conditions Requiring Treatments:* A chronic condition which:

(1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, *etc.*)

5. *Permanent/Long-term Conditions Requiring Supervision:* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. *Multiple Treatments (Non-Chronic Conditions):* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

___

APPENDIX C TO PART 825—[RESERVED]

APPENDIX D TO PART 825—PROTOTYPE NOTICE: EMPLOYING OFFICE RESPONSE TO EMPLOYEE REQUEST FOR FAMILY AND MEDICAL LEAVE

Employing Office Response to Employee Request for Family or Medical Leave

(Optional use form—see § 825.301(b)(1) of the regulations of the Office of Compliance)

(Family and Medical Leave Act of 1993, as made applicable by the Congressional Accountability Act of 1995)

(Date):

To: _____

(Employee's name)

From: _____

(Name of appropriate employing office representative)

Subject: Request for Family/Medical Leave

On (*date*) _____, you notified us of your need to take family/medical leave due to:

☐ the birth of your child, or the placement of a child with you for adoption or foster care; or

☐ a serious health condition that makes you unable to perform the essential functions of your job; or

☐ a serious health condition affecting your ☐ spouse, ☐ child, ☐ parent, for which you are needed to provide care.

You notified us that you need this leave beginning on (*date*) _____ and that you expect leave to continue until on or about _____.

Except as explained below, you have a right under the FMLA, as made applicable by the CAA, for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (*check appropriate boxes; explain where indicated*)

1. You are ☐ eligible ☐ not eligible for leave under the FMLA as made applicable by the CAA.

2. The requested leave ☐ will ☐ will not be counted against your annual FMLA leave entitlement.

3. You ☐ will ☐ will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by _____ (*insert date*) (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We ☐ will ☐ will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (*Explain*)

5(a). If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: (*Set forth dates, e.g., the 10th of each month, or pay periods, etc.* that specifically cover the agreement with the employee.)

(b). You have a minimum 30-day (*or, indicate longer period, if applicable*) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, *provided* we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We ☐ will ☐ will not pay your share of health insurance premiums while you are on leave.

(c). We ☐ will ☐ will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you ☐ will ☐ will not be expected to reimburse us for the payments made on your behalf.

6. You ☐ will ☐ will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until the certification is provided.

7(a). You ☐ are ☐ are not a ''key employee'' as described in §825.218 of the Office of Compliance's FMLA regulations. If you are a ''key employee,'' restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.

(b). We ☐ have ☐ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. (*Explain (a) and/or (b) below. See §825.219 of the Office of Compliance's FMLA regulations.*)

8. While on leave, you ☐ will ☐ will not be required to furnish us with periodic reports every ____ *(indicate interval of periodic reports, as appropriate for the particular leave situation) of your status and intent to return to work (See §825.309 of the Office of Compliance's FMLA regulations).* If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you ☐ will ☐ will not be required to notify us at least two work days prior to the date you intend to report for work.

9. You ☐ will ☐ will not be required to furnish recertification relating to a serious health condition. (*Explain below, if necessary, including the interval between certifications as prescribed in §825.308 of the Office of Compliance's FMLA regulations.*)

APPENDIX E TO PART 825—[RESERVED]

OFFICE OF COMPLIANCE—THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

NOTICE OF ISSUANCE OF FINAL REGULATION

On January 22, 1996, the Board of Directors of the Office of Compliance adopted and submitted for publication in the Congressional Record final regulations implementing Sections 204(a) and (b) of the Congressional Accountability Act of 1995 (''CAA''), which relate to the Employee Polygraph Protection Act of 1988. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate agreed to resolutions approving the final regulations. Specifically, the Senate agreed to S. Res. 242, to provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate; the House agreed to H. Res. 400, to provide for the approval of final regulations that are applicable to the House and the employees of the House; and the House and the Senate agreed to S. Con. Res. 51, to provide for approval of final regulations that are applicable to employing offices and employees other than those offices and employees of the House and the Senate. Accordingly, pursuant to section 304(d) of the CAA, the Board submits these regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for issuance by publication in the Congressional Record.

Pursuant to paragraph (3) of section 304(d) of the CAA, the Board finds good cause for the regulations to become effective on April 16, 1996, rather than 60 days after issuance. Were the regulations not effective immediately upon the expiration of the interim regulations on April 15, 1996, covered employees, employing offices and the Office of Compliance would be forced to operate under the same kind of regulatory uncertainty that the Board sought to avoid by adopting interim regulations effective as of January 23, 1996, the effective date of the relevant provisions of the CAA.

Signed at Washington, D.C. on this 19th day of April, 1996.

GLEN D. NAGER,
Chair of the Board, Office of Compliance.

Accordingly, the Board of Directors of the Office of Compliance hereby issues the following final regulations:

[Final Regulations]

Application of Rights and Protections of the Employee Polygraph Protection Act of 1988

Subpart A—General

Section—
1.1 Purpose and scope.
1.2 Definitions.
1.3 Coverage.
1.4 Prohibitions on lie detector use.
1.5 Effect on other laws or agreements.
1.6 Notice of protection.
1.7 Authority of the Board.
1.8 Employment relationship.

Subpart B—Exemptions

1.10 Exclusion for employees of the Capitol Police. [Reserved]
1.11 Exemption for national defense and security.
1.12 Exemption for employing offices conducting investigations of economic loss or injury.
1.13 Exemption for employing offices authorized to manufacture, distribute, or dispense controlled substances

Subpart C—Restrictions on Polygraph Usage Under Exemptions

1.20 Adverse employment action under ongoing investigation exemption.
1.21 Adverse employment action under controlled substance exemption.
1.22 Rights of examinee—general.
1.23 Rights of examinee—pretest phase.
1.24 Rights of examinee—actual testing phase.
1.25 Rights of examinee—post-test phase.
1.26 Qualifications of and requirements for examiners.

Subpart D—Recordkeeping and Disclosure Requirements

1.30 Records to be preserved for 3 years.
1.35 Disclosure of test information.

Appendix A—Notice to Examinee

Authority: Pub. L. 104-1, 109 Stat. 3, 2 U.S.C. 1314(c)

SUBPART A—GENERAL

Sec. 1.1 Purpose and scope.

Enacted into law on January 23, 1995, the Congressional Accountability Act (''CAA'') directly applies the rights and protections of eleven federal labor and employment law statutes to covered employees and employing offices within the legislative branch. Section 204(a) of the CAA, 2 U.S.C. §1314(a) provides that no employing office may require any covered employee (including a covered employee who does not work in that employing office) to take a lie detector test where such test would be prohibited if required by an employer under paragraphs (1), (2) or (3) of section 3 of the Employee Polygraph Protection Act of 1988 (EPPA), 29 U.S.C. §2002(1), (2) or (3). The purpose of this part is to set forth the regulations to carry out the provisions of Section 204 of the CAA.

Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use. Subpart B sets forth rules regarding the statutory exemptions from application of section 204 of the CAA. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the rules on recordkeeping and the disclosure of polygraph test information.

Sec. 1.2 Definitions

For purposes of this part:

(a) *Act* or *CAA* means the Congressional Accountability Act of 1995 (P.L. 104–1, 109 Stat. 3, 2 U.S.C. §§1301–1438).

(b) *EPPA* means the Employee Polygraph Protection Act of 1988 (Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. §§2001–2009) as applied to covered employees and employing offices by Section 204 of the CAA.

(c) The term *covered employee* means any employee of (1) the House of Representatives; (2) the Senate; (3) the Capitol Guide Service; (4) the Congressional Budget Office; (5) the Office of the Architect of the Capitol; (6) the Office of the Attending Physician; (7) the Office of Compliance; or (8) the Office of Technology Assessment.

(d) The term *employee* includes an applicant for employment and a former employee.

(e) The term *employee of the Office of the Architect of the Capitol* includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.

(f) The term *employee of the Capitol Police* includes any member or officer of the Capitol Police.

(g) The term *employee of the House of Representatives* includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (8) of paragraph (c) above.

(h) The term *employee of the Senate* includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (8) of paragraph (c) above.

(i) The term *employing office* means (1) the personal office of a Member of the House of Representatives or of a Senator; (2) a committee of the House of Representatives or the Senate or a joint committee; (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or (4) the Capitol Guide Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. The term *employing office* includes any person acting directly or indirectly in the interest of an employing office in relation to an employee or prospective employee. A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an employing office with respect to the examinees. Any reference to ''employer'' in these regulations includes employing offices.

(j) (1) The term *lie detector* means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual. Voice stress analyzers, or psychological stress evaluators, include any systems that utilize voice stress analysis, whether or not an opinion on honesty or dishonesty is specifically rendered. (2) The term *lie detector* does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. Also not included in the definition of *lie detector* are written or oral tests commonly referred to as ''honesty'' or ''paper and pencil'' tests, machine-scored or otherwise; and graphology tests commonly referred to as handwriting tests.

(k) The term *polygraph* means an instrument that—

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(l) *Board* means the Board of Directors of the Office of Compliance.

(m) *Office* means the Office of Compliance.

Sec. 1.3 Coverage.

The coverage of Section 204 of the Act extends to any ''covered employee'' or ''covered employing office'' without regard to the number of employees or the employing office's effect on interstate commerce.

Sec. 1.4 Prohibitions on lie detector use.

(a) Section 204 of the CAA provides that, subject to the exemptions of the EPPA incorporated into the CAA under section 225(f) of the CAA, as set forth in Sec. 1.10 through 1.12 of this Part, employing offices are prohibited from:

(1) Requiring, requesting, suggesting or causing, directly or indirectly, any covered employee or prospective employee to take or submit to a lie detector test;

(2) Using, accepting, or inquiring about the results of a lie detector test of any covered employee or prospective employee; and

(3) Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any covered employee or prospective employee to take such action for refusal or failure to take or submit to such test, or on the basis of the results of a test. The above prohibitions apply irrespective of whether the covered employee referred to in paragraphs (1), (2) or (3), above, works in that employing office.

(b) An employing office that reports a theft or other incident involving economic loss to police or other law enforcement authorities is not engaged in conduct subject to the prohibitions under paragraph (a) of this section if, during the normal course of a subsequent investigation, such authorities deem it necessary to administer a polygraph test to a covered employee(s) suspected of involvement in the reported incident. Employing offices that cooperate with police authorities during the course of their investigations into criminal misconduct are likewise not deemed engaged in prohibitive conduct provided that such cooperation is passive in nature. For example, it is not uncommon for police authorities to request employees suspected of theft or criminal activity to submit to a polygraph test during the employee's tour of duty since, as a general rule, suspect employees are often difficult to locate away from their place of employment. Allowing a test on the employing office's premises, releasing a covered employee during working hours to take a test at police headquarters, and other similar types of cooperation at the request of the police authorities would not be construed as ''requiring, requesting, suggesting, or causing, directly or indirectly, any covered employee * * * to take or submit to a lie detector test.'' Cooperation of this type must be distinguished from actual participation in the testing of employees suspected of wrongdoing, either through the administration of a test by the employing office at the request or direction of police authorities, or through reimbursement by the employing office of tests administered by police authorities to employees. In some communities, it may be a practice of police authorities to request testing by employing offices of employees before a police investigation is initiated on a reported incident. In other communities, police examiners are available to covered employing offices, on a cost reimbursement basis, to conduct tests on employees suspected by an employing office of wrongdoing. All such conduct on the part of employing offices is deemed within the prohibitions of section 204 of the CAA.

(c) The receipt by an employing office of information from a polygraph test administered by police authorities pursuant to an investigation is prohibited by section 3(2) of the EPPA. (*See* paragraph (a)(2) of this section.)

(d) The simulated use of a polygraph instrument so as to lead an individual to believe that an actual test is being or may be performed (e.g., to elicit confessions or admissions of guilt) constitutes conduct prohibited by paragraph (a) of this section. Such use includes the connection of a covered employee or prospective employee to the instrument without any intention of a diagnostic purpose, the placement of the instrument in a room used for interrogation unconnected to the covered employee or prospective employee, or the mere suggestion that the instrument may be used during the course of the interview.

(e) The Capitol Police may not require a covered employee not employed by the Capitol Police to take a lie detector test (on its own initiative or at the request of another employing office) except where the Capitol Police administers such lie detector test as part of an ''ongoing investigation'' by the Capitol Police. For the purpose of this subsection, the definition of ''ongoing investigation'' contained section 1.12(b) shall apply.

Sec. 1.5 Effect on other laws or agreements.

(a) Section 204 of the CAA does not preempt any otherwise applicable provision of federal law or any rule or regulation of the House or Senate or any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to the use of lie detector tests.

(b)(1) This provision applies to all aspects of the use of lie detector tests, including procedural safeguards, the use of test results, the rights and remedies provided examinees, and the rights, remedies, and responsibilities of examiners and employing offices.

(2) For example, a collective bargaining agreement that provides greater protection to an examinee would apply in addition to the protection provided in section 204 of the CAA.

Sec. 1.6 Notice of protection.

Pursuant to section 301(h) of the CAA, the Office shall prepare, in a manner suitable for posting, a notice explaining the provisions of section 204 of the CAA. Copies of such notice may be obtained from the Office of Compliance.

Sec. 1.7 Authority of the Board.

Pursuant to sections 204 and 304 of the CAA, the Board is authorized to issue regulations to implement the rights and protections of the EPPA. Section 204(c) directs the Board to promulgate regulations implementing section 204 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) [of section 204 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 204 of the CAA requires a regulation to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of promulgation of these regulations, that, with the exception of the regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) [of section 204 of the CAA].''

In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

Sec. 1.8 Employment relationship.

Subject to the exemptions incorporated into the CAA by section 225(f), section 204 applies the prohibitions on the use of lie detectors by employing offices with respect to covered employees irrespective of whether a covered employee works in that employing office. Sections 101(3), (4) and 204 of the CAA also apply EPPA prohibitions against discrimination to applicants for employment and former employees of a covered employing office. For example, an employee may quit rather than take a lie detector test. The employing office cannot discriminate or threaten to discriminate in any manner against that person (such as by providing bad references in the future) because of that person's refusal to be tested. Similarly, an employing office cannot discriminate or threaten to discriminate in any manner against that person because that person files a complaint, institutes a proceeding, testifies in a proceeding, or exercises any right under section 204 of the CAA. (*See* section 207 of the CAA.)

SUBPART B—EXEMPTIONS

Sec. 1.10 Exclusion for employees of the Capitol Police. [Reserved]

Sec. 1.11 Exemption for national defense and security.

(a) The exemptions allowing for the administration of lie detector tests in the following paragraphs (b) through (e) of this section apply only to the Federal Government; they do not allow covered employing offices to administer such tests. For the purposes of this section, the term ''Federal Government'' means any agency or entity within the Federal Government authorized to administer polygraph examinations which is otherwise exempt from coverage under section 7(a) of the EPPA, 29 U.S.C. §2006(a).

(b) Section 7(b)(1) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides that nothing in the EPPA shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any expert, consultant or employee of any contractor under contract with the Department of Defense; or with the Department of Energy, in connection with the atomic energy defense activities of such Department.

(c) Section 7(b)(2)(A) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides that nothing in the EPPA shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function of the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency, to any individual employed by, assigned to, or detailed to any such agency; or any expert or consultant under contract to any such agency; or any employee of a contractor to such agency; or any individual applying for a position in any such agency; or any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency.

(d) Section 7(b)(2)(B) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides that nothing in the EPPA shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function, to any covered employee whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2(a) of Executive Order 12356 (or a successor Executive Order).

(c) *Counterintelligence* for purposes of the above paragraphs means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, terrorist activities, or assassinations conducted for or on behalf of foreign governments, or foreign or domestic organizations or persons.

(d) Lie detector tests of persons described in the above paragraphs will be administered in accordance with applicable Department of Defense directives and regulations, or other regulations and directives governing the use of such tests by the United States Government, as applicable.

Sec. 1.12 Exemption for employing offices conducting investigations of economic loss or injury.

(a) Section 7(d) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides a limited exemption from the general prohibition on lie detector use for employers conducting ongoing investigations of economic loss or injury to the employer's business. An employing office may request an employee, subject to the conditions set forth in sections 8 and 10 of the EPPA and Secs. 1.20, 1.22, 1.23, 1.24, 1.25, 1.26 and 1.35 of this part, to submit to a polygraph test, but no other type of lie detector test, only if—

(1) The test is administered in connection with an ongoing investigation involving economic loss or injury to the employing office's operations, such as theft, embezzlement, misappropriation or an act of unlawful industrial espionage or sabotage;

(2) The employee had access to the property that is the subject of the investigation;

(3) The employing office has a reasonable suspicion that the employee was involved in the incident or activity under investigation;

(4) The employing office provides the examinee with a statement, in a language understood by the examinee, prior to the test which fully explains with particularity the specific incident or activity being investigated and the basis for testing particular employees and which contains, at a minimum:

(i) An identification with particularity of the specific economic loss or injury to the operations of the employing office;

(ii) A description of the employee's access to the property that is the subject of the investigation;

(iii) A description in detail of the basis of the employing office's reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(iv) Signature of a person (other than a polygraph examiner) authorized to legally bind the employing office; and

(5) The employing office retains a copy of the statement and proof of service described in paragraph (a)(4) of this section for at least 3 years.

(b) For the exemption to apply, the condition of an ongoing investigation must be met. As used in section 7(d) of the EPPA, the ongoing investigation must be of a specific incident or activity. Thus, for example, an employing office may not request that an employee or employees submit to a polygraph test in an effort to determine whether or not any thefts have occurred. Such random testing by an employing office is precluded by the EPPA. Further, because the exemption is limited to a specific incident or activity, an employing office is precluded from using the exemption in situations where the so-called ''ongoing investigation'' is continuous. For example, the fact that items are frequently missing would not be a sufficient basis, standing alone, for administering a polygraph test. Even if the employing office can establish that unusually high amounts of property are missing in a given month, this, in and of itself, would not be a sufficient basis to meet the specific incident requirement. On the other hand, polygraph testing in response to missing property would be permitted where additional evidence is obtained through subsequent investigation of specific items missing through intentional wrongdoing, and a ''reasonable suspicion that the employee to be polygraphed was involved'' in the incident under investigation. Administering a polygraph test in circumstances where the missing property is merely unspecified, statistical shortages, without identification of a specific incident or activity that produced the missing property and a reasonable suspicion that the employee was involved, would amount to little more than a fishing expedition and is prohibited by the EPPA as applied to covered employees and employing offices by the CAA.

(c)(1)(i) The terms *economic loss or injury to the employing office's operations* include both direct and indirect economic loss or injury.

(ii) Direct loss or injury includes losses or injuries resulting from theft, embezzlement, misappropriation, espionage or sabotage. These examples, cited in the EPPA, are intended to be illustrative and not exhaustive. Another specific incident which would constitute direct economic loss or injury is the misappropriation of confidential or trade secret information.

(iii) Indirect loss or injury includes the use of an employing office's operations to commit a crime, such as check-kiting or money laundering. In such cases, the ongoing investigation must be limited to criminal activity that has already occurred, and to use of the employing office's operations (and not simply the use of the premises) for such activity. For example, the use of an employing office's vehicles, warehouses, computers or equipment to smuggle or facilitate the importing of illegal substances constitutes an indirect loss or injury to the employing office's business operations. Conversely, the mere fact that an illegal act occurs on the employing office's premises (such as a drug transaction that takes place in the employing office's parking lot or rest room) does not constitute an indirect economic loss or injury to the employing office.

(iv) Indirect loss or injury also includes theft or injury to property of another for which the employing office exercises fiduciary, managerial or security responsibility, or where the office has custody of the property (but not property of other offices to which the employees have access by virtue of the employment relationship). For example, if a maintenance employee of the manager of an apartment building steals jewelry from a tenant's apartment, the theft results in an indirect economic loss or injury to the employer because of the manager's management responsibility with respect to the tenant's apartment. A messenger on a delivery of confidential business reports for a client firm who steals the reports causes an indirect economic loss or injury to the messenger service because the messenger service is custodian of the client firm's reports, and

therefore is responsible for their security. Similarly, the theft of property protected by a security service employer is considered an economic loss or injury to that employer.

(v) A theft or injury to a client firm does not constitute an indirect loss or injury to an employing office unless that employing office has custody of, or management, or security responsibility for, the property of the client that was lost or stolen or injured. For example, a cleaning contractor has no responsibility for the money at a client bank. If money is stolen from the bank by one of the cleaning contractor's employees, the cleaning contractor does not suffer an indirect loss or injury.

(vi) Indirect loss or injury does not include loss or injury which is merely threatened or potential, e.g., a threatened or potential loss of an advantageous business relationship.

(2) Economic losses or injuries which are the result of unintentional or lawful conduct would not serve as a basis for the administration of a polygraph test. Thus, apparently unintentional losses or injuries stemming from truck, car, workplace, or other similar type accidents or routine inventory or cash register shortages would not meet the economic loss or injury requirement. Any economic loss incident to lawful union or employee activity also would not satisfy this requirement.

(3) It is the operations of the employing office which must suffer the economic loss or injury. Thus, a theft committed by one employee against another employee of the same employing office would not satisfy the requirement.

(d) While nothing in the EPPA as applied by the CAA prohibits the use of medical tests to determine the presence of controlled substances or alcohol in bodily fluids, the section 7(d) exemption of the EPPA does not permit the use of a polygraph test to learn whether an employee has used drugs or alcohol, even where such possible use may have contributed to an economic loss to the employing office (e.g., an accident involving an employing office's vehicle).

(e) Section 7(d)(2) of the EPPA provides that, as a condition for the use of the exemption, the employee must have had access to the property that is the subject of the investigation.

(1) The word *access*, as used in section 7(d)(2), refers to the opportunity which an employee had to cause, or to aid or abet in causing, the specific economic loss or injury under investigation. The term ''access'', thus, includes more than direct or physical contact during the course of employment. For example, as a general matter, all employees working in or with authority to enter a property storage area have ''access'' to unsecured property in the area. All employees with the combination to a safe have ''access'' to the property in a locked safe. Employees also have ''access'' who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of investigation. For example, a bookkeeper in a jewelry store with access to inventory records may aid or abet a clerk who steals an expensive watch by removing the watch from the employing office's inventory records. In such a situation, it is clear that the bookkeeper effectively has ''access'' to the property that is the subject of the investigation. (2) As used in section 7(d)(2), *property* refers to specifically identifiable property, but also includes such things of value as security codes and computer data, and proprietary, financial or technical information, such as trade secrets, which by its availability to competitors or others would cause economic harm to the employing office. (f)(1) As used in section 7(d)(3), the term ''reasonable suspicion'' refers to an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss. Access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for ''reasonable suspicion.'' Information from a co-worker, or an employee's behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion. While access or opportunity, standing alone, does not constitute a basis for ''reasonable suspicion'', the totality of circumstances surrounding the access or opportunity (such as its unauthorized or unusual nature or the fact that access was limited to a single individual) may constitute a factor in determining whether there is a reasonable suspicion.

(2) For example, in an investigation of a theft of an expensive piece of jewelry, an employee authorized to open the establishment's safe no earlier than 9 a.m., in order to place the jewelry in a window display case, is observed opening the safe at 7:30 a.m. In such a situation, the opening of the safe by the employee one and one-half hours prior to the specified time may serve as the basis for reasonable suspicion. On the other hand, in the example given, if the employee is asked to bring the piece of jewelry to his or her office at 7:30 a.m., and the employee then opened the safe and reported the jewelry missing, such access, standing alone, would not constitute a basis for reasonable suspicion that the employee was involved in the incident unless access to the safe was limited solely to the employee. If no one other than the employee possessed the combination to the safe, and all other possible explanations for the loss are ruled out, such as a break-in, a basis for reasonable suspicion may be formulated based on sole access by one employee.

(3) The employing office has the burden of establishing that the specific individual or individuals to be tested are ''reasonably suspected'' of involvement in the specific economic loss or injury for the requirement in section 7(d)(3) of the EPPA to be met.

(g)(1) As discussed in paragraph (a)(4) of this section, section 7(d)(4) of the EPPA sets forth what information, at a minimum, must be provided to an employee if the employing office wishes to claim the exemption.

(2) The statement required under paragraph (a)(4) of this section must be received by the employee at least 48 hours, excluding weekend days and holidays, prior to the time of the examination. The statement must set forth the time and date of receipt by the employee and be verified by the employee's signature. This will provide the employee with adequate pre-test notice of the specific incident or activity being investigated and afford the employee sufficient time prior to the test to obtain and consult with legal counsel or an employee representative.

(3) The statement to be provided to the employee must set forth with particularity the specific incident or activity being investigated and the basis for testing particular employees. Section 7(d)(4)(A) of the EPPA requires specificity beyond the mere assertion of general statements regarding economic loss, employee access, and reasonable suspicion. For example, an employing office's assertion that an expensive watch was stolen, and that the employee had access to the watch and is therefore a suspect, would not meet the ''with particularity'' criterion. If the basis for an employing office's requesting an employee (or employees) to take a polygraph test is not articulated with particularity, and reduced to writing, then the standard is not met. The identity of a co-worker or other individual providing information used to establish reasonable suspicion need not be revealed in the statement.

(4) It is further required that the statement provided to the examinee be signed by the employing office, or an employee or other representative of the employing office with authority to legally bind the employing office. The person signing the statement must not be a polygraph examiner unless the examiner is acting solely in the capacity of an employing office with respect to his or her own employees and does not conduct the examination. The standard would not be met, and the exemption would not apply if the person signing the statement is not authorized to legally bind the employing office.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the EPPA, as discussed in Secs. 1.20, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employing office to remedial actions, as provided for in section 6(c) of the EPPA.

Sec. 1.13 Exemption of employing offices authorized to manufacture, distribute, or dispense controlled substances.

(a) Section 7(f) of the EPPA, incorporated into the CAA by section 225(f) of the CAA, provides an exemption from the EPPA's general prohibition regarding the use of polygraph tests for employers authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 202 of the Controlled Substances Act (21 U.S.C. §812). This exemption permits the administration of polygraph tests, subject to the conditions set forth in sections 8 and 10 of the EPPA and Sec. 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part, to:

(1) A prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(2) a current employee if the following conditions are met:

(i) The test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employing office; and

(ii) The employee had access to the person or property that is the subject of the investigation.

(b)(1) The terms *manufacture, distribute, distribution, dispense, storage, and sale*, for the purposes of this exemption, are construed within the meaning of the Controlled Substances Act (21 U.S.C. §812 et seq.), as administered by the Drug Enforcement Administration (DEA), U.S. Department of Justice.

(2) The exemption in section 7(f) of the EPPA applies only to employing offices that are authorized by DEA to manufacture, distribute, or dispense a controlled substance. Section 202 of the Controlled Substances Act (21 U.S.C. §812) requires every person who manufactures, distributes, or dispenses any controlled substance to register with the Attorney General (i.e., with DEA). Common or contract carriers and warehouses whose possession of the controlled substance is in the usual course of their business or employment are not required to register. Truck drivers and warehouse employees of the persons or entities registered with DEA and authorized to manufacture, distribute, or dispense controlled substances, are within the scope of the exemption where they have direct access or access to the controlled substances, as discussed below.

(c) In order for a polygraph examination to be performed, section 7(f) of the Act requires that a prospective employee have ''direct access'' to the controlled substance(s) manufactured, dispensed, or distributed by the employing office. Where a current employee is to be tested as a part of an ongoing investigation, section 7(f) requires that the employee have ''access'' to the person or property that is the subject of the investigation.

(1) A prospective employee would have ''direct access'' if the position being applied for has responsibilities which include contact with or which affect the disposition of a controlled substance, including participation in the process of obtaining, dispensing, or otherwise distributing a controlled substance. This includes contact or direct involvement in the manufacture, storage, testing, distribution, sale or dispensing of a controlled substance and may include, for example, packaging, repackaging, ordering, licensing, shipping, receiving, taking inventory, providing security, prescribing, and handling of a controlled substance. A prospective employee would have ''direct access'' if the described job duties would give such person access to the products in question, whether such employee would be in physical proximity to controlled substances or engaged in activity which would permit the employee to divert such substances to his or her possession.

(2) A current employee would have ''access'' within the meaning of section 7(f) if the employee had access to the specific person or property which is the subject of the on-going investigation, as discussed in Sec. 1.12(e) of this part. Thus, to test a current employee, the employee need not have had ''direct'' access to the controlled substance, but may have had only infrequent, random, or opportunistic access. Such access would be sufficient to test the employee if the employee could have caused, or could have aided or abetted in causing, the loss of the specific property which is the subject of the investigation. For example, a maintenance worker in a drug warehouse, whose job duties include the cleaning of areas where the controlled substances which are the subject of the investigation were present, but whose job duties do not include the handling of controlled substances, would be deemed to have ''access'', but normally not ''direct access'', to the controlled substances. On the other hand, a drug warehouse truck loader, whose job duties include the handling of outgoing shipment orders which contain controlled substances, would have ''direct access'' to such controlled substances. A pharmacy department in a supermarket is another common situation which is useful in illustrating the distinction between ''direct access'' and ''access.'' Store personnel receiving pharmaceutical orders, i.e., the pharmacist, pharmacy intern, and other such employees working in the pharmacy department, would ordinarily have ''direct access'' to controlled substances. Other store personnel whose job duties and responsibilities do not include the handling of controlled substances but who had occasion to enter the pharmacy department where the controlled substances which are the subject of the investigation were stored, such as maintenance personnel or pharmacy cashiers, would have ''access.'' Certain other store personnel whose job duties do not permit or require entrance into the pharmacy department for any reason, such as produce or meat clerks, checkout cashiers, or baggers, would not ordinarily have ''access.'' However, any current employee, regardless of described job duties, may be polygraphed if the employing office's investigation of criminal or other misconduct discloses that such employee in fact took action to obtain ''access'' to the person or property that is the subject of the investigation—e.g., by actually entering the drug storage area in violation of company rules. In the case of ''direct access'', the prospective employee's access to controlled substances would be as a part of the manufacturing, dispensing or distribution process, while a current employee's ''access'' to the controlled substances which are the subject of the investigation need only be opportunistic.

(d) The term *prospective employee*, for the purposes of this section, includes a current employee who presently holds a position which does not entail direct access to controlled substances, and therefore is outside the scope of the exemption's provisions for preemployment polygraph testing, provided the employee has applied for and is being considered for transfer or promotion to another position which entails such direct access. For example, an office secretary may apply for promotion to a position in the vault or cage areas of a drug warehouse, where controlled substances are kept. In such a situation, the current employee would be deemed a ''prospective employee'' for the purposes of this exemption, and thus could be subject to preemployment polygraph screening, prior to such a change in position. However, any adverse action which is based in part on a polygraph test against a current employee who is considered a ''prospective employee'' for purposes of this section may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(e) Section 7(f) of the EPPA, as applied by the CAA, makes no specific reference to a requirement that employing offices provide current employees with a written statement prior to polygraph testing. Thus, employing offices to whom this exemption is available are not required to furnish a written statement such as that specified in section 7(d) of the EPPA and Sec. 1.12(a)(4) of this part.

(f) For the section 7(f) exemption to apply, the polygraph testing of current employees must be administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employing office.

(1) Current employees may only be administered polygraph tests in connection with an ongoing investigation of criminal or other misconduct, relating to a specific incident or activity, or potential incident or activity. Thus, an employing office is precluded from using the exemption in connection with continuing investigations or on a random basis to determine if thefts are occurring. However, unlike the exemption in section 7(d) of the EPPA for employing offices conducting ongoing investigations of economic loss or injury, the section 7(f) exemption includes ongoing investigations of misconduct involving potential drug losses. Nor does the latter exemption include the requirement for ''reasonable suspicion'' contained in the section 7(d) exemption. Thus, a drug store operator is permitted to polygraph all current employees who have access to a controlled substance stolen from the inventory, or where there is evidence that such a theft is planned. Polygraph testing based on an inventory shortage of the drug during a particular accounting period would not be permitted unless there is extrinsic evidence of misconduct.

(2) In addition, the test must be administered in connection with loss or injury, or potential loss or injury, to the manufacture, distribution, or dispensing of a controlled substance.

(i) Retail drugstores and wholesale drug warehouses typically carry inventory of so-called health and beauty aids, cosmetics, over-the-counter drugs, and a variety of other similar products, in addition to their product lines of controlled drugs. The non-controlled products usually constitute the majority of such firms' sales volumes. An economic loss or injury related to such non-controlled substances would not constitute a basis of applicability of the section 7(f) exemption. For example, an investigation into the theft of a gross of cosmetic products could not be a basis for polygraph testing under section 7(f), but the theft of a container of Valium could be.

(ii) Polygraph testing, with respect to an ongoing investigation concerning products other than controlled substances might be initiated under section 7(d) of the EPPA and Sec. 1.12 of this part. However, the exemption in section 7(f) of the EPPA and this section is limited solely to losses or injury associated with controlled substances.

(g) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the EPPA, as discussed in Secs. 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employing office to the remedies authorized in section 204 of the CAA. The administration of such tests is also subject to collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

SUBPART C—RESTRICTIONS ON POLYGRAPH USAGE UNDER EXEMPTIONS

Sec. 1.20 Adverse employment action under ongoing investigation exemption.

(a) Section 8(a)(1) of the EPPA provides that the limited exemption in section 7(d) of the EPPA and Sec. 1.12 of this part for ongoing investigations shall not apply if an employing office discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence.

(b) ''Additional supporting evidence'', for purposes of section 8(a) of the EPPA, includes, but is not limited to, the following:

(1)(i) Evidence indicating that the employee had access to the missing or damaged property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employing office's reasonable suspicion that the employee was involved in the incident or activity under investigation; or

(2) Admissions or statements made by an employee before, during or following a polygraph examination.

(c) Analysis of a polygraph test chart or refusal to take a polygraph test may not serve as a basis for adverse employment action, even with additional supporting evidence, unless the employing office observes all the requirements of sections 7(d) and 8(b) of the EPPA, as applied by the CAA and described in Secs. 1.12, 1.22, 1.23, 1.24 and 1.25 of this part.

Sec. 1.21 Adverse employment action under controlled substance exemption.

(a) Section 8(a)(2) of the EPPA provides that the controlled substance exemption in section 7(f) of the EPPA and section 1.13 of this part shall not apply if an employing office discharges, disciplines, denies employment or promotion, or otherwise discriminates in any manner against a current employee or prospective employee based solely

on the analysis of a polygraph test chart or the refusal to take a polygraph test.

(b) Analysis of a polygraph test chart or refusal to take a polygraph test may serve as one basis for adverse employment actions of the type described in paragraph (a) of this section, provided that the adverse action was also based on another bona fide reason, with supporting evidence therefor. For example, traditional factors such as prior employment experience, education, job performance, etc. may be used as a basis for employment decisions. Employment decisions based on admissions or statements made by an employee or prospective employee before, during or following a polygraph examination may, likewise, serve as a basis for such decisions.

(c) Analysis of a polgraph test chart or the refusal to take a polygraph test may not serve as a basis for adverse employment action, even with another legitimate basis for such action, unless the employing office observes all the requirements of section 7(f) of the EPPA, as appropriate, and seciton 8(b) of the EPPA, as described in sections 1.13, 1.22, 1.23, 1.24 and 1.25 of this part.

Sec. 1.22 Rights of examinee—general.

(a) Pursuant to section 8(b) of the EPPA, the limited exemption in section 7(d) of the EPPA for ongoing investigations (described in Secs. 1.12 and 1.13 of this part) shall not apply unless all of the requirements set forth in this section and Secs. 1.23 through 1.25 of this part are met.

(b) During all phases of the polygraph testing the person being examined has the following rights:

(1) The examinee may terminate the test at any time.

(2) The examinee may not be asked any questions in a degrading or unnecessarily intrusive manner.

(3) The examinee may not be asked any questions dealing with:

(i) Religious beliefs or affiliations;

(ii) Beliefs or opinions regarding racial matters;

(iii) Political beliefs or affiliations;

(iv) Sexual preferences or behavior; or

(v) Beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations.

(4) The examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase. Sufficient written evidence shall constitute, at a minimum, a statement by a physician specifically describing the examinee's medical or psychological condition or treatment and the basis for the physician's opinion that the condition or treatment might result in such abnormal responses.

(5) An employee or prospective employee who exercises the right to terminate the test, or who for medical reasons with sufficient supporting evidence is not administered the test, shall be subject to adverse employment action only on the same basis as one who refuses to take a polygraph test, as described in Secs. 1.20 and 1.21 of this part.

(c) Any polygraph examination shall consist of one or more pretest phases, actual testing phases, and post-test phases, which must be conducted in accordance with the rights of examinees described in Secs. 1.23 through 1.25 of this part.

Sec. 1.23 Rights of examinee—pretest phase.

(a) The pretest phase consists of the questioning and other preparation of the prospective examinee before the actual use of the polygraph instrument. During the initial pretest phase, the examinee must be:

(1) Provided with written notice, in a language understood by the examinee, as to when and where the examination will take place and that the examinee has the right to consult with counsel or an employee representative before each phase of the test. Such notice shall be received by the examinee at least forty-eight hours, excluding weekend days and holidays, before the time of the examination, except that a prospective employee may, at the employee's option, give written consent to administration of a test anytime within 48 hours but no earlier than 24 hours after receipt of the written notice. The written notice or proof of service must set forth the time and date of receipt by the employee or prospective employee and be verified by his or her signature. The purpose of this requirement is to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative. Provision shall also be made for a convenient place on the premises where the examination will take place at which the examinee may consult privately with an attorney or an employee representative before each phase of the test. The attorney or representative may be excluded from the room where the examination is administered during the actual testing phase.

(2) Informed orally and in writing of the nature and characteristics of the polygraph instrument and examination, including an explanation of the physical operation of the polygraph instrument and the procedure used during the examination.

(3) Provided with a written notice prior to the testing phase, in a language understood by the examinee, which shall be read to and signed by the examinee. Use of Appendix A to this part, if properly completed, will constitute compliance with the contents of the notice requirement of this paragraph. If a format other than in Appendix A is used, it must contain at least the following information:

(i) Whether or not the polygraph examination area contains a two-way mirror, a camera, or other device through which the examinee may be observed;

(ii) Whether or not any other device, such as those used in conversation or recording will be used during the examination;

(iii) That both the examinee and the employing office have the right, with the other's knowledge, to make a recording of the entire examination;

(iv) That the examinee has the right to terminate the test at any time;

(v) That the examinee has the right, and will be given the opportunity, to review all questions to be asked during the test;

(vi) That the examinee may not be asked questions in a manner which degrades, or needlessly intrudes;

(vii) That the examinee may not be asked any questions concerning religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations;

(viii) That the test may not be conducted if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination;

(ix) That the test is not and cannot be required as a condition of employment;

(x) That the employing office may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against the examinee based on the analysis of a polygraph test, or based on the examinee's refusal to take such a test, without additional evidence which would support such action;

(xi)(A) In connection with an ongoing investigation, that the additional evidence required for the employing office to take adverse action against the examinee, including termination, may be evidence that the examinee had access to the property that is the subject of the investigation, together with evidence supporting the employing office's reasonable suspicion that the examinee was involved in the incident or activity under investigation;

(B) That any statement made by the examinee before or during the test may serve as additional supporting evidence for an adverse employment action, as described in paragraph (a)(3)(x) of this section, and that any admission of criminal conduct by the examinee may be transmitted to an appropriate government law enforcement agency;

(xii) That information acquired from a polygraph test may be disclosed by the examiner or by the employing office only:

(A) To the examinee or any other person specifically designated in writing by the examinee to receive such information;

(B) To the employing office that requested the test;

(C) To a court, governmental agency, arbitrator, or mediator pursuant to a court order;

(D) By the employing office, to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct;

(xiii) That if any of the examinee's rights or protections under the law are violated, the examinee has the right to take action against the employing office under sections 401-404 of the CAA. Employing offices that violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees;

(xiv) That the examinee has the right to obtain and consult with legal counsel or other representative before each phase of the test, although the legal counsel or representative may be excluded from the room where the test is administered during the actual testing phase.

(xv) That the employee's rights under the CAA may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the CAA, agreed to and signed by the parties.

(b) During the initial or any subsequent pretest phases, the examinee must be given the opportunity, prior to the actual testing phase, to review all questions in writing that the examiner will ask during each testing phase. Such questions may be presented at any point in time prior to the testing phase.

Sec. 1.24 Rights of examinee—actual testing phase.

(a) The actual testing phase refers to that time during which the examiner administers the examination by using a polygraph instrument with respect to the examinee and then analyzes the charts derived from the test. Throughout the actual testing phase, the examiner shall not ask any question that was not presented in writing for review prior to the testing phase. An examiner may, however, recess the testing phase and return to the pre-test phase to review additional relevant questions with the examinee. In the case of an ongoing investigation, the examiner shall ensure that all relevant questions (as distinguished from technical baseline questions) pertain to the investigation.

(b) No testing period subject to the provisions of the Act shall be less than ninety minutes in length. Such ''test period'' begins

at the time that the examiner begins informing the examinee of the nature and characteristics of the examination and the instruments involved, as prescribed in section 8(b)(2)(B) of the EPPA and Sec. 1.23(a)(2) of this part, and ends when the examiner completes the review of the test results with the examinee as provided in Sec. 1.25 of this part. The ninety-minute minimum duration shall not apply if the examinee voluntarily acts to terminate the test before the completion thereof, in which event the examiner may not render an opinion regarding the employee's truthfulness.

Sec. 1.25 Rights of examinee—post-test phase.

(a) The post-test phase refers to any questioning or other communication with the examinee following the use of the polygraph instrument, including review of the results of the test with the examinee. Before any adverse employment action, the employing office must:

(1) Further interview the examinee on the basis of the test results; and

(2) Give to the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as the questions asked during the test, with the corresponding charted responses. The term ''corresponding charted responses'' refers to copies of the entire examination charts recording the employee's physiological responses, and not just the examiner's written report which describes the examinee's responses to the questions as ''charted'' by the instrument.

Sec. 1.26 Qualifications of and requirements for examiners.

(a) Section 8 (b) and (c) of the EPPA provides that the limited exemption in section 7(d) of the EPPA for ongoing investigations shall not apply unless the person conducting the polygraph examination meets specified qualifications and requirements.

(b) An examiner must meet the following qualifications:

(1) Have a valid current license, if required by the State in which the test is to be conducted; and

(2) Carry a minimum bond of $50,000 provided by a surety incorporated under the laws of the United States or of any State, which may under those laws guarantee the fidelity of persons holding positions of trust, or carry an equivalent amount of professional liability coverage.

(c) An examiner must also, with respect to examinees identified by the employing office pursuant to Sec. 1.30(c) of this part:

(1) Observe all rights of examinees, as set out in Secs. 1.22, 1.23, 1.24, and 1.25 of this part;

(2) Administer no more than five polygraph examinations in any one calendar day on which a test or tests subject to the provisions of EPPA are administered, not counting those instances where an examinee voluntarily terminates an examination prior to the actual testing phase;

(3) Administer no polygraph examination subject to the provisions of the EPPA which is less than ninety minutes in duration, as described in Sec. 1.24(b) of this part; and

(4) Render any opinion or conclusion regarding truthfulness or deception in writing. Such opinion or conclusion must be based solely on the polygraph test results. The written report shall not contain any information other than admissions, information, case facts, and interpretation of the charts relevant to the stated purpose of the polygraph test and shall not include any recommendation concerning the employment of the examinee.

(5) Maintain all opinions, reports, charts, written questions, lists, and other records relating to the test, including, statements signed by examinees advising them of rights under the CAA (as described in section 1.23(a)(3) of this part) and any electronic recordings of examinations, for at least three years from the date of the administration of the test. (See section 1.30 of this part for recordkeeping requirements.)

SUBPART D—RECORDKEEPING AND DISCLOSURE REQUIREMENTS

Sec. 1.30 Records to be preserved for 3 years.

(a) The following records shall be kept for a minimum period of three years from the date the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted):

(1) Each employing office that requests an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific incident or activity under investigation and the basis for testing that particular covered employee, as required by section 7(d)(4) of the EPPA and described in 1.12(a)(4) of this part.

(2) Each examiner retained to administer examinations pursuant to any of the exemptions under section 7(d), (e) or (f) of the EPPA (described in sections 1.12 and 1.13 of this part) shall maintain all opinions, reports, charts, written questions, lists, and other records relating to polygraph tests of such persons.

Sec. 1.35 Disclosure of test information.

This section prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employing office (other than an employing office exempt under section 7 (a), or (b) of the EPPA (described in Secs. 1.10 and 1.11 of this part)) may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in *writing* by the examinee to receive such information;

(2) The employing office that requested the polygraph test pursuant to the provisions of the EPPA (including management personnel of the employing office where the disclosure is relevant to the carrying out of their job responsibilities);

(3) Any court, governmental agency, arbitrator, or mediator pursuant to an order from a court of competent jurisdiction requiring the production of such information;

(b) An employing office may disclose information from the polygraph test at any time to an appropriate governmental agency without the need of a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records), to another examiner(s) for examination and analysis, provided that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. Such action would not constitute disclosure under this part provided that the other examiner has no direct or indirect interest in the matter.

APPENDIX A TO PART 801—NOTICE TO EXAMINEE

Section 204 of the Congressional Accountability Act, which applies the rights and protections of section 8(b) of the Employee Polygraph Protection Act to covered employees and employing offices, and the regulations of the Board of Directors of the Office of Compliance (Sections 1.22, 1.23, 1.24, and 1.25), require that you be given the following information before taking a polygraph examination:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.

(b) Another device, such as those used in conversation or recording, [will] [will not] be used during the examination.

(c) Both you and the employing office have the right, with the other's knowledge, to record electronically the entire examination.

2. (a) You have the right to terminate the test at any time.

(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.

(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.

(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual preference or behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

(f) You have the right to consult with legal counsel or other representative before each phase of the test, although the legal counsel or other representative may be excluded from the room where the test is administered during the actual testing phase.

3. (a) The test is not and cannot be required as a condition of employment.

(b) The employing office may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.

(c)(1) In connection with an ongoing investigation, the additional evidence required for an employing office to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employing office's reasonable suspicion that you were involved in the incident or activity under investigation.

(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate government law enforcement agency.

4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employing office only:

(1) To you or any other person specifically designated in writing by you to receive such information;

(2) To the employing office that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order.

(b) Information acquired from a polygraph test may be disclosed by the employing office to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to take action against the employing office by filing a request for counseling with the Office of Compliance under section 402 of

the Congressional Accountability Act. Employing offices that violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees.

6. Your rights under the CAA may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the CAA, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

(Date):

(Signature):

OFFICE OF COMPLIANCE—THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988—EXCLUSION OF CAPITOL POLICE

NOTICE OF ISSUANCE OF FINAL REGULATION

On January 22, 1996, the Board of Directors of the Office of Compliance adopted and submitted for publication in the Congressional Record a final regulation authorizing the Capitol Police to use lie detector tests under Section 204(a)(3) and (c) of the Congressional Accountability Act of 1995 (''CAA''). On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate agreed to resolutions approving the final regulations. Specifically, the Senate agreed to S. Res. 242, to provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate; the House agreed to H. Res. 400, to provide for the approval of final regulations that are applicable to the House and the employees of the House; and the House and the Senate agreed to S. Con. Res. 51, to provide for approval of final regulations that are applicable to employing offices and employees other than those offices and employees of the House and the Senate. Accordingly, pursuant section 304(d) of the CAA, the Board submits these regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for issuance by publication in the Congressional Record.

Pursuant to paragraph (3) of section 304(d) of the CAA, the Board finds good cause for the regulations of become effective on April 16, 1996, rather than 60 days after issuance. Were the regulations not effective immediately upon the expiration of the interim regulations on April 15, 1996, covered employees, employing offices and the Office of Compliance would be forced to operate under the same kind of regulatory uncertainty that the Board sought to avoid by adopting interim regulations effective as of the January 23, 1996, which has the effective date of the relevant provisions of the CAA.

Signed at Washington, D.C. on this 19th day of April, 1996.

GLEN D. NAGER,
Chair of the Board, Office of Compliance.

Accordingly, the Board of Directors of the Office of Compliance hereby issues the following final regulation:

[Final Regulation]

EXCLUSION FOR EMPLOYEES OF THE CAPITOL POLICE

None of the limitations on the use of lie detector tests by employing offices set forth in Section 204 of the CAA apply to the Capitol Police. This exclusion from the limitations of Section 204 of the CAA applies only with respect to Capitol Police employees. Except as otherwise provided by law or these regulations, this exclusion does not extend to contractors or nongovernmental agents of the Capitol Police; nor does it extend to the Capitol Police with respect to employees of a private employer or an otherwise covered employing office with which the Capitol Police has a contractual or other business relationship.

SCOPE OF REGULATIONS

These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 204(a)(3) and 304 of the CAA, which authorize the Board to issue regulations governing the use of lie detector tests by the Capitol Police. The regulations issued by the Board herein are on all matters for which section 204(a)(3) of the CAA requires a regulation to be issued.

OFFICE OF COMPLIANCE—THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

NOTICE OF ISSUANCE OF FINAL REGULATIONS

On January 22, 1996, the Board of Directors of the Office of Compliance adopted and submitted for publication in the Congressional Record final regulations implementing section 203 of the Congressional Accountability Act of 1995 (CAA), which apply certain rights and protections of the Fair Labor Standards Act of 1938. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate agreed to resolutions approving the final regulations. Specifically, the Senate agreed to S. Res. 242, to provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate; the House agreed to H. Res. 400, to provide for the approval of final regulations that are applicable to the House and the employees of the House; and the House and the Senate agreed to S. Con. Res. 51, to provide for approval of final regulations that are applicable to employing offices and employees other than those offices and employees of the House and the Senate. Accordingly, pursuant section 304(d) of the CAA, the Board submits these regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for issuance by publication in the Congressional Record.

Pursuant to paragraph (3) of section 304(d) of the CAA, the Board finds good cause for the regulations to become effective on April 16, 1996, rather than 60 days after issuance. Were the regulations not effective immediately upon the expiration of the interim regulations on April 15, 1996, covered employees, employing offices and the Office of Compliance would be forced to operate under the same kind of regulatory uncertainty that the Board sought to avoid by adopting interim regulations effective as of the January 23, 1996, which was the effective date of the relevant provisions of the CAA.

Signed at Washington, D.C. on this 19th day of April, 1996

GLEN D. NAGER,
Chair of the Board, Office of Compliance.

Accordingly, the Board of Directors of the Office of Compliance hereby issues on an the following final regulations:

[Final Regulations]

SUBTITLE B—REGULATIONS RELATING TO THE HOUSE OF REPRESENTATIVES AND ITS EMPLOYING OFFICES—H SERIES

CHAPTER III—REGULATIONS RELATING TO THE RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

PART H501—GENERAL PROVISIONS

Sec.

H501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
H501.101 Purpose and scope.
H501.102 Definitions.
H501.103 Coverage.
H501.104 Administrative authority.
H501.105 Effect of Interpretations of the Labor Department.
H501.106 Application of the Portal-to-Portal Act of 1947.

§ H501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the parts of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding parts of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
Part 531—Wage payments under the Fair Labor Standards Act of 1938.	Part H531
Part 541—Defining and delimiting the terms ''bona fide executive,'' ''administrative,'' and ''professional'' employees.	Part H541
Part 547—Requirements of a ''Bona fide thrift or savings plan''.	Part H547
Part 553—Application of the FLSA to employees of public agencies.	Part H553

SUBPART A—MATTERS OF GENERAL APPLICABILITY

§ H501.101 Purpose and scope.

(a) Section 203 of the Congressional Accountability Act (CAA) provides that the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§206(a)(1) & (d), 207, 212(c)) shall apply to covered employees of the legislative branch of the Federal government. Section 301 of the CAA creates the Office of Compliance as an independent office in the legislative branch for enforcing the rights and protections of the FLSA, as applied by the CAA.

(b) The FLSA as applied by the CAA provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included also in the FLSA are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the FLSA exempts specified employees or groups of employees from the application of certain of its provisions.

(c) This chapter contains the substantive regulations with respect to the FLSA that the Board of Directors of the Office of Compliance has adopted pursuant to Sections 203(c) and 304 of the CAA, which require that the Board promulgate regulations that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of §203 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.''

(d) These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 203(c) and 304 of the CAA, which directs the Board to promulgate regulations implementing section 203 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection a [of section 203 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 203 of the CAA requires regulations to be issued. Specifically,

it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 203 of the CAA].''

(e) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

§ H501.102 Definitions.

For purposes of this chapter:

(a) *CAA* means the Congressional Accountability Act of 1995 (P.L. 104-1, 109 Stat. 3, 2 U.S.C. §§ 1301–1438).

(b) ''FLSA'' or Act means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq.), as applied by section 203 of the CAA to covered employees and employing offices.

(c) ''Covered employee'' means any employee of the House of Representatives, including an applicant for employment and a former employee, but shall not include an intern.

(d) ''Employee of the House of Representatives'' includes any individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment.

(e) *Employing office and employer* mean (1) the personal office of a Member of the House of Representatives; (2) a committee of the House of Representatives or a joint committee; or (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives.

(f) *Board* means the Board of Directors of the Office of Compliance.

(g) *Office* means the Office of Compliance.

(h) *Intern* is an individual who (a) is performing services in an employing office as part of a demonstrated educational plan, and (b) is appointed on a temporary basis for a period not to exceed 12 months; *provided* that if an intern is appointed for a period shorter than 12 months, the intern may be reappointed for additional periods as long as the total length of the internship does not exceed 12 months; *provided further* that the defintion of intern does not include volunteers, fellows or pages.

§H501.103 Coverage.

The coverage of Section 203 of the CAA extends to any covered employee of an employing office without regard to whether the covered employee is engaged in commerce or the production of goods for interstate commerce and without regard to size, number of employees, amount of business transacted, or other measure.

§ H501.104 Administrative authority.

(a) The Office of Compliance is authorized to administer the provisions of Section 203 of the Act with respect to any covered employee or covered employer.

(b) The Board is authorized to promulgate substantive regulations in accordance with the provisions of Sections 203(c) and 304 of the CAA.

§ H501.105 Effect of Interpretations of the Department of Labor.

(a) In administering the FLSA, the Wage and Hour Division of the Department of Labor has issued not only substantive regulations but also interpretative bulletins. Substantive regulations represent an exercise of statutorily-delegated lawmaking authority from the legislative branch to an administrative agency. Generally, they are proposed in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Once promulgated, such regulations are considered to have the force and effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). See also 29 C.F.R. § 790.17(b) (1994). Unlike substantive regulations, interpretative statements, including bulletins and other releases of the Wage and Hour Division, are not issued pursuant to the provisions of the APA and may not have the force and effect of law. Rather, they may only constitute official interpretations of the Department of Labor with respect to the meaning and application of the minimum wage, maximum hour, and overtime pay requirements of the FLSA. See 29 C.F.R. § 790.17(c) (citing Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st Sess., at p. 27 (1941)). The purpose of such statements is to make available in one place the interpretations of the FLSA which will guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. The Supreme Court has observed: ''[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

(b) Section 203(c) of the CAA provides that the substantive regulations implementing Section 203 of the CAA shall be ''the same as substantive regulations promulgated by the Secretary of Labor'' except where the Board finds, for good cause shown, that a modification would more effectively implement the rights and protections established by the FLSA. Thus, the CAA by its terms does not mandate that the Board adopt the interpretative statements of the Department of Labor or its Wage and Hour Division. The Board is thus not adopting such statements as part of its substantive regulations.

§ H501.106 Application of the Portal-to-Portal Act of 1947.

(a) Consistent with Section 225 of the CAA, the Portal to Portal Act (PPA), 29 U.S.C. §§ 216 and 251 *et seq.*, is applicable in defining and delimiting the rights and protections of the FLSA that are prescribed by the CAA. Section 10 of the PPA, 29 U.S.C. § 259, provides in pertinent part:

[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval or interpretation of [the Administrator of the Wage and Hour Division of the Department of Labor] . . . or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.''

(b) In defending any action or proceeding based on any act or omission arising out of section 203 of the CAA, an employing office may satisfy the standards set forth in subsection (a) by pleading and proving good faith reliance upon any written administrative regulation, order, ruling, approval or interpretation, of the Administrator of the Wage and Hour Division of the Department of Labor: *Provided*, that such regulation, order, ruling approval or interpretation had not been superseded at the time of reliance by any regulation, order, decision, or ruling of the Board or the courts.

PART H531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

Subpart A—Preliminary Matters

Sec.
H531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
H531.1 Definitions.
H531.2 Purpose and scope.

Subpart B—Determinations of ''Reasonable Cost;'' Effects of Collective Bargaining Agreements

H531.3 General determinations of 'reasonable cost'.
H531.6 Effects of collective bargaining agreements.

SUBPART A—PRELIMINARY MATTERS

§ H531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations		OC Regulations
531.1	Definitions	H531.1
531.2	Purpose and scope	H531.2
553.3	General determinations of ''reasonable cost''	H531.3
531.6	Effects of collective bargaining agreements	H531.6

§ H531.1 Definitions.

(a) Administrator means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) Act means the Fair Labor Standards Act of 1938, as amended.

§ H531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term 'wage' to include the 'reasonable cost', as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the 'fair value.' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of 'fair value.' Whenever so determined and when applicable and pertinent, the 'fair value' of the facilities involved shall be includable as part of 'wages' instead of the actual measure of the costs of those facilities. The section provides, however, that the cost of board, lodging, or other facilities shall not be included as part of 'wages' if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This part 531 contains any determinations made as to the 'reasonable cost' and 'fair value' of board, lodging, or other facilities having general application.

SUBPART B—DETERMINATIONS OF ''REASONABLE COST'' AND ''FAIR VALUE''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

§ H531.3 General determinations of 'reasonable cost.'

(a) The term reasonable cost as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) The reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer: *Provided,* That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term good accounting practices does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term depreciation includes obsolescence.

(d)(1) The cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

§ H531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be ''bona fide'' when pursuant to the provisions of section 7(b)(1) or 7(b)(2) of the FLSA it is made with the certified representative of the employees under the provisions of the CAA.

PART H541—DEFINING AND DELIMITING THE TERMS ''BONA FIDE EXECUTIVE,'' ''ADMINISTRATIVE,'' OR ''PROFESSIONAL'' CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN SECONDARY SCHOOL)

Subpart A—General Regulations

Sec.
H541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
H541.01 Application of the exemptions of section 13(a)(1) of the FLSA.
H541.1 Executive.
H541.2 Administrative.
H541.3 Professional.
H541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.
H541.5d Special provisions applicable to employees of public agencies.

SUBPART A—GENERAL REGULATIONS

§ H541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
541.1 Executive	H541.1
541.2 Administrative	H541.2
541.3 Professional	H541.3
541.5b Equal pay provisions of section 6(d) of the FLSA apply to executive, administrative, and professional employees.	H541.5b
541.5d Special provisions applicable to employees of public agencies.	541.5d

§ H541.01 Application of the exemptions of section 13 (a)(1) of the FLSA.

(a) Section 13(a)(1) of the FLSA, which provides certain exemptions for employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in a secondary school), applies to covered employees by virtue of Section 225(f)(1) of the CAA.

(b) The substantive regulations set forth in this part are promulgated under the authority of sections 203(c) and 304 of the CAA, which require that such regulations be the same as the substantive regulations promulgated by the Secretary of Labor except where the Board determines for good cause shown that modifications would be more effective for the implementation of the rights and protections under § 203.

§ H541.1 Executive.

The term *employee employed in a bona fide executive * * * capacity* in section 13(a) (1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the management of an employing office in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided,* That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities: Provided, That an employee who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

§ H541.2 Administrative.

The term *employee employed in a bona fide * * * administrative * * * capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists the head of an employing office, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this

section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment or institution by which employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§ H541.3 Professional.

The term *employee employed in a bona* fide * * * professional capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system, educational establishment or institution by which employed, or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities: *Provided,* That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further,* That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 1/2 times the minimum wage provided by section 6 of the FLSA as applied by the CAA.

§ H541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.

The FLSA, as amended and as applied by the CAA, includes within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) under section 13(a)(1) of the FLSA. Thus, for example, where an exempt administrative employee and another employee of the employing office are performing substantially ''equal work,'' the sex discrimination prohibitions of section 6(d) are applicable with respect to any wage differential between those two employees.

§ H541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirement of being paid on a salary basis shall not be disqualified from exemption under Sec. H541.1, H541.2, or H541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid ''on a salary basis'' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

PART H547—REQUIREMENTS OF A ''BONA FIDE THRIFT OR SAVINGS PLAN''

Sec.
H547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
H547.0 Scope and effect of part.
H547.1 Essential requirements of qualifications.
H547.2 Disqualifying provisions.

§ H547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
547.0—Scope and effect of part.	H547.0
547.1—Essential requirements of qualifications.	H547.1
547.2—Disqualifying provisions.	H547.2

§ H547.0 Scope and effect of part.

(a) The regulations in this part set forth the requirements of a ''bona fide thrift or savings plan'' under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (FLSA), as applied by the CAA. In determining the total remuneration for employment which section 7(e) of the FLSA requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations.

§ H547.1 Essential requirements of qualifications.

(a) A ''bona fide thrift or savings plan'' for the purpose of section 7(e)(3)(b) of the FLSA as applied by the CAA is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § H547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees: *Provided, however,* That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the

participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: *Provided,* That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

§ H547.2 Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

PART H553—OVERTIME COMPENSATION: PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION; OVERTIME AND COMPENSATORY TIME-OFF FOR EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE HOUSE

Introduction

Sec.
H553.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
H553.1 Definitions
H553.2 Purpose and scope
Subpart C—Partial Exemption for Employees Engaged in Law Enforcement and Fire Protection
H553.201 Statutory provisions: section 7(k).
H553.202 Limitations.
H553.211 Law enforcement activities.
H553.212 Twenty percent limitation on nonexempt work.
H553.213 Public agency employees engaged in both fire protection and law enforcement activities.
H553.214 Trainees.
H553.215 Ambulance and rescue service employees.
H553.216 Other exemptions.
H553.220 ''Tour of duty'' defined.
H553.221 Compensable hours of work.
H553.222 Sleep time.
H553.223 Meal time.
H553.224 ''Work period'' defined.
H553.225 Early relief.
H553.226 Training time.
H553.227 Outside employment.
H553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).
H553.231 Compensatory time off.
H553.232 Overtime pay requirements.
H553.233 ''Regular rate'' defined.
Subpart D—Compensatory Time-off for Overtime Earned by Employees Whose Work Schedule Directly Depends upon the Schedule of the House
H553.301 Definition of ''directly depends.''
H553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the House.
H553.303 Using compensatory time off.
H553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service.

Introduction

§ H553.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
553.1—Definitions	H553.1
553.2—Purpose and scope	H553.2
553.201—Statutory provisions: section 7(k).	H553.201
553.202—Limitations.	H553.202
553.211—Law enforcement activities.	H553.211
553.212—Twenty percent limitation on nonexempt work.	H553.212
553.213—Public agency employees engaged in both fire protection and law enforcement activities..	H553.213
553.214—Trainees.	H553.214
553.215—Ambulance and rescue service employees.	H553.215
553.216—Other exemptions.	H553.216
553.220—''Tour of duty'' defined.	H553.220
553.221—Compensable hours of work.	H553.221
553.222—Sleep time.	H553.222
553.223—Meal time.	H553.223
553.224—''Work period'' defined.	H553.224
553.225—Early relief.	H553.225
553.226—Training time.	H553.226
553.227—Outside employment.	H553.227
553.230—Maximum hours standards for work periods of 7 to 28 days—section 7(k)..	H553.230
553.231—Compensatory time off.	H553.231
553.232—Overtime pay requirements.	H553.232
553.233—''Regular rate'' defined.	H553.233

Introduction

§ H553.1 Definitions

(a) Act or FLSA means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201-219), as applied by the CAA.

(b) 1985 Amendments means the Fair Labor Standards Amendments of 1985 (Pub. L. 99-150).

(c) Public agency means an employing office as the term is defined in §—501.102 of this chapter, including the Capitol Police.

(d) Section 7(k) means the provisions of §7(k) of the FLSA as applied to covered employees and employing offices by §203 of the CAA.

§ H553.2 Purpose and scope

The purpose of part H553 is to adopt with appropriate modifications the regulations of the Secretary of Labor to carry out those provisions of the FLSA relating to public agency employees as they are applied to covered employees and employing offices of the CAA. In particular, these regulations apply section 7(k) as it relates to fire protection and law enforcement employees of public agencies.

SUBPART C—PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION

§ H553.201 Statutory provisions: section 7(k).

Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in § H553.230 of this part, the 216-hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

§ H553.202 Limitations.

The application of §7(k), by its terms, is limited to public agencies, and does not apply to any private organization engaged in furnishing fire protection or law enforcement services. This is so even if the services are provided under contract with a public agency.

Exemption Requirements

§H553.211 Law enforcement activities.

(a) As used in §7(k) of the Act, the term 'any employee . . . in law enforcement activities' refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by law to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as 'trainee,' 'probationary,' or 'permanent,' and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See Sec. H553.215.

(c) Typically, employees engaged in law enforcement activities include police who are regularly employed and paid as such. Other agency employees with duties not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, any law enforcement employee within the legislative branch concerned with keeping public peace and order and protecting life and property.

(d) Employees who do not meet each of the three tests described above are not engaged in 'law enforcement activities' as that term is used in sections 7(k). Employees who normally would not meet each of these tests include:

(1) Building inspectors (other than those defined in Sec. H553.213(a)),

(2) Health inspectors,

(3) Sanitarians,

(4) Civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points,

(5) Civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices,

(6) Wage and hour compliance officers,

(7) Equal employment opportunity compliance officers, and

(8) Building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term 'any employee in law enforcement activities' also includes, by express reference, 'security personnel in correctional institutions. Typically, such facilities may include precinct house lockups. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining

custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution. These employees are considered to be engaged in law enforcement activities regardless of their rank or of their status as 'trainee,' 'probationary,' or 'permanent,' and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term 'employee in law enforcement activities' are the so-called 'civilian' employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ H553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in fire protection or law enforcement activities as described in Sec. H553.210 and H553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat the §7(k) exemption unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. The performance of such work does not affect the application of the §7(k) exemption with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in paragraph (a) of this section.

§ H553.213 Public agency employees engaged in both fire protection and law enforcement activities.

(a) Some public agencies have employees (often called 'public safety officers') who engage in both fire protection and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat the section 7(k) exemption, provided that each of the activities performed meets the appropriate tests set forth in Sec. H553.210 and H553.211. This is so regardless of how the employee's time is divided between the two activities. However, all time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in Sec. H553.212.

(b) As specified in Sec. H553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

§ H553.214 Trainees.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under section 7(k) only when the employee meets all the applicable tests described in Sec. H553.210 or Sec. H553.211 (except for the power of arrest for law enforcement personnel), as the case may be. If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

§ H553.215 Ambulance and rescue service employees.

Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by §7(k) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in Sec. H553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

§ H553.216 Other exemptions.

Although the 1974 Amendments to the FLSA as applied by the CAA provide special exemptions for employees of public agencies engaged in fire protection and law enforcement activities, such workers may also be subject to other exemptions in the Act, and public agencies may claim such other applicable exemptions in lieu of §7(k). For example, section 13(a)(1) as applied by the CAA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in Part H541. The section 13(a)(1) exemption can be claimed for any fire protection or law enforcement employee who meets all of the tests specified in part H541 relating to duties, responsibilities, and salary. Thus, high ranking police officials who are engaged in law enforcement activities, may also, depending on the facts, qualify for the section 13(a)(1) exemption as 'executive' employees. Similarly, certain criminal investigative agents may qualify as ''administrative'' employees under section 13(a)(1).

Tour of Duty and Compensable Hours of Work Rules

§ H553.220 ''Tour of duty'' defined.

(a) The term ''tour of duty'' is a unique concept applicable only to employees for whom the section 7(k) exemption is claimed. This term, as used in section 7(k), means the period of time during which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include 'shifts' assigned to employees often days in advance of the performance of the work. Scheduled periods also include time spent in work outside the ''shift'' which the public agency employer assigns. For example, a police officer may be assigned to crowd control during a parade or other special event outside of his or her shift.

(b) Unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance.

(c) The tour of duty does not include time spent working for a separate and independent employer in certain types of special details as provided in Sec. H553.227.

§ H553.221 Compensable hours of work.

(a) The rules under the FLSA as applied by the CAA on compensable hours of work are applicable to employees for whom the section 7(k) exemption is claimed. Special rules for sleep time (Sec. H553.222) apply to both law enforcement and firefighting employees for whom the section 7(k) exemption is claimed. Also, special rules for meal time apply in the case of firefighters (Sec. H553.223).

(b) Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses.

(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, where a police station must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits.

(d) An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

(e) Normal home to work travel is not compensable, even where the employee is expected to report to work at a location away from the location of the employer's premises.

(f) A police officer, who has completed his or her tour of duty and who is given a patrol

car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls is compensable.

§ H553.222 Sleep time.

(a) Where a public agency elects to pay overtime compensation to firefighters and/or law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude sleep time from hours worked if all the conditions for the exclusion of such time are met.

(b) Where the employer has elected to use the section 7(k) exemption, sleep time cannot be excluded from the compensable hours of work where

(1) The employee is on a tour of duty of less than 24 hours, and

(2) Where the employee is on a tour of duty of exactly 24 hours.

(c) Sleep time can be excluded from compensable hours of work, however, in the case of police officers or firefighters who are on a tour of duty of more than 24 hours, but only if there is an expressed or implied agreement between the employer and the employees to exclude such time. In the absence of such an agreement, the sleep time is compensable. In no event shall the time excluded as sleep time exceed 8 hours in a 24-hour period. If the sleep time is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes means at least 5 hours), the entire time must be counted as hours of work.

§ H553.223 Meal time.

(a) If a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude meal time from hours worked if all the statutory tests for the exclusion of such time are met.

(b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other statutory tests for the exclusion of such time are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., stakeouts'), they are not considered to be completely relieved from duty, and meal periods would be compensable.

(c) With respect to firefighters employed under section 7(k), who are confined to a duty station, the legislative history of the Act indicates Congressional intent to mandate a departure from the usual FLSA 'hours of work' rules and adoption of an overtime standard keyed to the unique concept of 'tour of duty' under which firefighters are employed. Where the public agency elects to use the section 7(k) exemption for firefighters, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, and (2) where the firefighter is on a tour of duty of exactly 24 hours.

(d) In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the statutory tests for exclusion of such hours are met.

§ H553.224 ''Work period'' defined.

(a) As used in section 7(k), the term ''work period'' refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

(b) An employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees.

§ H553.225 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift prior to the scheduled starting time. Such early relief time may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work for employees employed under section 7(k) where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer, the time involved must be added to the employee's tour of duty and treated as compensable hours of work.

§ H553.226 Training time.

(a) The general rules for determining the compensability of training time under the FLSA apply to employees engaged in law enforcement or fire protection activities.

(b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees in required training is considered to be noncompensable:

(1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government, does not constitute compensable hours of work.

(3) Time spent in the training described in paragraphs (b) (1) or (2) of this section is not compensable, even if all or part of the costs of the training is borne by the employer.

(c) Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

§ H553.227 Outside employment.

(a) Section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.

(b) Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

(c) Whether two employers are, in fact, separate and independent can only be determined on a case-by-case basis.

(d) The primary employer may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may maintain a roster of officers who wish to perform such work. The department may also select the officers for special details from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses. The department may require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special details through the agency's payroll system. Finally, the department may require that the officers observe their normal standards of conduct during such details and take disciplinary action against those who fail to do so.

(e) Section 7(p)(1) applies to special details even where a State law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. For example, a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation.

(f) The principles in paragraphs (d) and (e) of this section with respect to special details of public agency fire protection and law enforcement employees under section 7(p)(1) are exceptions to the usual rules on joint employment set forth in part 791 of this title.

(g) Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. Thus, assignments of police officers outside of their normal work hours to perform crowd control at a parade, where the assignments are not solely at the option of the officers, would not qualify as special details subject to this exception. This would be true even if the parade organizers reimburse the public agency for providing such services.

(h) Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees.

Overtime Compensation Rules

§ H553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

§ H553.231 Compensatory time off.

(a) Law enforcement and fire protection employees who are subject to the section 7(k) exemption may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum for their work period as set forth in Sec. H553.230.

(b) Section 7(k) permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a firefighter's work period is 28 consecutive days, and he or she works 80 hours in each of the first two weeks, but only 52 hours in the third week, and does not work in the fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation or compensatory time off would be due for 54 hours (160 minus 106 hours) in the first 14 day work period.

§ H553.232 Overtime pay requirements.

If a public agency pays employees subject to section 7(k) for overtime hours worked in cash wages rather than compensatory time off, such wages must be paid at one and one-half times the employees' regular rates of pay.

§ H553.233 'Regular rate' defined.

The statutory rules for computing an employee's 'regular rate', for purposes of the Act's overtime pay requirements are applicable to employees or whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages.

SUBPART D—COMPENSATORY TIME-OFF FOR OVERTIME EARNED BY EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE HOUSE

§ H553.301 Definition of ''directly depends.''

For the purposes of this Part, a covered employee's work schedule ''directly depends'' on the schedule of the House of Representatives only if the eligible employee performs work that directly supports the conduct of legislative or other business in the chamber and works hours that regularly change in response to the schedule of the House and the Senate.

§ H553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the House.

No employing office shall be deemed to have violated section 203(a)(1) of the CAA, which applies the protections of section 7(a) of the Fair Labor Standards Act (''FLSA'') to covered employees and employing office, by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under section 7(a) of the FLSA where the employee's work schedule directly depends on the schedule of the House of Representatives within the meaning of § H553.301, and: (a) the employee is compensated at the rate of time-and-a-half in pay for all hours in excess of 40 and up to 60 hours in a workweek, and (b) the employee is compensated at the rate of time-and-a-half in either pay or in time off for all hours in excess of 60 hours in a workweek.

§ H553.303 Using compensatory time off.

An employee who has accrued compensatory time off under § H553.302 upon his or her request, shall be permitted by the employing office to use such time within a reasonable period after making the request, unless the employing office makes a bona fide determination that the needs of the operations of the office do not allow the taking of compensatory time off at the time of the request. An employee may renew the request at a subsequent time. An employing office may also, upon reasonable notice, require an employee to use accrued compensatory time-off.

§ H553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service.

An employee who has accrued compensatory time authorized by this regulation shall, upon termination of employment, be paid for the unused compensatory time at the rate earned by the employee at the time the employee receives such payment.

OFFICE OF COMPLIANCE—THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

NOTICE OF ISSUANCE OF FINAL REGULATIONS

On January 22, 1996, the Board of Directors of the Office of Compliance adopted and submitted for publication in the Congressional Record final regulations implementing section 203 of the Congressional Accountability Act of 1995 (CAA), which apply certain rights and protections of the Fair Labor Standards Act of 1938. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate agreed to resolutions approving the final regulations. Specifically, the Senate agreed to S. Res. 242, to provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate; the House agreed to H. Res. 400, to provide for the approval of final regulations that are applicable to the House and the employees of the House; and the House and the Senate agreed to S. Con. Res. 51, to provide for approval of final regulations that are applicable to employing offices and employees other than those offices and employees of the House and the Senate. Accordingly, pursuant section 304(d) of the CAA, the Board submits these regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for issuance by publication in the Congressional Record.

Pursuant to paragraph (3) of section 304(d) of the CAA, the Board finds good cause for the regulations to become effective on April 16, 1996, rather than 60 days after issuance. Were the regulations not effective immediately upon the expiration of the interim regulations on April 15, 1996, covered employees, employing offices and the Office of Compliance would be forced to operate under the same kind of regulatory uncertainty that the Board sought to avoid by adopting interim regulations effective as of January 23, 1996, which was the effective date of the relevant provisions of the CAA.

Signed at Washington, D.C. on this 19th day of April, 1996.

GLEN D. NAGER,
Chair of the Board, Office of Compliance.

Accordingly, the Board of Directors of the Office of Compliance hereby issues the following final regulations:

[Final Regulations]

SUBTITLE A—REGULATIONS RELATING TO THE SENATE AND ITS EMPLOYING OFFICES—S SERIES

CHAPTER III—REGULATIONS RELATING TO THE RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

PART S501—GENERAL PROVISIONS

Sec.

S501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S501.101 Purpose and scope.
S501.102 Definitions.
S501.103 Coverage.
S501.104 Administrative authority.
S501.105 Effect of Interpretations of the Labor Department.
S501.106 Application of the Portal-to-Portal Act of 1947.

§ S501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the parts of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding parts of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
Part 531— Wage payments under the Fair Labor Standards Act of 1938.	Part S531
Part 541—Defining and delimiting the terms ''bona fide executive,'' ''administrative,'' and ''professional'' employees.	Part S541
Part 547—Requirements of a ''Bona fide thrift or savings plan''.	Part S547
Part 553—Application of the FLSA to employees of public agencies.	Part S553
Part 570—Child labor	Part S570

SUBPART A—MATTERS OF GENERAL APPLICABILITY.

§ S501.101 Purpose and scope.

(a) Section 203 of the Congressional Accountability Act (CAA) provides that the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§ 206(a)(1) & (d), 207, 212(c)) shall apply to covered employees of the legislative branch of the Federal government. Section 301 of the CAA creates the Office of Compliance as an independent office in the legislative branch for enforcing the rights and protections of the FLSA, as applied by the CAA.

(b) The FLSA as applied by the CAA provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included also in the FLSA are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the FLSA exempts specified employees or groups of employees from the application of certain of its provisions.

(c) This chapter contains the substantive regulations with respect to the FLSA that the Board of Directors of the Office of Compliance has adopted pursuant to Sections 203(c) and 304 of the CAA, which require that the Board promulgate regulations that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of §203 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.''

(d) These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 203(c) and 304 of the CAA, which directs the Board to promulgate regulations implementing section 203 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection a [of section 203 of the CAA] except insofar as the Board may determine, for good cause shown . . .that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 203 of the CAA requires a regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 203 of the CAA].''

(e) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

§ S501.102 Definitions.

For purposes of this chapter:

(a) *CAA* means the Congressional Accountability Act of 1995 (P.L. 104–1, 109 Stat. 3, 2 U.S.C. §§1301–1438).

(b) *FLSA* or *Act* means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §201 et seq.), as applied by section 203 of the CAA to covered employees and employing offices.

(c) *Covered employee* means any employee of the Senate, including an applicant for employment and a former employee, but shall not include an intern.

(d) *Employee of the Senate* includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment.

(e) *Employing office* and *employer* mean (1) the personal office of a Senator; (2) a committee of the Senate or a joint committee; or (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the Senate.

(f) *Board* means the Board of Directors of the Office of Compliance.

(g) *Office* means the Office of Compliance.

(h) *Intern* is an individual who (a) is performing services in an employing office as part of a demonstrated educational plan, and (b) is appointed on a temporary basis for a period not to exceed 12 months; provided that if an intern is appointed for a period shorter than 12 months, the intern may be reappointed for additional periods as long as the total length of the internship does not exceed 12 months; *provided further* that an intern for purposes of section 203(a)(2) of the CAA also includes an individual who is a senior citizen appointed under S. Res. 219 (May 5, 1978, as amended by S. Res. 96, April 9, 1991), but does not include volunteers, fellows or pages.

§S501.103 Coverage.

The coverage of Section 203 of the CAA extends to any covered employee of an employing office without regard to whether the covered employee is engaged in commerce or the production of goods for interstate commerce and without regard to size, number of employees, amount of business transacted, or other measure.

§ S501.104 Administrative authority.

(a) The Office of Compliance is authorized to administer the provisions of Section 203 of the Act with respect to any covered employee or covered employer.

(b) The Board is authorized to promulgate substantive regulations in accordance with the provisions of Sections 203(c) and 304 of the CAA.

§ S501.105 Effect of Interpretations of the Department of Labor.

(a) In administering the FLSA, the Wage and Hour Division of the Department of Labor has issued not only substantive regulations but also interpretative bulletins. Substantive regulations represent an exercise of statutorily-delegated lawmaking authority from the legislative branch to an administrative agency. Generally, they are proposed in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. §553. Once promulgated, such regulations are considered to have the force and effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977). See also 29 C.F.R. §790.17(b) (1994). Unlike substantive regulations, interpretative statements, including bulletins and other releases of the Wage and Hour Division, are not issued pursuant to the provisions of the APA and may not have the force and effect of law. Rather, they may only constitute official interpretations of the Department of Labor with respect to the meaning and application of the minimum wage, maximum hour, and overtime pay requirements of the FLSA. See 29 C.F.R. §790.17(c) (citing Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st Sess., at p. 27 (1941)). The purpose of such statements is to make available in one place the interpretations of the FLSA which will guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. The Supreme Court has observed: ''[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

(b) Section 203(c) of the CAA provides that the substantive regulations implementing Section 203 of the CAA shall be ''the same as substantive regulations promulgated by the Secretary of Labor'' except where the Board finds, for good cause shown, that a modification would more effectively implement the rights and protections established by the FLSA. Thus, the CAA by its terms does not mandate that the Board adopt the interpretative statements of the Department of Labor or its Wage and Hour Division. The Board is thus not adopting such statements as part of its substantive regulations.

§ S501.106 Application of the Portal-to-Portal Act of 1947.

(a) Consistent with Section 225 of the CAA, the Portal to Portal Act (PPA), 29 U.S.C. §§216 and 251 et seq., is applicable in defining and delimiting the rights and protections of the FLSA that are prescribed by the CAA. Section 10 of the PPA, 29 U.S.C. §259, provides in pertinent part:

''[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval or interpretation of [the Administrator of the Wage and Hour Division of the Department of Labor] . . . or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.''

(b) In defending any action or proceeding based on any act or omission arising out of section 203 of the CAA, an employing office may satisfy the standards set forth in subsection (a) by pleading and proving good faith reliance upon any written administrative regulation, order, ruling, approval or interpretation, of the Administrator of the Wage and Hour Division of the Department of Labor: *Provided*, that such regulation, order, ruling approval or interpretation had not been superseded at the time of reliance by any regulation, order, decision, or ruling of the Board or the courts.

PART S531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

Subpart A—Preliminary Matters

Sec.

S531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

S531.1 Definitions.

S531.2 Purpose and scope.

Subpart B—Determinations of ''Reasonable Cost;'' Effects of Collective Bargaining Agreements

S531.3 General determinations of 'reasonable cost'.

S531.6 Effects of collective bargaining agreements.

SUBPART A—PRELIMINARY MATTERS.

§ S531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
531.1 Definitions	S531.1
531.2 Purpose and scope	S531.2
531.3 General determinations of ''reasonable cost''	S531.3
531.6 Effects of collective bargaining agreements	S531.6

§ S531.1 Definitions.

(a) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) *Act* means the Fair Labor Standards Act of 1938, as amended.

§ S531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term 'wage' to include the 'reasonable cost', as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the 'fair value.' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of 'fair value.' Whenever so determined and when applicable and pertinent, the 'fair value' of the facilities involved shall be includable as part of 'wages' instead of the actual measure of the costs of those facilities. The section provides, however, that the cost of board, lodging, or other facilities shall not be included as part of 'wages' if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This part 531 contains any determinations made as to the ''reasonable cost'' and ''fair value'' of board, lodging, or other facilities having general application.

SUBPART B—DETERMINATIONS OF ''REASONABLE COST'' AND ''FAIR VALUE''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

§ S531.3 General determinations of ''reasonable cost.''

(a) The term *reasonable cost* as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) The reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term *good accounting practices* does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term *depreciation* includes obsolescence.

(d)(1) The cost of furnishing ''facilities'' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

§ S531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be ''bona fide'' when pursuant to the provisions of section 7(b)(1) or 7(b)(2) of the FLSA it is made with the certified representative of the employees under the provisions of the CAA.

PART S541—DEFINING AND DELIMITING THE TERMS ''BONA FIDE EXECUTIVE,'' ''ADMINISTRATIVE,'' OR ''PROFESSIONAL'' CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN SECONDARY SCHOOL).

Subpart A—General Regulations

Sec.

S541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

S541.01 Application of the exemptions of section 13(a)(1) of the FLSA.

S541.1 Executive.

S541.2 Administrative.

S541.3 Professional.

S541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.

S541.5d Special provisions applicable to employees of public agencies.

SUBPART A—GENERAL REGULATIONS

§ S541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
541.1 Executive	S541.1
541.2 Administrative	S541.2
541.3 Professional	S541.3
541.5b Equal pay provisions of section 6(d) of the FLSA apply to executive, administrative, and professional employees.	S541.5b
541.5d Special provisions applicable to employees of public agencies.	S541.5d

§ S541.01 Application of the exemptions of section 13(a)(1) of the FLSA.

(a) Section 13(a)(1) of the FLSA, which provides certain exemptions for employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in a secondary school), applies to covered employees by virtue of Section 225(f)(1) of the CAA.

(b) The substantive regulations set forth in this part are promulgated under the authority of sections 203(c) and 304 of the CAA, which require that such regulations be the same as the substantive regulations promulgated by the Secretary of Labor except where the Board determines for good cause shown that modifications would be more effective for the implementation of the rights and protections under § 203.

§S541.1 Executive.

The term *employee employed in a bona fide executive* * * * capacity in section 13(a) (1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the management of an employing office in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

§ S541.2 Administrative.

The term *employee employed in a bona fide* * * * *administrative* * * * *capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a

department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists the head of an employing office, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment or institution by which employed: *Provided,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§ S541.3 Professional.

The term *employee employed in a bona fide * * * professional capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system, educational establishment or institution by which employed, or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities: *Provided,* That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further,* That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 1/2 times the minimum wage provided by section 6 of the FLSA as applied by the CAA.

§ S541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.

The FLSA, as amended and as applied by the CAA, includes within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) under section 13(a)(1) of the FLSA. Thus, for example, where an exempt administrative employee and another employee of the employing office are performing substantially ''equal work,'' the sex discrimination prohibitions of section 6(d) are applicable with respect to any wage differential between those two employees.

§ S541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirement of being paid on a salary basis shall not be disqualified from exemption under Sec. S541.1, S541.2, or S541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied; (2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid 'on a salary basis' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

PART S547—REQUIREMENTS OF A ''BONA FIDE THRIFT OR SAVINGS PLAN''

Sec.
S547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S547.0 Scope and effect of part.
S547.1 Essential requirements of qualifications.
S547.2 Disqualifying provisions.

§ S547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
547.0 Scope and effect of part.	S547.0
547.1 Essential requirements of qualifications.	S547.1
547.2 Disqualifying provisions.	S547.2

§ S547.0 Scope and effect of part.

(a) The regulations in this part set forth the requirements of a ''bona fide thrift or savings plan'' under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (FLSA), as applied by the CAA. In determining the total remuneration for employment which section 7(e) of the FLSA requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations.

§ S547.1 Essential requirements for qualifications.

(a) A ''bona fide thrift or savings plan'' for the purpose of section 7(e)(3)(b) of the FLSA as applied by the CAA is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § S547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing,

adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees: *Provided, however,* That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: *Provided,* That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

§ S547.2 Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

PART S553—OVERTIME COMPENSATION: PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION; OVERTIME AND COMPENSATORY TIME-OFF FOR EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE HOUSE

Introduction

Sec.
S553.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S553.1 Definitions.
S553.2 Purpose and scope.
Subpart C—Partial Exemption for Employees Engaged in Law Enforcement and Fire Protection
S553.201 Statutory provisions: section 7(k).
S553.202 Limitations.
S553.211 Law enforcement activities.
S553.212 Twenty percent limitation on nonexempt work.
S553.213 Public agency employees engaged in both fire protection and law enforcement activities.
S553.214 Trainees.
S553.215 Ambulance and rescue service employees.
S553.216 Other exemptions.
S553.220 ''Tour of duty'' defined.
S553.221 Compensable hours of work.
S553.222 Sleep time.
S553.223 Meal time.
S553.224 ''Work period'' defined.
S553.225 Early relief.
S553.226 Training time.
S553.227 Outside employment.
S553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).
S553.231 Compensatory time off.
S553.232 Overtime pay requirements.
S553.233 ''Regular rate'' defined.
Subpart D—Compensatory Time-off for Overtime Earned by Employees Whose Work Schedule Directly Depends upon the Schedule of the House
S553.301 Definition of ''directly depends.''
S553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the House.
S553.303 Using compensatory time off.
S553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service.

Introduction

§ S553.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
553.1 Definitions	S553.1
553.2 Purpose and scope	S553.2
553.201 Statutory provisions: section 7(k).	S553.201
553.202 Limitations	S553.202
553.211 Law enforcement activities.	S553.211
553.212 Twenty percent limitation on nonexempt work	S553.212
553.213 Public agency employees engaged in both fire protection and law enforcement activities.	S553.213
553.214 Trainees	S553.214
553.215 Ambulance and rescue service employees	S553.215
553.216 Other exemptions	S553.216
553.220 ''Tour of duty'' defined	S553.220
553.221 Compensable hours of work	S553.221
553.222 Sleep time	S553.222
553.223 Meal time	S553.223
553.224 ''Work period'' defined	S553.224
553.225 Early relief	S553.225
553.226 Training time	S553.226
553.227 Outside employment	S553.227
553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).	S553.230
553.231 Compensatory time off	S553.231
553.232 Overtime pay requirements	S553.232
553.233 ''Regular rate'' defined	S553.233

Introduction

§ S553.1 Definitions

(a) Act or FLSA means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201-219), as applied by the CAA.

(b) 1985 Amendments means the Fair Labor Standards Amendments of 1985 (Pub. L. 99-150).

(c) Public agency means an employing office as the term is defined in §—501.102 of this chapter, including the Capitol Police.

(d) Section 7(k) means the provisions of §7(k) of the FLSA as applied to covered employees and employing offices by §203 of the CAA.

§ S553.2 Purpose and scope

The purpose of part S553 is to adopt with appropriate modifications the regulations of the Secretary of Labor to carry out those provisions of the FLSA relating to public agency employees as they are applied to covered employees and employing offices of the CAA. In particular, these regulations apply section 7(k) as it relates to fire protection and law enforcement employees of public agencies.

SUBPART C—PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION

§ S553.201 Statutory provisions: section 7(k).

Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in § S553.230 of this part, the 216-hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

§S553.202 Limitations.

The application of §7(k), by its terms, is limited to public agencies, and does not apply to any private organization engaged in furnishing fire protection or law enforcement services. This is so even if the services are provided under contract with a public agency.

Exemption Requirements

§ S553.211 Law enforcement activities.

(a) As used in §7(k) of the Act, the term ''any employee * * * in law enforcement activities'' refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by law to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as ''trainee,'' ''probationary,'' or ''permanent,'' and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See Sec. S553.215.

(c) Typically, employees engaged in law enforcement activities include police who are regularly employed and paid as such. Other agency employees with duties not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, any law enforcement employee within the legislative branch concerned with keeping public

peace and order and protecting life and property.

(d) Employees who do not meet each of the three tests described above are not engaged in ''law enforcement activities'' as that term is used in sections 7(k). Employees who normally would not meet each of these tests include:

(1) Building inspectors (other than those defined in Sec. S553.213(a)),

(2) Health inspectors,

(3) Sanitarians,

(4) Civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points,

(5) Civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices,

(6) Wage and hour compliance officers,

(7) Equal employment opportunity compliance officers, and

(8) Building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term ''any employee in law enforcement activities'' also includes, by express reference, ''security personnel in correctional institutions.'' Typically, such facilities may include precinct house lockups. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution. These employees are considered to be engaged in law enforcement activities regardless of their rank or of their status as ''trainee,'' ''probationary,'' or ''permanent,'' and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term ''employee in law enforcement activities'' are the so-called ''civilian'' employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§S553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in fire protection or law enforcement activities as described in Sec. S553.210 and S553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat the §7(k) exemption unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. The performance of such work does not affect the application of the §7(k) exemption with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in paragraph (a) of this section.

§ S553.213 Public agency employees engaged in both fire protection and law enforcement activities.

(a) Some public agencies have employees (often called 'public safety officers') who engage in both fire protection and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat the section 7(k) exemption, provided that each of the activities performed meets the appropriate tests set forth in Sec. S553.210 and S553.211. This is so regardless of how the employee's time is divided between the two activities. However, all time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in Sec.S553.212.

(b) As specified in Sec. S553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

§ S553.214 Trainees.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under section 7(k) only when the employee meets all the applicable tests described in Sec. S553.210 or Sec. S553.211 (except for the power of arrest for law enforcement personnel), as the case may be. If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

§ S553.215 Ambulance and rescue service employees.

Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by §7(k) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in Sec. S553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

§ S553.216 Other exemptions.

Although the 1974 Amendments to the FLSA as applied by the CAA provide special exemptions for employees of public agencies engaged in fire protection and law enforcement activities, such workers may also be subject to other exemptions in the Act, and public agencies may claim such other applicable exemptions in lieu of §7(k). For example, section 13(a)(1) as applied by the CAA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in Part S541. The section 13(a)(1) exemption can be claimed for any fire protection or law enforcement employee who meets all of the tests specified in part S541 relating to duties, responsibilities, and salary. Thus, high ranking police officials who are engaged in law enforcement activities, may also, depending on the facts, qualify for the section 13(a)(1) exemption as 'executive' employees. Similarly, certain criminal investigative agents may qualify as ''administrative'' employees under section 13(a)(1).

Tour of Duty and Compensable Hours of Work Rules

§ S553.220 ''Tour of duty'' defined.

(a) The term ''tour of duty'' is a unique concept applicable only to employees for whom the section 7(k) exemption is claimed. This term, as used in section 7(k), means the period of time during which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include 'shifts' assigned to employees often days in advance of the performance of the work. Scheduled periods also include time spent in work outside the ''shift'' which the public agency employer assigns. For example, a police officer may be assigned to crowd control during a parade or other special event outside of his or her shift.

(b) Unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance.

(c) The tour of duty does not include time spent working for a separate and independent employer in certain types of special details as provided in Sec. S553.227.

§ S553.221 Compensable hours of work.

(a) The rules under the FLSA as applied by the CAA on compensable hours of work are applicable to employees for whom the section 7(k) exemption is claimed. Special rules for sleep time (Sec. S553.222) apply to both law enforcement and firefighting employees for whom the section 7(k) exemption is claimed. Also, special rules for meal time apply in the case of firefighters (Sec. S553.223).

(b) Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses.

(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal

pursuits also constitutes compensable hours of work. For example, where a police station must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits.

(d) An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

(e) Normal home to work travel is not compensable, even where the employee is expected to report to work at a location away from the location of the employer's premises.

(f) A police officer, who has completed his or her tour of duty and who is given a patrol car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls is compensable.

§ S553.222 Sleep time.

(a) Where a public agency elects to pay overtime compensation to firefighters and/or law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude sleep time from hours worked if all the conditions for the exclusion of such time are met.

(b) Where the employer has elected to use the section 7(k) exemption, sleep time cannot be excluded from the compensable hours of work where

(1) The employee is on a tour of duty of less than 24 hours, and

(2) Where the employee is on a tour of duty of exactly 24 hours.

(c) Sleep time can be excluded from compensable hours of work, however, in the case of police officers or firefighters who are on a tour of duty of more than 24 hours, but only if there is an expressed or implied agreement between the employer and the employees to exclude such time. In the absence of such an agreement, the sleep time is compensable. In no event shall the time excluded as sleep time exceed 8 hours in a 24-hour period. If the sleep time is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes means at least 5 hours), the entire time must be counted as hours of work.

§S553.223 Meal time.

(a) If a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude meal time from hours worked if all the statutory tests for the exclusion of such time are met.

(b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other statutory tests for the exclusion of such time are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., stakeouts'), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

(c) With respect to firefighters employed under section 7(k), who are confined to a duty station, the legislative history of the Act indicates Congressional intent to mandate a departure from the usual FLSA 'hours of work' rules and adoption of an overtime standard keyed to the unique concept of 'tour of duty' under which firefighters are employed. Where the public agency elects to use the section 7(k) exemption for firefighters, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, and (2) where the firefighter is on a tour of duty of exactly 24 hours.

(d) In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the statutory tests for exclusion of such hours are met.

§ S553.224 ''Work period'' defined.

(a) As used in section 7(k), the term 'work period' refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

(b) An employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees.

§ S553.225 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift prior to the scheduled starting time. Such early relief time may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work for employees employed under section 7(k) where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer, the time involved must be added to the employee's tour of duty and treated as compensable hours of work.

§ S553.226 Training time.

(a) The general rules for determining the compensability of training time under the FLSA apply to employees engaged in law enforcement or fire protection activities.

(b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees in required training is considered to be noncompensable:

(1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government, does not constitute compensable hours of work.

(3) Time spent in the training described in paragraphs (b) (1) or (2) of this section is not compensable, even if all or part of the costs of the training is borne by the employer.

(c) Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

§ S553.227 Outside employment.

(a) Section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.

(b) Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

(c) Whether two employers are, in fact, separate and independent can only be determined on a case-by-case basis.

(d) The primary employer may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may maintain a roster of officers who wish to perform such work. The department may also select the officers for special details from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses. The department may require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special details through the agency's payroll system. Finally, the department may require that the officers observe their normal standards of conduct during such details and take disciplinary action against those who fail to do so.

(e) Section 7(p)(1) applies to special details even where a State law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. For example, a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation.

(f) The principles in paragraphs (d) and (e) of this section with respect to special details of public agency fire protection and law enforcement employees under section 7(p)(1) are exceptions to the usual rules on joint employment set forth in part 791 of this title.

(g) Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. Thus, assignments of police officers outside of their normal work hours to perform crowd control at a parade, where the assignments are not solely at the option of the officers, would not qualify as special details subject to this exception. This would be true even if the parade organizers reimburse the public agency for providing such services.

(h) Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees.

Overtime Compensation Rules

§ S553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

§ S553.231 Compensatory time off.

(a) Law enforcement and fire protection employees who are subject to the section 7(k) exemption may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum for their work period as set forth in Sec. S553.230.

(b) Section 7(k) permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a firefighter's work period is 28 consecutive days, and he or she works 80 hours in each of the first two weeks, but only 52 hours in the third week, and does not work in the fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation or compensatory time off would be due for 54 hours (160 minus 106 hours) in the first 14 day work period.

§ S553.232 Overtime pay requirements.

If a public agency pays employees subject to section 7(k) for overtime hours worked in cash wages rather than compensatory time off, such wages must be paid at one and one-half times the employees' regular rates of pay.

§ S553.233 'Regular rate' defined.

The statutory rules for computing an employee's 'regular rate', for purposes of the Act's overtime pay requirements are applicable to employees or whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages.

SUBPART D—COMPENSATORY TIME-OFF FOR OVERTIME EARNED BY EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE SENATE

§ S553.301 Definition of ''directly depends.''

For the purposes of this Part, a covered employee's work schedule ''directly depends'' on the schedule of the Senate only if the eligible employee performs work that directly supports the conduct of legislative or other business in the chamber and works hours that regularly change in response to the schedule of the House and the Senate.

§ S553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the Senate.

No employing office shall be deemed to have violated section 203(a)(1) of the CAA, which applies the protections of section 7(a) of the Fair Labor Standards Act (''FLSA'') to covered employees and employing office, by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under section 7(a) of the FLSA where the employee's work schedule directly depends on the schedule of the Senate within the meaning of § S553.301, and: (a) the employee is compensated at the rate of time-and-a-half in pay for all hours in excess of 40 and up to 60 hours in a workweek, and (b) the employee is compensated at the rate of time-and-a-half in either pay or in time off for all hours in excess of 60 hours in a workweek.

§ S553.303 Using compensatory time off.

An employee who has accrued compensatory time off under § S553.302, upon his or her request, shall be permitted by the employing office to use such time within a reasonable period after making the request, unless the employing office makes a bona fide determination that the needs of the operations of the office do not allow the taking of compensatory time off at the time of the request. An employee may renew the request at a subsequent time. An employing office may also, upon reasonable notice, require an employee to use accrued compensatory time-off.

§ S553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service.

An employee who has accrued compensatory time authorized by this regulation shall, upon termination of employment, be paid for the unused compensatory time at the rate earned by the employee at the time the employee receives such payment.

PART S570—CHILD LABOR REGULATIONS

Subpart A—General

Sec.
S570.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S570.1 Definitions.
S570.2 Minimum age standards.

Subpart C—Employment of Minors Between 14 and 16 Years of Age (Child Labor Reg. 3)

S570.31 Determination.
S570.32 Effect of this subpart.
S570.33 Occupations.
S570.35 Periods and conditions of employment.

SUBPART A—GENERAL

§ S570.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance Regulations under Section 202 of the CAA:

Secretary of Labor Regulations	OC Regulations
570.1 Definitions.	S570.1
570.2 Minimum age standards.	S570.2
570.31 Determinations.	S570.31
570.32 Effect of this subpart.	S570.32
570.33 Occupations.	S570.33
570.35 Periods and conditions of employment.	S570.35

§ S570.1 Definitions.

As used in this part:

(a) *Act* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201-219).

(b) *Oppressive child labor* means employment of a minor in an occupation for which he does not meet the minimum age standards of the Act, as set forth in Sec. S570.2 of this subpart.

(c) *Oppressive child labor age* means an age below the minimum age established under the Act for the occupation in which a minor is employed or in which his employment is contemplated.

(d) [Reserved]

(e) [Reserved]

(f) *Secretary* or *Secretary of Labor* means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(g) *Wage and Hour Division* means the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

(h) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative.

§ S570.2 Minimum age standards.

(a) All occupations except in agriculture. (1) The Act, in section 3(1), sets a general 16-year minimum age which applies to all employment subject to its child labor provisions in any occupation other than in agriculture, with the following exceptions:

(i) The Act authorizes the Secretary of Labor to provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor, if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being (see subpart C of this part); and

(ii) The Act sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being.

(2) The Act exempts from its minimum age requirements the employment by a parent of

his own child, or by a person standing in place of a parent of a child in his custody, except in occupations to which the 18-year age minimum applies and in manufacturing and mining occupations.

SUBPART B [RESERVED]

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

§ S570.31 Determination.

The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions hereafter specified does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child labor.

§ S570.32 Effect of this subpart.

In all occupations covered by this subpart the employment (including suffering or permitting to work) by an employer of minor employees between 14 and 16 years of age for the periods and under the conditions specified in § S570.35 shall not be deemed to be oppressive child labor within the meaning of the Fair Labor Standards Act of 1938.

§ S570.33 Occupations.

This subpart shall apply to all occupations other than the following:

(a) Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;

(b) Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(c) The operation of motor vehicles or service as helpers on such vehicles;

(d) Public messenger service;

(e) Occupations which the Secretary of Labor may, pursuant to section 3(1) of the Fair Labor Standards Act and Reorganization Plan No. 2, issued pursuant to the Reorganization Act of 1945, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being;

(f) Occupations in connection with:

(1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means;

(2) Warehousing and storage;

(3) Communications and public utilities;

(4) Construction (including demolition and repair); except such office (including ticket office) work, or sales work, in connection with paragraphs (f)(1), (2), (3), and (4) of this section, as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

§ S570.35 Periods and conditions of employment.

(a) Except as provided in paragraph (b) of this section, employment in any of the occupations to which this subpart is applicable shall be confined to the following periods:

(1) Outside school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

OFFICE OF COMPLIANCE—THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

NOTICE OF ISSUANCE OF FINAL REGULATIONS

On January 22, 1996, the Board of Directors of the Office of Compliance adopted and submitted for publication in the Congressional Record final regulations implementing section 203 of the Congressional Accountability Act of 1995 (CAA), which apply certain rights and protections of the Fair Labor Standards Act of 1938. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate agreed to resolutions approving the final regulations. Specifically, the Senate agreed to S. Res. 242, to provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate; the House agreed to H. Res. 400, to provide for the approval of final regulations that are applicable to the House and the employees of the House; and the House and the Senate agreed to S. Con. Res. 51, to provide for approval of final regulations that are applicable to employing offices and employees other than those offices and employees of the House and the Senate. Accordingly, pursuant to section 304(d) of the CAA, the Board submits these regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for issuance by publication in the Congressional Record.

Pursuant to paragraph (3) of section 304(d) of the CAA, the Board finds good cause for the regulations to become effective on April 16, 1996, rather than 60 days after issuance. Were the regulations not effective immediately upon the expiration of the interim regulations on April 15, 1996, covered employees, employing offices and the Office of Compliance would be forced to operate under the same kind of regulatory uncertainty that the Board sought to avoid by adopting interim regulations effective as of January 23, 1996, which was the effective date of the relevant provisions of the CAA.

Signed at Washington, D.C. on this 19th day of April, 1996.

GLEN D. NAGER,
Chair of the Board,
Office of Compliance.

Accordingly, the Board of Directors of the Office of Compliance hereby issues the following final regulations:

[Final Regulations]

SUBTITLE C—REGULATIONS RELATING TO THE EMPLOYING OFFICES OTHER THAN THOSE OF THE SENATE AND THE HOUSE OF REPRESENTATIVES—C SERIES

CHAPTER III—REGULATIONS RELATING TO THE RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

PART C501—GENERAL PROVISIONS

Sec.
C501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
C501.101 Purpose and scope.
C501.102 Definitions.
C501.103 Coverage.
C501.104 Administrative authority.
C501.105 Effect of Interpretations of the Labor Department.
C501.106 Application of the Portal-to-Portal Act of 1947.

§ C501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the parts of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding parts of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
Part 531—Wage payments under the Fair Labor Standards Act of 1938.	Part C531
Part 541—Defining and delimiting the terms ''bona fide executive,'' ''administrative,'' and ''professional'' employees.	Part C541
Part 547—Requirements of a ''Bona fide thrift or savings plan''.	Part C547
Part C553—Application of the FLSA to employees of public agencies.	Part C553
Part 570—Child labor	Part C570

SUBPART A—MATTERS OF GENERAL APPLICABILITY.

§ C501.101 Purpose and scope.

(a) Section 203 of the Congressional Accountability Act (CAA) provides that the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§ 206(a)(1) & (d), 207, 212(c)) shall apply to covered employees of the legislative branch of the Federal government. Section 301 of the CAA creates the Office of Compliance as an independent office in the legislative branch for enforcing the rights and protections of the FLSA, as applied by the CAA.

(b) The FLSA as applied by the CAA provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included also in the FLSA are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the FLSA exempts specified employees or groups of employees from the application of certain of its provisions.

(c) This chapter contains the substantive regulations with respect to the FLSA that the Board of Directors of the Office of Compliance has adopted pursuant to Sections 203(c) and 304 of the CAA, which requires that the Board promulgate regulations that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of § 203 of the CAA] except insofar as the Board may determine, for good cause shown * * * that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.''

(d) These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 203(c) and 304 of the CAA, which directs the Board to promulgate regulations implementing section 203 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection a [of section 203 of the CAA] except insofar as the Board may determine, for good cause shown * * * that a modification of such regulations would be more effective for the implementation of the rights and protections under this section.'' The regulations issued by the Board herein are on all matters for which section 203 of the CAA requires a regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 203 of the CAA].''

(e) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes

are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

§ C501.102 Definitions.

For purposes of this chapter:

(a) *CAA* means the Congressional Accountability Act of 1995 (P.L. 104–1, 109 Stat. 3, 2 U.S.C. §§ 1301–1438).

(b) *FLSA* or *Act* means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq.), as applied by section 203 of the CAA to covered employees and employing offices.

(c) *Covered employee* means any employee, including an applicant for employment and a former employee, of the (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment, but shall not include an intern.

(d) (1) *Employee of the Office of the Architect of the Capitol* includes any employee of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants;

(2) *Employee of the Capitol Police* includes any member or officer of the Capitol Police.

(e) *Employing office* and *employer* mean (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment.

(f) Board means the Board of Directors of the Office of Compliance.

(g) *Office* means the Office of Compliance.

(h) *Intern* is an individual who (a) is performing services in an employing office as part of a demonstrated educational plan, and (b) is appointed on a temporary basis for a period not to exceed 12 months; *provided* that if an intern is appointed for a period shorter than 12 months, the intern may be reappointed for additional periods as long as the total length of the internship does not exceed 12 months; *provided further* that the defintion of *intern* does not include volunteers, fellows or pages.

§ C501.103 Coverage.

The coverage of Section 203 of the CAA extends to any covered employee of an employing office without regard to whether the covered employee is engaged in commerce or the production of goods for interstate commerce and without regard to size, number of employees, amount of business transacted, or other measure.

§ C501.104 Administrative authority.

(a) The Office of Compliance is authorized to administer the provisions of Section 203 of the Act with respect to any covered employee or covered employer.

(b) The Board is authorized to promulgate substantive regulations in accordance with the provisions of Sections 203(c) and 304 of the CAA.

§ C501.105 Effect of Interpretations of the Department of Labor.

(a) In administering the FLSA, the Wage and Hour Division of the Department of Labor has issued not only substantive regulations but also interpretative bulletins. Substantive regulations represent an exercise of statutorily-delegated lawmaking authority from the legislative branch to an administrative agency. Generally, they are proposed in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Once promulgated, such regulations are considered to have the force and effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977). See also 29 C.F.R. § 790.17(b) (1994). Unlike substantive regulations, interpretative statements, including bulletins and other releases of the Wage and Hour Division, are not issued pursuant to the provisions of the APA and may not have the force and effect of law. Rather, they may only constitute official interpretations of the Department of Labor with respect to the meaning and application of the minimum wage, maximum hour, and overtime pay requirements of the FLSA. See 29 C.F.R. § 790.17(c) (citing Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No.8, 77th Cong., 1st Sess., at p. 27 (1941)). The purpose of such statements is to make available in one place the interpretations of the FLSA which will guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. The Supreme Court has observed: ''[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore* v. *Swift*, 323 U.S. 134, 140 (1944).

(b) Section 203(c) of the CAA provides that the substantive regulations implementing Section 203 of the CAA shall be ''the same as substantive regulations promulgated by the Secretary of Labor'' except where the Board finds, for good cause shown, that a modification would more effectively implement the rights and protections established by the FLSA. Thus, the CAA by its terms does not mandate that the Board adopt the interpretative statements of the Department of Labor or its Wage and Hour Division. The Board is thus not adopting such statements as part of its substantive regulations.

§ C501.106 Application of the Portal-to-Portal Act of 1947.

(a) Consistent with Section 225 of the CAA, the Portal to Portal Act (PPA), 29 U.S.C. §§ 216 and 251 *et seq.*, is applicable in defining and delimiting the rights and protections of the FLSA that are prescribed by the CAA. Section 10 of the PPA, 29 U.S.C. § 259, provides in pertinent part:

* * * [N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval or interpretation of [the Administrator of the Wage and Hour Division of the Department of Labor] * * * or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) In defending any action or proceeding based on any act or omission arising out of section 203 of the CAA, an employing office may satisfy the standards set forth in subsection (a) by pleading and proving good faith reliance upon any written administrative regulation, order, ruling, approval or interpretation, of the Administrator of the Wage and Hour Division of the Department of Labor: *Provided*, that such regulation, order, ruling approval or interpretation had not been superseded at the time of reliance by any regulation, order, decision, or ruling of the Board or the courts.

PART C531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

Subpart A—Preliminary Matters

Sec.

C531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

C531.1 Definitions.

C531.2 Purpose and scope.

Subpart B—Determinations of ''Reasonable Cost and ''Fair Value''; Effects of Collective Bargaining Agreements

C531.3 General determinations of 'reasonable cost'.

C531.6 Effects of collective bargaining agreements.

SUBPART A—PRELIMINARY MATTERS.

§ C531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
531.1—Definitions.	C531.1
531.2—Purpose and scope.	C531.2
531.3—General determinations of ''reasonable cost''.	C531.3
531.6—Effects of collective bargaining agreements.	C531.6

§ C531.1 Definitions.

(a) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) *Act* means the Fair Labor Standards Act of 1938, as amended.

§ C531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term 'wage' to include the 'reasonable cost', as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the 'fair value.' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of 'fair value.' Whenever so determined and when applicable and pertinent, the 'fair value' of the facilities involved shall be includable as part of 'wages' instead of the actual measure of the costs of

those facilities. The section provides, however, that the cost of board, lodging, or other facilities shall not be included as part of 'wages' if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This part 531 contains any determinations made as to the 'reasonable cost' and 'fair value' of board, lodging, or other facilities having general application.

SUBPART B—DETERMINATIONS OF ''REASONABLE COST'' AND ''FAIR VALUE''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

§ C531.3 General determinations of 'reasonable cost.'

(a) The term *reasonable cost* as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) The reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer: *Provided,* That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term *good accounting practices* does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term *depreciation* includes obsolescence.

(d)(1) The cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

§ C531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be ''bona fide'' when pursuant to the provisions of section 7(b)(1) or 7(b)(2) of the FLSA it is made with the certified representative of the employees under the provisions of the CAA.

PART C541—DEFINING AND DELIMITING THE TERMS ''BONA FIDE EXECUTIVE,'' ''ADMINISTRATIVE,'' OR ''PROFESSIONAL'' CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN SECONDARY SCHOOL).

Subpart A—General Regulations.

Sec.

C541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

C541.01 Application of the exemptions of section 13(a)(1) of the FLSA.

C541.1 Executive.

C541.2 Administrative.

C541.3 Professional.

C541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.

C541.5d Special provisions applicable to employees of public agencies.

SUBPART A—GENERAL REGULATIONS.

§ C541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
541.1—Executive	C541.1
541.2—Administrative.	C541.2
541.3—Professional.	C541.3
541.5b—Equal pay provisions of section 6(d) of the FLSA apply to executive, administrative, and professional employees..	C541.5b
541.5d—Special provisions applicable to employees of public agencies.	C541.5d

§ C541.01 Application of the exemptions of section 13 (a)(1) of the FLSA.

(a) Section 13(a)(1) of the FLSA, which provides certain exemptions for employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in a secondary school), applies to covered employees by virtue of Section 225(f)(1) of the CAA.

(b) The substantive regulations set forth in this part are promulgated under the authority of sections 203(c) and 304 of the CAA, which require that such regulations be the same as the substantive regulations promulgated by the Secretary of Labor except where the Board determines for good cause shown that modifications would be more effective for the implementation of the rights and protections under § 203.

§ C541.1 Executive.

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the management of an employing office in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided,* That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and (f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities: *Provided,* That an employee who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section

§ C541.2 Administrative.

The term *employee employed in a bona fide * * * administrative * * * capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution,or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists the head of an employing office, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers of in the school system, educational establishment or institution by which employed: *Provided,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§ C541.3 Professional.

The term *employee employed in a bona fide * * * professional capacity* in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in school system, educational establishment or institution by which employed, or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities: *Provided,* That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further,* That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6½ times the minimum wage provided by section 6 of the FLSA as applied by the CAA.

§ C541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.

The FLSA, as amended and as applied by the CAA, includes within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) under section 13(a)(1) of the FLSA. Thus, for example, where an exempt administrative employee and another employee of the employing office are performing substantially ''equal work,'' the sex discrimination prohibitions of section 6(d) are applicable with respect to any wage differential between those two employees.

§ C541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirement of being paid on a salary basis shall not be disqualified from exemption under Sec. C541.1, C541.2, or C541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid ''on a salary basis'' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

PART C547—REQUIREMENTS OF A ''BONA FIDE THRIFT OR SAVINGS PLAN.''

Sec.
C547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
C547.0 Scope and effect of part.
C547.1 Essential requirements of qualifications.
C547.2 Disqualifying provisions.

§ C547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
547.0—Scope and effect of part.	C547.0
547.1—Essential requirements of qualifications.	C547.1
547.2—Disqualifying provisions.	C547.2

§ C547.0 Scope and effect of part.

(a) The regulations in this part set forth the requirements of a ''bona fide thrift or savings plan'' under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (FLSA), as applied by the CAA. In determining the total remuneration for employment which section 7(e) of the FLSA requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations.

§ C547.1 Essential requirements for qualifications.

(a) A ''bona fide thrift or savings plan'' for the purpose of section 7(e)(3)(b) of the FLSA as applied by the CAA is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § 547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees: *Provided, however,* That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: *Provided,* That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

§ C547.2 Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

PART C553—OVERTIME COMPENSATION: PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION; OVERTIME AND COMPENSATORY TIME-OFF FOR EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE HOUSE

Introduction

Sec.
C553.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
C553.1 Definitions
C553.2 Purpose and scope

Subpart C—Partial Exemption for Employees Engaged in Law Enforcement and Fire Protection

C553.201 Statutory provisions: section 7(k).
C553.202 Limitations.
C553.211 Law enforcement activities.
C553.212 Twenty percent limitation on nonexempt work.
C553.213 Public agency employees engaged in both fire protection and law enforcement activities.
C553.214 Trainees.
C553.215 Ambulance and rescue service employees.
C553.216 Other exemptions.
C553.220 ''Tour of duty'' defined.
C553.221 Compensable hours of work.
C553.222 Sleep time.
C553.223 Meal time.
C553.224 ''Work period'' defined.
C553.225 Early relief.
C553.226 Training time.
C553.227 Outside employment.
C553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).
C553.231 Compensatory time off.
C553.232 Overtime pay requirements.
C553.233 ''Regular rate'' defined.

Subpart D—Compensatory Time-off for Overtime Earned by Employees Whose Work Schedule Directly Depends upon the Schedule of the House and the Senate

C553.301 Definition of ''directly depends.''
C553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the House.
C553.303 Using compensatory time off.
C553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service.

Introduction

§ C553.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under Section 203 of the CAA:

Secretary of Labor Regulations	OC Regulations
553.1 Definitions	C553.1
553.2 Purpose and scope	C553.2
553.201 Statutory provisions: section 7(k)	C553.201
553.202 Limitations.	C553.202
553.211 Law enforcement activities.	C553.211
553.212 Twenty percent limitation on nonexempt work.	C553.212
553.213 Public agency employees engaged in both fire protection and law enforcement activities..	C553.213
553.214 Trainees.	C553.214
553.215 Ambulance and rescue service employees.	C553.215
553.216 Other exemptions.	C553.216
553.220 ''Tour of duty'' defined.	C553.220
553.221 Compensable hours of work.	C553.221
553.222 Sleep time.	C553.222
553.223 Meal time.	C553.223
553.224 ''Work period'' defined.	C553.224
553.225 Early relief.	C553.225
553.226 Training time.	C553.226
553.227 Outside employment.	C553.227
553.230 Maximum hours standards for work periods of 7 to 28 days - section 7(k)..	C553.230
553.231 Compensatory time off.	C553.231
553.232 Overtime pay requirements.	C553.232
553.233 ''Regular rate'' defined.	C553.233

Introduction

§ C553.1 Definitions

(a) Act or FLSA means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201-219), as applied by the CAA.

(b) 1985 Amendments means the Fair Labor Standards Amendments of 1985 (Pub. L. 99-150).

(c) Public agency means an employing office as the term is defined in §—501.102 of this chapter, including the Capitol Police.

(d) Section 7(k) means the provisions of §7(k) of the FLSA as applied to covered employees and employing offices by §203 of the CAA.

§ C553.2 Purpose and scope

The purpose of part C553 is to adopt with appropriate modifications the regulations of the Secretary of Labor to carry out those provisions of the FLSA relating to public agency employees as they are applied to covered employees and employing offices of the CAA. In particular, these regulations apply section 7(k) as it relates to fire protection and law enforcement employees of public agencies.

SUBPART C—PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION

§ C553.201 Statutory provisions: section 7(k).

Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in §C553.230 of this part, the 216-hour standard has been replaced pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

§ C553.202 Limitations.

The application of §7(k), by its terms, is limited to public agencies, and does not apply to any private organization engaged in furnishing fire protection or law enforcement services. This is so even if the services are provided under contract with a public agency.

Exemption Requirements

§ C553.211 Law enforcement activities.

(a) As used in §7(k) of the Act, the term ''any employee . . . in law enforcement activities'' refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by law to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as ''trainee,'' ''probationary,'' or ''permanent,'' and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See Sec. C553.215.

(c) Typically, employees engaged in law enforcement activities include police who are regularly employed and paid as such. Other agency employees with duties not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, any law enforcement employee within the legislative branch concerned with keeping public peace and order and protecting life and property.

(d) Employees who do not meet each of the three tests described above are not engaged in ''law enforcement activities'' as that term is used in sections 7(k). Employees who normally would not meet each of these tests include:

(1) Building inspectors (other than those defined in Sec. C553.213(a)),

(2) Health inspectors,

(3) Sanitarians,

(4) civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points,

(5) Civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices,

(6) Wage and hour compliance officers,

(7) Equal employment opportunity compliance officers, and

(8) Building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term ''any employee in law enforcement activities'' also includes, by express reference, ''security personnel in correctional institutions''. Typically, such facilities may include precinct house lockups. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution. These employees are considered to be engaged in law enforcement activities regardless of their rank or of their status as ''trainee,'' ''probationary,'' or ''permanent,'' and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities

of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term ''employee in law enforcement activities'' are the so-called ''civilian'' employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ C553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in fire protection or law enforcement activities as described in Sec. C553.210 and C553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat the §7(k) exemption unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. The performance of such work does not affect the application of the §7(k) exemption with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in paragraph (a) of this section.

§ C553.213 Public agency employees engaged in both fire protection and law enforcement activities.

(a) Some public agencies have employees (often called ''public safety officers'') who engage in both fire protection and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat the section 7(k) exemption, provided that each of the activities performed meets the appropriate tests set forth in Sec. C553.210 and C553.211. This is so regardless of how the employee's time is divided between the two activities. However, all time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in Sec.C553.212.

(b) As specified in Sec.C553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

§ C553.214 Trainees.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under section 7(k) only when the employee meets all the applicable tests described in Sec. C553.210 or Sec. C553.211 (except for the power of arrest for law enforcement personnel), as the case may be. If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

§ C553.215 Ambulance and rescue service employees.

Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by §7(k) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in Sec. C553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

§ C553.216 Other exemptions.

Although the 1974 Amendments to the FLSA as applied by the CAA provide special exemptions for employees of public agencies engaged in fire protection and law enforcement activities, such workers may also be subject to other exemptions in the Act, and public agencies may claim such other applicable exemptions in lieu of §7(k). For example, section 13(a)(1) as applied by the CAA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in Part C541. The section 13(a)(1) exemption can be claimed for any fire protection or law enforcement employee who meets all of the tests specified in part C541 relating to duties, responsibilities, and salary. Thus, high ranking police officials who are engaged in law enforcement activities, may also, depending on the facts, qualify for the section 13(a)(1) exemption as ''executive'' employees. Similarly, certain criminal investigative agents may qualify as ''administrative'' employees under section 13(a)(1).

Tour of Duty and Compensable Hours of Work Rules

§ C553.220 ''Tour of duty'' defined.

(a) The term ''tour of duty'' is a unique concept applicable only to employees for whom the section 7(k) exemption is claimed. This term, as used in section 7(k), means the period of time during which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include 'shifts' assigned to employees often days in advance of the performance of the work. Scheduled periods also include time spent in work outside the ''shift'' which the public agency employer assigns. For example, a police officer may be assigned to crowd control during a parade or other special event outside of his or her shift.

(b) Unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance. (c) The tour of duty does not include time spent working for a separate and independent employer in certain types of special details as provided in Sec. C553.227.

§ C553.221 Compensable hours of work.

(a) The rules under the FLSA as applied by the CAA on compensable hours of work are applicable to employees for whom the section 7(k) exemption is claimed. Special rules for sleep time (Sec. C553.222) apply to both law enforcement and firefighting employees for whom the section 7(k) exemption is claimed. Also, special rules for meal time apply in the case of firefighters (Sec. C553.223).

(b) Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses.

(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, where a police station must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits.

(d) An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

(e) Normal home to work travel is not compensable, even where the employee is expected to report to work at a location away from the location of the employer's premises.

(f) A police officer, who has completed his or her tour of duty and who is given a patrol car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls is compensable.

§ C553.222 Sleep time.

(a) Where a public agency elects to pay overtime compensation to firefighters and/or law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude sleep time from hours

worked if all the conditions for the exclusion of such time are met.

(b) Where the employer has elected to use the section 7(k) exemption, sleep time cannot be excluded from the compensable hours of work where

(1) The employee is on a tour of duty of less than 24 hours, and

(2) Where the employee is on a tour of duty of exactly 24 hours.

(c) Sleep time can be excluded from compensable hours of work, however, in the case of police officers or firefighters who are on a tour of duty of more than 24 hours, but only if there is an expressed or implied agreement between the employer and the employees to exclude such time. In the absence of such an agreement, the sleep time is compensable. In no event shall the time excluded as sleep time exceed 8 hours in a 24-hour period. If the sleep time is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes means at least 5 hours), the entire time must be counted as hours of work.

§ C553.223 Meal time.

(a) If a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude meal time from hours worked if all the statutory tests for the exclusion of such time are met.

(b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other statutory tests for the exclusion of such time are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., stakeouts'), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

(c) With respect to firefighters employed under section 7(k), who are confined to a duty station, the legislative history of the Act indicates Congressional intent to mandate a departure from the usual FLSA 'hours of work' rules and adoption of an overtime standard keyed to the unique concept of 'tour of duty' under which firefighters are employed. Where the public agency elects to use the section 7(k) exemption for firefighters, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, and (2) where the firefighter is on a tour of duty of exactly 24 hours.

(d) In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the statutory tests for exclusion of such hours are met.

§ C553.224 ''Work period'' defined.

(a) As used in section 7(k), the term 'work period' refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

(b) An employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees.

§ C553.225 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift prior to the scheduled starting time. Such early relief time may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work for employees employed under section 7(k) where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer, the time involved must be added to the employee's tour of duty and treated as compensable hours of work.

§ C553.226 Training time.

(a) The general rules for determining the compensability of training time under the FLSA apply to employees engaged in law enforcement or fire protection activities.

(b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees in required training is considered to be noncompensable:

(1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government, does not constitute compensable hours of work.

(3) Time spent in the training described in paragraphs (b) (1) or (2) of this section is not compensable, even if all or part of the costs of the training is borne by the employer.

(c) Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

§ C553.227 Outside employment.

(a) Section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.

(b) Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

(c) Whether two employers are, in fact, separate and independent can only be determined on a case-by-case basis.

(d) The primary employer may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may maintain a roster of officers who wish to perform such work. The department may also select the officers for special details from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses. The department may require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special details through the agency's payroll system. Finally, the department may require that the officers observe their normal standards of conduct during such details and take disciplinary action against those who fail to do so.

(e) Section 7(p)(1) applies to special details even where a State law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. For example, a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation.

(f) The principles in paragraphs (d) and (e) of this section with respect to special details of public agency fire protection and law enforcement employees under section 7(p)(1) are exceptions to the usual rules on joint employment set forth in part 791 of this title.

(g) Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. Thus, assignments of police officers outside of their normal work hours to perform crowd control at a parade, where the assignments are not solely at the option of the officers, would not qualify as special details subject to this exception. This would be true even if the parade organizers reimburse the public agency for providing such services.

(h) Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees.

Overtime Compensation Rules

§ C553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k).

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

Maximum hours standards	Work period (days)	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

§ C553.231 Compensatory time off.

(a) Law enforcement and fire protection employees who are subject to the section 7(k) exemption may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum for their work period as set forth in Sec. C553.230.

(b) Section 7(k) permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a firefighter's work period is 28 consecutive days, and he or she works 80 hours in each of the first two weeks, but only 52 hours in the third week, and does not work in the fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation or compensatory time off would be due for 54 hours (160 minus 106 hours) in the first 14 day work period.

§ C553.232 Overtime pay requirements.

If a public agency pays employees subject to section 7(k) for overtime hours worked in cash wages rather than compensatory time off, such wages must be paid at one and one-half times the employees' regular rate of pay.

§ C553.233 'Regular rate' defined.

The statutory rules for computing an employees' 'regular rate', for purposes of the Act's overtime pay requirements are applicable to employees or whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages.

SUBPART D—COMPENSATORY TIME-OFF FOR OVERTIME EARNED BY EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE HOUSE AND THE SENATE

§ C553.301 Definition of ''directly depends''.

For the purposes of this Part, a covered employees' work schedule ''directly depends'' on the schedule of the House of Representatives and the Senate only if the eligible employee performs work that directly supports the conduct of legislative or other business in the chamber and works hours that regularly change in response to the schedule of the House and the Senate.

§ C553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the House and Senate.

No employing office shall be deemed to have violated section 203(a)(1) of the CAA, which applies the protections of section 7(a) of the Fair Labor Standards Act (''FLSA'') to covered employees and employing office, by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under section 7(a) of the FLSA where the employees' work schedule directly depends on the schedule of the House of Representatives or the Senate within the meaning of § C553.301, and: (a) the employee is compensated at the rate of time-and-a-half in pay for all hours in excess of 40 and up to 60 hours in a workweek, and (b) the employee is compensated at the rate of time-and-a-half in either pay or in time off for all hours in excess of 60 hours in a workweek.

§ C553.303 Using compensatory time off.

An employee who has accrued compensatory time off under § C553.302 upon his or her request, shall be permitted by the employing office to use such time within a reasonable period after making the request, unless the employing office makes a bona fide determination that the needs of the operations of the office do not allow the taking of compensatory time off at the time of the request. An employee may renew the request at a subsequent time. An employing office may also, upon reasonable notice, require an employee to use accrued compensatory time-off.

§ C553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service.

An employee who has accrued compensatory time authorized by this regulation shall, upon termination of employment, be paid for the unused compensatory time at the rate earned by the employee at the time the employee receives such payment.

PART C570—CHILD LABOR REGULATIONS

Subpart A—General

Sec.
C570.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
C570.1 Definitions.
C570.2 Minimum age standards.

Subpart C—Employment of Minors Between 14 and 16 Years of Age (Child Labor Reg. 3)

C570.31 Determination.
C570.32 Effect of this subpart.
C570.33 Occupations.
C570.35 Periods and conditions of employment.

Subpart E—Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well-Being

C570.50 General.
C570.51 Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1).
C570.52 Occupations of motor-vehicle driver and outside helper (Order 2).
C570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5).
C570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7).
C570.59 Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8).
C570.62 Occupations involved in the operation of bakery machines (Order 11).
C570.63 Occupations involved in the operation of paper-products machines (Order 12).
C570.65 Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14).
C570.66 Occupations involved in wrecking and demolition operations (Order 15).
C570.67 Occupations in roofing operations (Order 16).
C570.68 Occupations in excavation operations (Order 17).

SUBPART A—GENERAL

§ C570.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance Regulations under Section 202 of the CAA:

Secretary of Labor Regulations	OC Regulations
570.1—Definitions	C570.1
570.2—Minimum age standards	C570.2
570.31—Determinations	C570.31
570.32—Effect of this subpart	C570.32
570.33— Occupations	C570.33
570.35—Periods and conditions of employment	C570.35
570.50—General	C570.50
570.51—Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1).	C570.51
570.52—Occupations of motor-vehicle driver and outside helper (Order 2).	C570.52
570.55—Occupations involved in the operation of power-driven woodworking machines (Order 5).	C570.55
570.58—Occupations involved in the operation of power-driven hoisting apparatus (Order 7).	C570.58
570.59—Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8).	C570.59
570.62—Occupations involved in the operation of bakery machines (Order 11).	C570.62
570.63—Occupations involved in the operation of paper-products machines (Order 12).	C570.63
570.65—Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14).	C570.65
570.66—Occupations involved in wrecking and demolition operations (Order 15).	C570.66
570.67—Occupations in roofing operations (Order 16)	C570.67
570.68—Occupations in excavation operations (Order 17)	C570.68

§ C570.1 Definitions.

As used in this part:

(a) *Act* means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201–219).

(b) *Oppressive child labor* means employment of a minor in an occupation for which he does not meet the minimum age standards of the Act, as set forth in Sec. 570.2 of this subpart.

(c) *Oppressive child labor age* means an age below the minimum age established under the Act for the occupation in which a minor is employed or in which his employment is contemplated.

(d) [Reserved]

(e) [Reserved]

(f) *Secretary* or *Secretary of Labor* means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(g) *Wage and Hour Division* means the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

(h) *Administrator* means the Administrator of the Wage and Hour Division or his authorized representative.

§ C570.2 Minimum age standards.

(a) All occupations except in agriculture. (1) The Act, in section 3(l), sets a general 16-year minimum age which applies to all employment subject to its child labor provisions in any occupation other than in agriculture, with the following exceptions:

(i) The Act authorizes the Secretary of Labor to provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor, if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being (see subpart C of this part); and

(ii) The Act sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of

Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being.

(2) The Act exempts from its minimum age requirements the employment by a parent of his own child, or by a person standing in place of a parent of a child in his custody, except in occupations to which the 18-year age minimum applies and in manufacturing and mining occupations.

SUBPART B [RESERVED]

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

§ C570.31 Determination.

The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions hereafter specified does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child labor.

§ C570.32 Effect of this subpart.

In all occupations covered by this subpart the employment (including suffering or permitting to work) by an employer of minor employees between 14 and 16 years of age for the periods and under the conditions specified in § 570.35 shall not be deemed to be oppressive child labor within the meaning of the Fair Labor Standards Act of 1938.

§ C570.33 Occupations.

This subpart shall apply to all occupations other than the following:

(a) Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;

(b) Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(c) The operation of motor vehicles or service as helpers on such vehicles;

(d) Public messenger service;

(e) Occupations which the Secretary of Labor may, pursuant to section 3(1) of the Fair Labor Standards Act and Reorganization Plan No. 2, issued pursuant to the Reorganization Act of 1945, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being;

(f) Occupations in connection with:

(1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means;

(2) Warehousing and storage;

(3) Communications and public utilities;

(4) Construction (including demolition and repair); except such office (including ticket office) work, or sales work, in connection with paragraphs (f)(1), (2), (3), and (4) of this section, as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

§ C570.35 Periods and conditions of employment.

(a) Except as provided in paragraph (b) of this section, employment in any of the occupations to which this subpart is applicable shall be confined to the following periods:

(1) Outside school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

SUBPART D [RESERVED]

SUBPART E—OCCUPATIONS PARTICULARLY HAZARDOUS FOR THE EMPLOYMENT OF MINORS BETWEEN 16 AND 18 YEARS OF AGE OR DETRIMENTAL TO THEIR HEALTH OR WELL-BEING

§ C570.50 General.

(a) Higher standards. Nothing in this subpart shall authorize non-compliance with any Federal law or regulation establishing a higher standard. If more than one standard within this subpart applies to a single activity the higher standard shall be applicable.

(b) Apprentices. Some sections in this subpart contain an exemption for the employment of apprentices. Such an exemption shall apply only when: (1) the apprentice is employed in a craft recognized as an apprenticeable trade; (2) the work of the apprentice in the occupations declared particularly hazardous is incidental to his training; (3) such work is intermittent and for short periods of time and is under the direct and close supervision of a journeyman as a necessary part of such apprentice training; and (4) the apprentice is registered by the Executive Director of the Office of Compliance as employed in accordance with the standards established by the Bureau of Apprenticeship and Training of the United States Department of Labor.

(c) Student-learners. Some sections in this subpart contain an exemption for the employment of student-learners. Such an exemption shall apply when:

(1) The student-learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized State or local educational authority or in a course of study in a substantially similar program conducted by a private school and;

(2) Such student-learner is employed under a written agreement which provides:

(i) That the work of the student-learner in the occupations declared particularly hazardous shall be incidental to his training;

(ii) That such work shall be intermittent and for short periods of time, and under the direct and close supervision of a qualified and experienced person;

(iii) That safety instructions shall be given by the school and correlated by the employer with on-the-job training; and

(iv) That a schedule of organized and progressive work processes to be performed on the job shall have been prepared. Each such written agreement shall contain the name of student-learner, and shall be signed by the employer and the school coordinator or principal. Copies of each agreement shall be kept on file by both the school and the employer. This exemption for the employment of student-learners may be revoked in any individual situation where it is found that reasonable precautions have not been observed for the safety of minors employed thereunder. A high school graduate may be employed in an occupation in which he has completed training as provided in this paragraph as a student-learner, even though he is not yet 18 years of age.

§ C570.51 Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1).

(a) Finding and declaration of fact. The following occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components are particularly hazardous for minors between 16 and 18 years of age or detrimental to their health or well-being:

(1) All occupations in or about any plant or establishment (other than retail establishments or plants or establishments of the type described in paragraph (a)(2) of this section) manufacturing or storing explosives or articles containing explosive components except where the occupation is performed in a 'nonexplosives area' as defined in paragraph (b)(3) of this section.

(2) The following occupations in or about any plant or establishment manufacturing or storing small-arms ammunition not exceeding .60 caliber in size, shotgun shells, or blasting caps when manufactured or stored in conjunction with the manufacture of small-arms ammunition:

(i) All occupations involved in the manufacturing, mixing, transporting, or handling of explosive compounds in the manufacture of small-arms ammunition and all other occupations requiring the performance of any duties in the explosives area in which explosive compounds are manufactured or mixed.

(ii) All occupations involved in the manufacturing, transporting, or handling of primers and all other occupations requiring the performance of any duties in the same building in which primers are manufactured.

(iii) All occupations involved in the priming of cartridges and all other occupations requiring the performance of any duties in the same workroom in which rim-fire cartridges are primed.

(iv) All occupations involved in the plate loading of cartridges and in the operation of automatic loading machines.

(v) All occupations involved in the loading, inspecting, packing, shipping and storage of blasting caps.

(b) Definitions. For the purpose of this section:

(1) The term *plant or establishment manufacturing or storing explosives or articles containing explosive component* means the land with all the buildings and other structures thereon used in connection with the manufacturing or processing or storing of explosives or articles containing explosive components.

(2) The terms *explosives* and *articles containing explosive components* mean and include ammunition, black powder, blasting caps, fireworks, high explosives, primers, smokeless powder, and all goods classified and defined as explosives by the Interstate Commerce Commission in regulations for the transportation of explosives and other dangerous substances by common carriers (49 CFR parts 71 to 78) issued pursuant to the Act of June 25, 1948 (62 Stat. 739; 18 U.S.C. 835).

(3) An area meeting all of the criteria in paragraphs (b)(3) (i) through (iv) of this section shall be deemed a ''nonexplosives area'':

(i) None of the work performed in the area involves the handling or use of explosives;

(ii) The area is separated from the explosives area by a distance not less than that prescribed in the American Table of Distances for the protection of inhabited buildings;

(iii) The area is separated from the explosives area by a fence or is otherwise located so that it constitutes a definite designated area; and

(iv) Satisfactory controls have been established to prevent employees under 18 years of age within the area from entering any area in or about the plant which does not meet criteria of paragraphs (b)(3) (i) through (iii) of this section.

§C570.52 Occupations of motor-vehicle driver and outside helper (Order 2).

(a) Findings and declaration of fact. Except as provided in paragraph (b) of this section, the occupations of motor-vehicle driver and outside helper on any public road, highway, in or about any mine (including open pit mine or quarry), place where logging or sawmill operations are in progress, or in any excavation of the type identified in § C570.68(a) are particularly hazardous for the employment of minors between 16 and 18 years of age.

(b) Exemption—Incidental and occasional driving. The findings and declaration in paragraph (a) of this section shall not apply to the operation of automobiles or trucks not exceeding 6,000 pounds gross vehicle weight if such driving is restricted to daylight hours; *provided*, such operation is only occasional and incidental to the minor's employment; that the minor holds a State license valid for the type of driving involved in the job performed and has completed a State approved driver education course; and *provided further*, that the vehicle is equipped with a seat belt or similar restraining device for the driver and for each helper, and the employer has instructed each minor that such belts or other devices must be used. This paragraph shall not be applicable to any occupation of motor-vehicle driver which involves the towing of vehicles.

(c) Definitions. For the purpose of this section:

(1) The term *motor vehicle* shall mean any automobile, truck, truck-tractor, trailer, semitrailer, motorcycle, or similar vehicle propelled or drawn by mechanical power and designed for use as a means of transportation but shall not include any vehicle operated exclusively on rails.

(2) The term *driver* shall mean any individual who, in the course of employment, drives a motor vehicle at any time.

(3) The term *outside helper* shall mean any individual, other than a driver, whose work includes riding on a motor vehicle outside the cab for the purpose of assisting in transporting or delivering goods.

(4) The term *gross vehicle weight* includes the truck chassis with lubricants, water and a full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body and special chassis and body equipment, and payload.

§ C570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5).

(a) Finding and declaration of fact. The following occupations involved in the operation of power-driven wood-working machines are particularly hazardous for minors between 16 and 18 years of age:

(1) The occupation of operating power-driven woodworking machines, including supervising or controlling the operation of such machines, feeding material into such machines, and helping the operator to feed material into such machines but not including the placing of material on a moving chain or in a hopper or slide for automatic feeding.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning power-driven woodworking machines.

(3) The occupations of off-bearing from circular saws and from guillotine-action veneer clippers.

(b) Definitions. As used in this section:

(1) The term *power-driven woodworking machines* shall mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer.

(2) The term *off-bearing* shall mean the removal of material or refuse directly from a saw table or from the point of operation. Operations not considered as off-bearing within the intent of this section include: (i) The removal of material or refuse from a circular saw or guillotine-action veneer clipper where the material or refuse has been conveyed away from the saw table or point of operation by a gravity chute or by some mechanical means such as a moving belt or expulsion roller, and (ii) the following operations when they do not involve the removal of material or refuse directly from a saw table or from the point of operation: The carrying, moving, or transporting of materials from one machine to another or from one part of a plant to another; the piling, stacking, or arranging of materials for feeding into a machine by another person; and the sorting, tying, bundling, or loading of materials.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in Sec. 570.50 (b) and (c).

§ C570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7).

(a) Finding and declaration of fact. The following occupations involved in the operation of power-driven hoisting apparatus are particularly hazardous for minors between 16 and 18 years of age:

(1) Work of operating an elevator, crane, derrick, hoist, or high-lift truck, except operating an unattended automatic operation passenger elevator or an electric or air- operated hoist not exceeding one ton capacity.

(2) Work which involves riding on a manlift or on a freight elevator, except a freight elevator operated by an assigned operator.

(3) Work of assisting in the operation of a crane, derrick, or hoist performed by crane hookers, crane chasers, hookers-on, riggers, rigger helpers, and like occupations.

(b) Definitions. As used in this section:

(1) The term *elevator* shall mean any power-driven hoisting or lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction. The term shall include both passenger and freight elevators (including portable elevators or tiering machines), but shall not include dumbwaiters.

(2) The term *crane* shall mean a power-driven machine for lifting and lowering a load and moving it horizontally, in which the hoisting mechanism is an integral part of the machine. The term shall include all types of cranes, such as cantilever gantry, crawler, gantry, hammerhead, ingot-pouring, jib, locomotive, motor-truck, overhead traveling, pillar jib, pintle, portal, semi-gantry, semi-portal, storage bridge, tower, walking jib, and wall cranes.

(3) The term *derrick* shall mean a power-driven apparatus consisting of a mast or equivalent members held at the top by guys or braces, with or without a boom, for use with an hoisting mechanism or operating ropes. The term shall include all types of derricks, such as A-frame, breast, Chicago boom, gin-pole, guy and stiff-leg derrick.

(4) The term *hoist* shall mean a power-driven apparatus for raising or lowering a load by the application of a pulling force that does not include a car or platform running in guides. The term shall include all types of hoists, such as base mounted electric, clevis suspension, hook suspension, monorail, overhead electric, simple drum and trolley suspension hoists.

(5) The term *high-lift* truck shall mean a power-driven industrial type of truck used for lateral transportation that is equipped with a power-operated lifting device usually in the form of a fork or platform capable of tiering loaded pallets or skids one above the other. Instead of a fork or platform, the lifting device may consist of a ram, scoop, shovel, crane, revolving fork, or other attachments for handling specific loads. The term shall mean and include highlift trucks known under such names as fork lifts, fork trucks, fork-lift trucks, tiering trucks, or stacking trucks, but shall not mean low-lift trucks or low-lift platform trucks that are designed for the transportation of but not the tiering of material.

(6) The term *manlift* shall mean a device intended for the conveyance of persons which consists of platforms or brackets mounted on, or attached to, an endless belt, cable, chain or similar method of suspension; such belt, cable or chain operating in a substantially vertical direction and being supported by and driven through pulleys, sheaves or sprockets at the top and bottom.

(c) Exception. (1) This section shall not prohibit the operation of an automatic elevator and an automatic signal operation elevator provided that the exposed portion of the car interior (exclusive of vents and other necessary small openings), the car door, and the hoistway doors are constructed of solid surfaces without any opening through which a part of the body may extend; all hoistway openings at floor level have doors which are interlocked with the car door so as to prevent the car from starting until all such doors are closed and locked; the elevator (other than hydraulic elevators) is equipped with a device which will stop and hold the car in case of overspeed or if the cable slackens or breaks; and the elevator is equipped with upper and lower travel limit devices which will normally bring the car to rest at either terminal and a final limit switch which will prevent the movement in either direction and will open in case of excessive over travel by the car.

(2) For the purpose of this exception the term *automatic elevator* shall mean a passenger elevator, a freight elevator, or a combination passenger-freight elevator, the operation of which is controlled by pushbuttons in such a manner that the starting, going to the landing selected, leveling and holding, and the opening and closing of the car and hoistway doors are entirely automatic.

(3) For the purpose of this exception, the term *automatic signal operation elevator* shall mean an elevator which is started in response to the operation of a switch (such as a lever or pushbutton) in the car which when operated by the operator actuates a starting device that automatically closes the car and hoistway doors—from this point on, the movement of the car to the landing selected, leveling and holding when it gets there, and the opening of the car and hoistway doors are entirely automatic.

§ C570.59 Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8).

(a) Finding and declaration of fact. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operator of or helper on the following power-driven metal forming, punching, and shearing machines:

(i) All rolling machines, such as beading, straightening, corrugating, flanging, or bending rolls; and hot or cold rolling mills.

(ii) All pressing or punching machines, such as punch presses except those provided with full automatic feed and ejection and with a fixed barrier guard to prevent the hands or fingers of the operator from entering the area between the dies; power presses; and plate punches.

(iii) All bending machines, such as apron brakes and press brakes.

(iv) All hammering machines, such as drop hammers and power hammers.

(v) All shearing machines, such as guillotine or squaring shears; alligator shears; and rotary shears.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning these machines including those with automatic feed and ejection.

(b) Definitions. (1) The term *operator* shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

(2) The term *helper* shall mean a person who assists in the operation of a machine covered by this section by helping place materials into or remove them from the machine.

(3) The term *forming, punching, and shearing machines* shall mean power-driven metalworking machines, other than machine tools, which change the shape of or cut metal by means of tools, such as dies, rolls, or knives which are mounted on rams, plungers, or other moving parts. Types of forming, punching, and shearing machines enumerated in this section are the machines to which the designation is by custom applied.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in Sec. 570.50 (b) and (c).

§ C570.62 Occupations involved in the operation of bakery machines (Order 11).

(a) Finding and declaration of fact. The following occupations involved in the operation of power-driven bakery machines are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operating, assisting to operate, or setting up, adjusting, repairing, oiling, or cleaning any horizontal or vertical dough mixer; batter mixer; bread dividing, rounding, or molding machine; dough brake; dough sheeter; combination bread slicing and wrapping machine; or cake cutting band saw.

(2) The occupation of setting up or adjusting a cooky or cracker machine.

§ C570.63 Occupations involved in the operation of paper-products machines (Order 12).

(a) Findings and declaration of fact. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operation or assisting to operate any of the following power-driven paper products machines:

(i) Arm-type wire stitcher or stapler, circular or band saw, corner cutter or mitering machine, corrugating and single-or-double-facing machine, envelope die-cutting press, guillotine paper cutter or shear, horizontal bar scorer, laminating or combining machine, sheeting machine, scrap-paper baler, or vertical slotter.

(ii) Platen die-cutting press, platen printing press, or punch press which involves hand feeding of the machine.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning these machines including those which do not involve hand feeding.

(b) Definitions. (1) The term *operating or assisting to operate* shall mean all work which involves starting or stopping a machine covered by this section, placing or removing materials into or from the machine, or any other work directly involved in operating the machine. The term does not include the stacking of materials by an employee in an area nearby or adjacent to the machine where such employee does not place the materials into the machine.

(2) The term *paper products* machine shall mean all power-driven machines used in:

(i) The remanufacture or conversion of paper or pulp into a finished product, including the preparation of such materials for recycling; or

(ii) The preparation of such materials for disposal. The term applies to such machines whether they are used in establishments that manufacture converted paper or pulp products, or in any other type of manufacturing or nonmanufacturing establishment.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

§ C570.65 Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14).

(a) Findings and declaration of fact. The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operator of or helper on the following power-driven fixed or portable machines except machines equipped with full automatic feed and ejection:

(i) Circular saws.

(ii) Band saws.

(iii) Guillotine shears.

(2) The occupations of setting-up, adjusting, repairing, oiling, or cleaning circular saws, band saws, and guillotine shears.

(b) Definitions. (1) The term *operator* shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

(2) The term *helper* shall mean a person who assists in the operation of a machine covered by this section by helping place materials into or remove them from the machine.

(3) The term *machines equipped with full automatic feed and ejection* shall mean machines covered by this Order which are equipped with devices for full automatic feeding and ejection and with a fixed barrier guard to prevent completely the operator or helper from placing any part of his body in the point-of-operation area.

(4) The term *circular saw* shall mean a machine equipped with a thin steel disc having a continuous series of notches or teeth on the periphery, mounted on shafting, and used for sawing materials.

(5) The term *band saw* shall mean a machine equipped with an endless steel band having a continuous series of notches or teeth, running over wheels or pulleys, and used for sawing materials.

(6) The term *guillotine shear* shall mean a machine equipped with a movable blade operated vertically and used to shear materials. The term shall not include other types of shearing machines, using a different form of shearing action, such as alligator shears or circular shears.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

§ C570.66 Occupations involved in wrecking and demolition operations (Order 15).

(a) Finding and declaration of fact. All occupations in wrecking and demolition operations are particularly hazardous for the employment of minors between 16 and 18 years of age and detrimental to their health and well-being.

(b) Definition. The term *wrecking and demolition operations* shall mean all work, including clean-up and salvage work, performed at the site of the total or partial razing, demolishing, or dismantling of a building, bridge, steeple, tower, chimney, or other structure.

§ C570.67 Occupations in roofing operations (Order 16).

(a) Finding and declaration of fact. All occupations in roofing operations are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health.

(b) Definition of roofing operations. The term *roofing operations* shall mean all work performed in connection with the application of weatherproofing materials and substances (such as tar or pitch, asphalt prepared paper, tile, slate, metal, translucent materials, and shingles of asbestos, asphalt or wood) to roofs of buildings or other structures. The term shall also include all work performed in connection with: (1) The installation of roofs, including related metal work such as flashing and (2) alterations, additions, maintenance, and repair, including painting and coating, of existing roofs. The term shall not include gutter and downspout work; the construction of the sheathing or base of roofs; or the installation of television antennas, air conditioners, exhaust and ventilating equipment, or similar appliances attached to roofs.

(c) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

§ C570.68 Occupations in excavation operations (Order 17).

(a) Finding and declaration of fact. The following occupations in excavation operations are particularly hazardous for the employment of persons between 16 and 18 years of age: (1) Excavating, working in, or backfilling (refilling) trenches, except (i) manually excavating or manually backfilling trenches that do not exceed four feet in depth at any point, or (ii) working in trenches that do not exceed four feet in depth at any point.

(2) Excavating for buildings or other structures or working in such excavations, except: (i) Manually excavating to a depth not exceeding four feet below any ground surface adjoining the excavation, or (ii) working in an excavation not exceeding such depth, or (iii) working in an excavation where the side walls are shored or sloped to the angle of repose.

(3) Working within tunnels prior to the completion of all driving and shoring operations.

(4) Working within shafts prior to the completion of all sinking and shoring operations.

(b) Exemptions. This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in Sec.C570.50 (b) and (c).

OFFICE OF COMPLIANCE—The Congressional Accountability Act of 1995: Extension of Rights and Protections Under the Worker Adjustment and Retraining Notification Act of 1988

NOTICE OF ISSUANCE OF FINAL REGULATIONS

On January 22, 1996, the Board of Directors of the Office of Compliance adopted and submitted for publication in the Congressional Record final regulations implementing section 205 of the Congressional Accountability Act of 1995 (''CAA''), relating to the Worker Adjustment and Retraining Act. On April 15, 1996, pursuant to section 304(c) of the CAA, the House and the Senate agreed to resolutions approving the final regulations. Specifically, the Senate agreed to S. Res. 242, to provide for the approval of final regulations that are applicable to the Senate and the employees of the Senate; the House agreed to H. Res. 400, to provide for the approval of final regulations that are applicable to the House and the employees of the House; and the House and the Senate agreed to S. Con. Res. 51, to provide for approval of final regulations that are applicable to employing offices and employees other than those offices and employees of the House and the Senate. Accordingly, pursuant section 304(d) of the CAA, the Board submits these regulations to the Speaker of the House of Representatives

and the President pro tempore of the Senate for issuance by publication in the Congressional Record.

Pursuant to paragraph (3) of section 304(d) of the CAA, the Board finds good cause for the regulations of become effective on April 16, 1996, rather than 60 days after issuance. Were the regulations not effective immediately upon the expiration of the interim regulations on April 15, 1996, covered employees, employing offices and the Office of Compliance would be forced to operate under the same kind of regulatory uncertainty that the Board sought to avoid by adopting interim regulations effective as of the January 23, 1996, which was the effective date of the relevant provisions of the CAA.

Signed at Washington, D.C. on this 19th day of April, 1996.

GLEN D. NAGER,
Chair of the Board, Office of Compliance.

Accordingly, the Board of Directors of the Office of Compliance hereby issues on an the following final regulations:

Accordingly, the Board of Directors of the Office of Compliance hereby issues following final regulations:

[Final Regulations]

APPLICATION OF RIGHTS AND PROTECTIONS OF THE WORKER ADJUSTMENT RETRAINING AND NOTIFICATION ACT OF 1988 (IMPLEMENTING SECTION 204 OF THE CAA)

Section

639.1 Purpose and scope.
639.2 What does WARN require?
639.3 Definitions.
639.4 Who must give notice?
639.5 When must notice be given?
639.6 Who must receive notice?
639.7 What must the notice contain?
639.8 How is the notice served?
639.9 When may notice be given less than 60 days in advance?
639.10 When may notice be extended?

§ 639.1 Purpose and scope.

(a) *Purpose of WARN as applied by the CAA.* Section 205 of the Congressional Accountability Act, P.L. 104-1 (''CAA''), provides protection to covered employees and their families by requiring employing offices to provide notification 60 calendar days in advance of office closings and mass layoffs within the meaning of section 3 of the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2102. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. As used in these regulations, WARN shall refer to the provisions of WARN applied to covered employing offices by section 205 of the CAA.

(b) *Scope of these regulations.* These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 205(c) and 304 of the CAA, which directs the Board to promulgate regulations implementing section 205 that are the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 205 of the CAA] except insofar as the Board may determine, for good cause shown. . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section. The regulations issued by the Board herein are on all matters for which section 205 of the CAA requires a regulation to be issued. Specifically, it is the Board s considered judgment, based on the information available to it at the time of promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 205 of the CAA].''

In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these sections and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The objective of these regulations is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, it is recognized that rulemaking cannot address the multitude of employing office-specific situations in which advance notice will be given.

(c) *Notice in ambiguous situations.* It is civically desirable and it would appear to be good business practice for an employing office to provide advance notice, where reasonably possible, to its workers or unions when terminating a significant number of employees. The Office encourages employing offices to give notice in such circumstances.

(d) *WARN not to supersede other laws and contracts.* The provisions of WARN do not supersede any otherwise applicable laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

§ 639.2 What does WARN require?

WARN requires employing offices that are planning an office closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employing offices from voluntarily providing longer periods of advance notice. Not all office closings and layoffs are subject to WARN, and certain employment thresholds must be reached before WARN applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Remedies authorized under section 205 of the CAA may be assessed against employing offices that violate WARN requirements.

§ 639.3 Definitions.

(a) *Employing office.* (1) The term ''employing office'' means any of the entities listed in section 101(9) of the CAA, 2 U.S.C. § 1301(9) that employs—

(i) 100 or more employees, excluding part-time employees; or

(ii) employs 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime. Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a ''reasonable expectation of recall'' when he/she understands, through notification or through common practice, that his/her employment with the employing office has been temporarily interrupted and that he/she will be recalled to the same or to a similar job.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN, are nonetheless counted as employees for purposes of determining coverage as an employing office.

(3) An employing office may have one or more sites of employment under common control.

(b) *Office closing.* The term ''office closing'' means the permanent or temporary shutdown of a ''single site of employment'', or one or more ''facilities or operating units'' within a single site of employment, if the shutdown results in an ''employment loss'' during *any 30-day period* at the single site of employment for *50 or more* employees, excluding any part-time employees. An employment action that results in the effective cessation of the work performed by a unit, even if a few employees remain, is a shutdown. A ''temporary shutdown'' triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of ''employment loss.''

(c) *Mass layoff.* (1) The term ''mass layoff'' means a reduction in force which first, is not the result of an office closing, and second, results in an employment loss at the single site of employment during *any 30-day period* for:

(i) *At least 33 percent* of the active employees, excluding part-time employees, and

(ii) *At least 50 employees,* excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met. Office closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an office closing or mass layoff. For example, if an employing office closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered office closing has occurred although only 10 workers are entitled to notice.

(d) *Representative.* The term ''representative'' means an exclusive representative of employees within the meaning of 5 U.S.C. §§ 7101 *et seq.,* as applied to covered employees and employing offices by section 220 of the CAA, 2 U.S.C. § 1351.

(e) *Affected employees.* The term ''affected employees'' means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed office closing or mass layoff by their employing office. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term ''affected employees'' includes managerial and supervisory employees. Consultant or contract employees who have a separate employment relationship with another employing office or employer and are paid by that other employing office or employer, or who are self-employed, are not ''affected employees'' of the operations to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) *Employment loss.* (1) The term ''employment loss'' means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

(2) Where a termination or a layoff (see paragraphs (f)(1)(i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employing office-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employing office's operations and, prior to the closing or layoff—

(i) The employing office offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or

(ii) The employing office offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A ''relocation or consolidation'' of part or all of an employing office s operations, for purposes of paragraph §639.3(f)(3), means that some definable operations are transferred to a different site of employment and that transfer results in an office closing or mass layoff.

(g) *Part-time employee.* The term ''part-time'' employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as ''seasonal'' employees. The period to be used for calculating whether a worker has worked ''an average of fewer than 20 hours per week'' is the shorter of the actual time the worker has been employed or the most recent 90 days.

(h) *Single site of employment.* (1) A single site of employment can refer to either a single location or a group of contiguous locations. Separate facilities across the street from one another may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employing offices conduct activities within such a building. For example, an office building housing 50 different employing offices will contain 50 single sites of employment. The offices of each employing office will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site.

(5) Contiguous buildings operated by the same employing office which have separate management and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employing office's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employing office is covered as an employing office under §639.3(a).

(8) The term ''single site of employment'' may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of WARN to provide notice is not acceptable.

(i) *Facility or operating unit.* The term ''facility'' refers to a building or buildings. The term ''operating unit'' refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.

§639.4 Who must give notice?

Section 205(a)(1) of the CAA states that ''[n]o employing office shall be closed or a mass layoff ordered within the meaning of section 3 of [WARN] until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff. . .'' Therefore, an employing office that is anticipating carrying out an office closing or mass layoff is required to give notice to affected employees or their representative(s). (See definitions in §639.3 of this part.).

(a) It is the responsibility of the employing office to decide the most appropriate person within the employing office's organization to prepare and deliver the notice to affected employees or their representative(s). In most instances, this may be the local site office manager, the local personnel director or a labor relations officer.

(b) An employing office that has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to circumstances not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement.

(c) In the case of the privatization or sale of part or all of an employing office's operations, the employing office is responsible for providing notice of any office closing or mass layoff which takes place up to and including the effective date (time) of the privatization or sale, and the contractor or buyer is responsible for providing any required notice of any office closing or mass layoff that takes place thereafter.

(1) If the employing office is made aware of any definite plans on the part of the buyer or contractor to carry out an office closing or mass layoff within 60 days of purchase, the employing office may give notice to affected employees as an agent of the buyer or contractor, if so empowered. If the employing office does not give notice, the buyer or contractor is, nevertheless, responsible to give notice. If the employing office gives notice as the agent of the buyer or contractor, the responsibility for notice still remains with the buyer or contractor.

(2) It may be prudent for the buyer or contractor and employing office to determine the impacts of the privatization or sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or office closing is planned.

§639.5 When must notice be given?

(a) *General rule.* (1) With certain exceptions discussed in paragraphs (b) and (c) of this section and in §639.9 of this part, notice must be given at least 60 calendar days prior to any planned office closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30- day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employing office to decide whether issuing notice is required, the employing office should—

(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for an office closing or a mass layoff and thus trigger the notice requirement; and

(ii) Look ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for an office closing or a mass layoff and thus trigger the notice requirement. An employing office is not, however, required under section 3(d) to give notice if the employing office demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this ''snapshot'' of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) *Transfers.* (1) Notice is not required in certain cases involving transfers, as described under the definition of employment loss at §639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a ''transfer'' if the new job constitutes a constructive discharge.

(3) The meaning of the term ''reasonable commuting distance'' will vary with local conditions. In determining what is a ''reasonable commuting distance,'' consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employing office may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the

closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employing office, the normal 60-day notice period may have expired and the office closing or mass layoff may have occurred. An employing office is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) *Temporary employment.* (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of other employing offices or a locality, but the burden of proof will lie with the employing office to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

§ 639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at that time, to each affected employee.

(a) *Representative(s) of affected employees.* Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) *Affected employees.* Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employing office cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employing office must provide notice to the incumbent in that position. While part-time employees are not counted in determining whether office closing or mass layoff thresholds are reached, such workers are due notice.

§ 639.7 What must the notice contain?

(a) *Notice must be specific.* (1) All notice must be specific.

(2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employing office must ensure that all of the information required by this section is provided in writing to the parties listed in § 639.6 at least 60 days in advance of a covered employment action.

(3) Notice may be given conditional upon the occurrence or nonoccurrence of an event only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of operations, lead to a covered office closing or mass layoff less than 60 days after the event. The notice must contain each of the elements set out in this section.

(4) The information provided in the notice shall be based on the best information available to the employing office at the time the notice is served. It is not the intent of the regulations that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN.

(b) As used in this section, the term ''date'' refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

(c) Notice to each representative of affected employees is to contain:

(1) The name and address of the employment site where the office closing or mass layoff will occur, and the name and telephone number of an employing office official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire office is to be closed, a statement to that effect;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain:

(1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire office is to be closed, a statement to that effect;

(2) The expected date when the office closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist;

(4) The name and telephone number of an employing office official to contact for further information.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

§ 639.8 How is the notice served?

Any reasonable method of delivery to the parties listed under § 639.6 of this part which is designed to ensure receipt of notice of at least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

§ 639.9 When may notice be given less than 60 days in advance?

Section 3(b) of WARN, as applied by section 205 of the CAA, sets forth two conditions under which the notification period may be reduced to less than 60 days. The employing office bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employing office must give as much notice as is practicable to the union and non-represented employees and this may, in some circumstances, be notice after the fact. The employing office must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in § 639.7.

(a) The ''unforeseeable business circumstances'' exception under section 3(b)(2)(A) of WARN, as applied under the CAA, applies to office closings and mass layoffs caused by circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employing office's control.

(2) The test for determining when circumstances are not reasonably foreseeable focuses on an employing office's business judgment. The employing office must exercise such reasonable business judgment as would a similarly situated employing office in predicting the demands of its operations. The employing office is not required, however, to accurately predict general economic conditions that also may affect its operations.

(b) The ''natural disaster'' exception in section 3(b)(2)(B) of WARN applies to office closings and mass layoffs due to any form of a natural disaster.

(1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.

(2) To qualify for this exception, an employing office must be able to demonstrate that its office closing or mass layoff is a direct result of a natural disaster.

(3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.

(4) Where an office closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the ''unforeseeable business circumstance'' exception described in paragraph (a) of this section may be applicable.

§ 639.10 When may notice be extended?

Additional notice is required when the date or schedule of dates of a planned office closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in § 639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.

(b) If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to the provisions of §§ 639.5, 639.6 and 639.7 of this part. Rolling notice, in the sense of routine periodic notice, given whether or not an office closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

REPORT RELATIVE TO NARCOTICS TRAFFICKERS—MESSAGE FROM THE PRESIDENT—PM 140

The PRESIDING OFFICER laid before the Senate the following message

from the President of the United States, together with an accompanying report; which was referred to the Committee on Banking, Housing, and Urban Affairs.

To the Congress of the United States:

I hereby report to the Congress on the developments concerning the national emergency with respect to significant narcotics traffickers centered in Colombia that was declared in Executive Order No. 12978 of October 21, 1995. This report is submitted pursuant to section 401(c) of the National Emergencies Act, 50 U.S.C. 1641(c), and section 204(c) of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1703(c).

1. On October 21, 1995, I signed Executive Order No. 12978, ''Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers'' (the ''Order'') (60 *Fed. Reg.* 54579, October 24, 1995). The Order blocks all property subject to U.S. jurisdiction in which there is any interest of four significant foreign narcotics traffickers who are principals in the so-called Cali drug cartel centered in Colombia. They are listed in the annex to the Order. In addition, the Order blocks the property and interests in property of foreign persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, (a) to play a significant role in international narcotics trafficking centered in Colombia or (b) to materially assist in or provide financial or technological support for, or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order. In addition the Order blocks all property and interests in property subject to U.S. jurisdiction of persons determined by the Secretary of the Treasury in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated in or pursuant to the Order (collectively ''Specially Designated Narcotics Traffickers'' or ''SDNTs'').

The Order further prohibits any transaction or dealing by a United States person or within the United States in property or interests in property of SDNTs, and any transaction that evades or avoids, has the purpose of evading or avoiding, or attempts to violate, the prohibitions contained in the Order.

Designations of foreign persons blocked pursuant to the Order are effective upon the date of determination by the Director of the Department of the Treasury's Office of Foreign Assets Control (FAC) acting under authority delegated by the Secretary of the Treasury. Public notice of blocking is effective upon the date of filing with the *Federal Register,* or upon prior actual notice.

2. On October 24, 1995, the Department of the Treasury issued a notice containing 76 additional names of persons determined to meet the criteria set forth in Executive Order No. 12978 (60 *Fed. Reg.* 54582–84, October 24, 1995). A copy of the notice is attached to this report.

The Department of the Treasury issued another notice adding the names of one additional entity and three additional individuals, as well as expanded information regarding addresses and pseudonyms, to the List of SDNTs on November 29, 1995 (60 *Fed. Reg.* 61288–89). A copy of the notice is attached to this report.

3. On March 8, 1996, FAC published a notice in the *Federal Register* adding the names of 138 additional individuals and 60 entities designated pursuant to the Order, and revising information for 8 individuals on the list of blocked persons contained in the notices published on November 29, 1995, and October 24, 1995 (61 *Fed. Reg.* 9523–28). A copy of the notice is attached to this report. The FAC, in coordination with the Attorney General and the Secretary of State, is continuing to expand the list of Specially Designated Narcotics Traffickers, including both organizations and individuals, as additional information is developed.

4. On October 22, 1995, FAC disseminated details of this program to the financial, securities, and international trade communities by both electronic and conventional media. This information was updated on November 29, 1995, and again on March 5, 1996. In addition to bulletins to banking institutions via the Federal Reserve System and the Clearing House Inter-bank Payments System (CHIPS), individual notices were provided to all State and Federal regulatory agencies, automated clearing houses, and State and independent banking associations across the country. The FAC contacted all major securities industry associations and regulators, posted electronic notices to 10 computer bulletin boards and 2 fax-on-demand services, and provided the same material to the U.S. Embassy in Bogota for distribution to U.S. companies operating in Colombia.

5. There were no funds specifically appropriated to implement this program. The expenses incurred by the Federal Government in the 6-month period from October 21, 1995, through April 20, 1996, that are directly attributable to the exercise of powers and authorities conferred by the declaration of the national emergency with respect to Significant Narcotics Traffickers are estimated at approximately $500,000 from previously appropriated funds. Personnel costs were largely centered in the Department of the Treasury (particularly in the Office of Foreign Assets Control, the Office of the General Counsel, and the U.S. Customs Service), the Department of Justice, and the Department of State.

6. Executive Order No. 12978 provides this Administration with a new tool for combating the actions of significant foreign narcotics traffickers centered in Colombia, and the unparalleled violence, corruption, and harm that they cause in the United States and abroad. The Order is designed to deny these traffickers the benefit of any assets subject to the jurisdiction of the United States and to prevent United States persons from engaging in any commercial dealings with them, their front companies, and their agents. Executive Order No. 12978 demonstrates the U.S. commitment to end the scourge that such traffickers have wrought upon society in the United States and beyond.

The magnitude and the dimension of the problem in Colombia—perhaps the most pivotal country of all in terms of the world's cocaine trade—is extremely grave. I shall continue to exercise the powers at my disposal to apply economic sanctions against significant foreign narcotics traffickers and their violent and corrupting activities as long as these measures are appropriate, and will continue to report periodically to the Congress on significant developments pursuant to 50 U.S.C. 1703(c).

WILLIAM J. CLINTON.

THE WHITE HOUSE, *April 23, 1996.*

MESSAGES FROM THE HOUSE

At 4:10 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the Speaker appoints Mr. STOKES, of Ohio, as a primary conferee to fill the vacancy occasioned by the resignation of Mr. HOYER, of Maryland, and reappoints Mr. HOYER of Maryland, as a conferee for consideration of section 101(c) of the House bill and section 101(d) of the Senate amendment and modifications committed to conference in the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3019) making appropriations for fiscal year 1996 to make a further appropriations for fiscal year 1996 to make a further a downpayment toward a balanced budget, and for other purposes.

At 5:58 p.m., a message from the House of Representatives, delivered by Mr. Hays, one of its reading clerks, announced that the House agreed to the following concurrent resolution, in which it requests the concurrence of the Senate:

H. Con. Res. 166. Concurrent resolution authorizing the use of the Capitol Grounds for the Washington for Jesus 1996 prayer rally.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. BREAUX:

S. 1693. A bill to require the Secretary of Labor to submit to Congress the report on method of allocating administrative funds among states required under section 304 of the Emergency Unemployment Compensation Act of 1991; to the Committee on Finance.

By Ms. SNOWE:

S. 1694. A bill to prohibit insurance providers from denying or canceling health insurance coverage, or varying the premiums, terms, or conditions for health insurance coverage on the basis of genetic information or a request for genetic services, and for other purposes; to the Committee on Labor and Human Resources.

By Mr. MCCAIN:

S. 1695. A bill to authorize the Secretary of the Interior to assess up to $2 per person visiting the Grand Canyon or other national park to secure bonds for capital improvements to the park, and for other purposes; to the Committee on Energy and Natural Resources.

By Mr. THURMOND:

S. 1696. A bill to provide antitrust clarification, to reduce frivolous antitrust litigation, to promote equitable resolution of disputes over the location of professional sports franchises, and for other purposes; to the Committee on the Judiciary.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. JEFFORDS (for himself, Mrs. KASSEBAUM, Mr. SIMON, and Mr. FEINGOLD):

S. Con. Res. 53. A concurrent resolution congratulating the people of the Republic of Sierra Leone on the success of their recent democratic multiparty elections; to the Committee on Foreign Relations.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Ms. SNOWE:

S. 1694. A bill to prohibit insurance providers from denying or canceling health insurance coverage, or varying the premiums, terms, or conditions for health insurance coverage on the basis of genetic information or a request for genetic services, and for other purposes; to the Committee on Labor and Human Resources.

THE GENETIC INFORMATION NONDISCRIMINATION IN HEALTH INSURANCE ACT OF 1996

● Ms. SNOWE. Mr. President, I introduce the Genetic Information Nondiscrimination in Health Insurance Act of 1996. I join Representative LOUISE SLAUGHTER, who introduced this bill in the House, in calling for an end to discrimination on the basis of genetic information in health insurance.

Progress in the field of genetics is accelerating at a breathtaking pace. Who could have predicted 20 years ago that scientists today could accurately identify the genes associated with cystic fibrosis, cancer, Alzheimers' and Huntington's disease? Today, scientists can, and as a result doctors are increasingly able to identify predispositions to certain diseases based on the results of genetic testing, and to successfully treat and manage such diseases. These scientific advances hold tremendous promise for the approximately 15 million people affected by the over 4,000 currently known genetic disorders, and the millions more who are carriers of genetic diseases who may pass them on to their children.

But as our knowledge of genetic predisposition to disease has grown, so has the potential for discrimination in health insurance.

As a legislator who has worked for many years on the issue of breast cancer, and as a woman with a history of breast cancer in her family, I am delighted with the possibilities for further treatment advances based on the recent discoveries of two genes related to breast cancer—BRCA1 and BRCA2. Women who inherit mutated forms of either gene have an 85-percent risk of developing breast cancer in their lifetime. Although there is no known treatment to ensure that women who carry the mutated gene do not develop breast cancer, genetic testing makes it possible for carriers of these mutated genes to take extra precautions—such as mammograms and self-examinations—in order to detect cancer at its earliest stages. This discovery is truly a momentous breakthrough.

However, the tremendous promise of genetic testing is being significantly threatened by insurance companies that use the results of genetic testing to deny or limit coverage to consumers. Unfortunately, this practice is relatively common today. In fact, a recent survey of individuals with a known genetic condition in their family revealed that 22 percent had been denied health insurance coverage because of genetic information.

In addition to the potentially devastating consequences health insurance denials on the basis of genetic information can have on American families, the fear of discrimination has equally harmful consequences for consumers and for scientific research. For example, many women who might take extra precautions if they knew they had the breast cancer gene may not seek testing because they fear losing their health insurance. Patients may be unwilling to disclose information about their genetic status to their physicians out of fear, hindering treatment or preventive efforts. And people may be unwilling to participate in potentially ground-breaking research trials because they do not want to reveal information about their genetic status.

The bill I am introducing today addresses these serious concerns by prohibiting health insurance providers from denying or canceling health insurance coverage or varying the terms, premiums, or conditions for health insurance for individuals or their family members on the basis of genetic information. It also prohibits insurance companies from discriminating against individuals who have requested or received genetic services.

My bill also contains important confidentiality provisions which prohibit insurance companies from disclosing genetic information about an individual without that person's written consent. And it prohibits an insurance provider from requesting someone to undergo, and from disclosing, genetic information about that person.

Finally, the bill allows individuals to sue for monetary damages or injunctive relief if an insurance company violates, or threatens to violate, these nondiscrimination or disclosure provisions.

I urge my colleagues to end the unfair practice of denying health care coverage to individuals on the basis of genetic information by supporting the bill I am introducing today.●

By Mr. MCCAIN:

S. 1695. A bill to authorize the Secretary of the Interior to assess up to $2 per person visiting the Grand Canyon or other national parks to secure bonds for capital improvements to the park, and for other purposes; to the Committee on Energy and Natural Resources.

THE NATIONAL PARKS CAPITAL IMPROVEMENTS ACT

● Mr. MCCAIN. Mr. President, I introduce legislation to make desperately needed improvements within America's national parks.

The National Parks Capital Improvements Act would allow private fundraising organizations, under agreement with the Secretary of the Interior, to issue taxable capital development bonds to finance park improvement projects. The bonds would be secured by an entrance fee surcharge of up to $2 per visitor at participating parks.

Our National Park System has enormous capital needs—by last estimate over $3 billion of high priority projects such as improved transportation systems, trail repairs, visitor facilities, historic preservation, and the list goes on and on. The unfortunate reality is that even under the rosiest budget scenarios our growing park needs far outstrip the resources available.

A good example of this funding gap is at Grand Canyon National Park. The park's newly approved park management plan calls for over $300 million in capital improvements, including a desperately needed transportation system to reduce congestion. Compare that to the $12 million the Grand Canyon received last year for operating costs. The gap is as wide as the Grand Canyon itself. Clearly, we must find new means of financing park needs.

Revenue bonding is an integral part of the solution. Based on current visitation rates, a $2 surcharge at the Grand Canyon would enable us to raise $100 million dollars from a bond issue amortized over 20 years. That is significant amount of money with which we could accomplish a lot of critical work.

I want to point out that the Grand Canyon would not be the only park eligible for the program. Any park unit with capital needs in excess of $5 million is eligible to participate. Among eligible park the Secretary will determine which shall take part in the program.

I also want to stress that only projects approved as part of park's General Management Plan can be funded through bond revenue. This proviso eliminates any concern that the revenue could be used for projects of questionable value to the park.

Finally, the bill requires that all professional standards apply and that the issues are subject to the same laws, rules and regulatory enforcement procedures as any other bond issue.

In addition, only organizations under agreement with the Secretary will be authorized to administer the bonding, so the Secretary can establish any rules or policies he deems necessary and appropriate.

Under, no circumstances, however would investors be able to attach liens against Federal property in the very unlikely event of default. The bonds will be secured only by the surcharge revenues.

Will the bond markets support park improvement issues, guaranteed by an entrance surcharge? The answer is yes, emphatically. Americans are eager to invest in our Nation's natural heritage, and with park visitation growing stronger, the risks would appear minimal.

Are visitors willing to pay a little more at the entrance gate if the money is used for park improvement? Again, yes. Time and time again visitors have expressed their support provided the revenue is used where collected and not diverted for some other purpose devised by Congress.

Finally, I want to point out that the bill will not cost the Treasury any money? On the contrary it will result in a net increase in Federal revenue. First, the bonds will be fully taxable, and, second, making disparately needed improvements sooner rather than later will reduce project costs.

America has been blessed with a rich natural heritage. The National Park Organic Act enjoins us to protect our precious natural resources for future generations and to provide for their enjoyment by the American people. The National Parks Capital Improvements Act must pass if we are to successfully fulfill the enduring responsibilities of stewardship with which we have been vested.●

By Mr. THURMOND:

S. 1696. A bill to provide antitrust clarification, to reduce frivolous antitrust litigation, to promote equitable resolution of disputes over the location of professional sports franchises, and for other purposes; to the Committee on the Judiciary.

THE PROFESSIONAL SPORTS ANTITRUST CLARIFICATION ACT OF 1996

Mr. THURMOND. Mr. President, I rise today to introduce the Professional Sports Antitrust Clarification Act of 1996 to address underlying problems which have resulted in recent franchise instability and movement in professional sports, particularly the National Football League. My legislation clarifies that the antitrust laws do not apply to professional sports leagues and their member franchises when they establish rules and make decisions about whether a team may change its home territory. This antitrust protection is obtained, however, only if the sports league provides notice and a hearing and examines appropriate factors prior to its decision on relocation, and institutes revenue sharing of the public benefits received by its teams, in order to reduce the incentive for teams to move simply to reap large public subsides. I will clarify the importance of these points in a moment.

Let me initially explain why this issue deserves the attention of the Congress. First, larger and larger amounts of public funds seem to be spent subsidizing professional sports, by building new or improved stadiums, providing rent abatement and special tax treatment, and even making direct cash payments. Cities and States are being pitted against each other by the threat or promise that a team will relocate depending on the subsidy offered, which raises serious questions about the appropriate use of scarce public resources. Baltimore and Cleveland made headlines last winter by competing to be the hometown of the Browns football team, with hundreds of millions of public dollars at stake. The resolution, of course, was for both cities to pour hundreds of millions of dollars into new or improved stadiums so each could secure a football team. Even more remarkable, perhaps, is the report that Cincinnati has been handing over $3 million in cash to its football team in each of the last several years to stave off relocation.

Second, professional sports are an important part of American life, emotionally as well as financially, and relocation of a popular team can devastate its fans and shake the confidence of its hometown. The Browns' announcement that they intended to move to Baltimore upset the team's fans tremendously both in Cleveland and around the country. The current willingness of so many teams to consider moving frightens fans of all teams, regardless of whether their own team is openly threatening a move.

The current level of sports franchise instability is at its highest since the Congress focused its attention on these issues in the 1980's. In 1982 and 1985, I held several hearings as chairman of the Judiciary Committee on legislation dealing with sports franchise relocation. Since that time, the financial stakes for local and State governments have escalated. The public funds routinely expended to keep a team in place or entice a team to move seem to have risen from tens of millions to hundreds of millions of dollars. At a time when public resources at all levels of government are becoming ever tighter, this transfer of scarce public funds to rich owners and rich players is remarkable. Accordingly, it is time to address these issues.

Two hearings have been held in the Senate Judiciary Committee in recent months on these issues. As chairman of the Antitrust, Business Rights, and Corporation Subcommittee, I chaired a hearing on November 29, 1995, which analyzed sports franchise movement. Witnesses included a range of elected officials, sports league commissioners, and antitrust and economic experts. Senator HATCH chaired a second hearing of the full Judiciary Committee on January 23, 1996, in order to further examine these issues. This legislation is an outgrowth of those hearings.

Let me turn to the specifics of the legislation I am introducing today. My bill does not grant a special exemption from current antitrust law, but essentially codifies existing judicial interpretations which permit a sports league to determine where its member franchises may operate, provided certain requirements are met. My legislation clarifies and provides certainty in this complex area of the law, where costs of defending claims are always high, and any damages resulting from liability or an incorrect judicial decision are trebled and may amount to hundreds of millions of dollars or more. Antitrust certainty would restore integrity to the decision- making processes of professional sports leagues which have been chilled by the prospect of huge treble damage judgments.

A sports league cannot enjoy this antitrust certainty, however, unless it meets three requirements set forth in the legislation. First, the league must provide notice and a hearing to all interested parties concerning a team's proposed move. Second, the league must protect the public interest by considering specified factors in deciding whether to permit the move. Last, the league must promote comparable economic opportunities for its teams by sharing revenue derived from the public benefits and subsidies the teams receive.

This conditional antitrust protection will help resolve the problems of franchise instability caused by large public subsidies. The antitrust certainty provided by this bill will permit a sports league to take more decisive action to stop teams from moving when the league believes relocation will not serve the public interest. The requirements that the league analyze specific factors and provide notice and a hearing to interested parties before deciding whether a team can relocate will help ensure that proper decisions are made. The third requirement, instituting revenue sharing of public benefits, is crucial to address an underlying cause of sports franchise instability. Unlike the first two requirements, the effectiveness of revenue sharing does not depend on the opinion of the league about a particular move. Let me briefly explain the economic background of this revenue sharing requirement.

As revealed during my Antitrust Subcommittee hearing, the franchise instability we are now experiencing is largely the result of changing economics within major league sports. Now that players are free agents, competition among owners for the best talent has driven player salaries to amazing heights. This, in turn, has increased pressure on owners to increase their

revenues, particularly relative to other owners, in order to compete for the best players. In this competition for talent, the total amount of an owner's revenue matters less than whether that owner has fallen behind the other owners.

Football, hockey, and basketball each share a significant portion of total revenues among the teams in the league. Because owners seek to better their positions compared to other owners, however, they naturally seek to raise revenue in areas where revenue is not shared. As a result, owners aggressively seek new public benefits and subsidies, often through new or improved stadiums with more luxury suites as we have seen in football, because they have not been required to share that revenue. In this effort, owners routinely use threats of relocation to another city as leverage.

Let me emphasize that my legislation would not in any way prohibit public funds from being used to attract or keep a team, if a city or State voluntarily decides to allocate its resources in that way. Instead, my legislation would require the league to promote comparable opportunities for all teams by equalizing the public benefits among them. This would level the playing field, so to speak, so that teams need not move or threaten to move in order to obtain more public funds to keep from falling behind others in the league. Let me illustrate how this is intended to work in practice.

Last Fall, Art Modell, owner of the Cleveland Browns, announced that he planned to move his team from Cleveland to Baltimore. His move reportedly was motivated by financial pressure on the franchise caused by rapidly increasing player salaries, plus promises of large public benefits from Baltimore. If my revenue-sharing provision had been in place, however, Mr. Modell would have faced different options. Under my legislation, the league would have instituted procedures to promote comparable economic opportunities to address disparities in team revenue due to public benefits and subsidies. So in our example, if Mr. Modell was obtaining fewer public benefits in Cleveland than average, he would receive transfers to bring his team up to the league average. On the other hand, if the annual public benefits received for moving to Baltimore pushed Mr. Modell above the average, he would have to share some of the value of the public benefits in order to keep his team at the league average. Faced with these choices and a hometown that loved his team, it is hard to imagine that Mr. Modell would have chosen to move—and endure tremendous criticism—if he would receive the league average either way. Even if Mr. Modell still wished to relocate, however, the league might well have blocked the move, based on the factors established and the antitrust certainty provided by this legislation.

Of course, it is sometimes appropriate and even desirable for a team to relocate, such as when the fans and local business community do not adequately appreciate and support their team. My revenue-sharing requirement would not stop such moves, but would encourage professional sports to look more to private funding than to public subsidies in such cases.

Nor does this revenue-sharing requirement stop a community from using public funds to construct or improve a stadium or arena if it wishes to do so. The provision would require the team using the facility to share revenue only if the team receives financial benefits as a result of the public expenditures, such as rent abatement or extra luxury suite income, which exceed the league average. In other words, if the city chose to build or renovate a stadium, and used any additional revenues to repay the public expenditures for the construction, those new revenues would not be included in any revenue-sharing arrangement.

As I indicated earlier, the recent problems with franchise instability have occurred largely in the National Football League. It may be no coincidence that since a $49 million antitrust judgment was levied against the NFL for trying to block the Raiders' move to Los Angeles in the 1980's, football has been more reluctant than basketball and hockey to risk antitrust litigation over the propriety of league actions. It should be noted that my legislation does not require any league to take any action, but simply provides antitrust certainty to those leagues which choose to comply with the bill's requirements. Some leagues may not choose to participate initially.

Certainly this legislation should not be taken as any indication that joint conduct by a league in addressing franchise movement or any other issue would be illegal under the current state of antitrust law. The conduct of a league may very well be found lawful under the antitrust laws when making and enforcing rules governing franchise relocation by its teams, without consideration of this legislation. My bill simply provides certainty to leagues that choose to comply with its terms.

Finally, this bill does not limit its antitrust clarification to the major sports, but defines professional sports league broadly. It should be noted, however, that major league baseball is excluded from the bill as long as baseball's judicially created antitrust exemption concerning franchise relocation remains in place. I would hasten to add that franchise relocation issues are expressly not affected by the separate baseball legislation, S. 627, that I introduced with Senator HATCH and others, to limit baseball's judicially created antitrust exemption. Let me repeat so there is no confusion: neither this legislation I am introducing today, nor our baseball legislation, S. 627, which has passed both the Antitrust Subcommittee and the full Judiciary Committee, would in any way impact baseball's current ability to control franchise movement. Indeed, this new legislation along with S. 627 would go a long way toward putting all professional sports on an even footing under our Nation's antitrust laws.

Mr. President, the instability of sports franchises caused by large public subsidies of professional sports raises important issues which have a direct and significant impact on the lives and finances of most Americans. The Professional Sports Antitrust Clarification Act will help to resolve these concerns.

I send the bill to the desk and ask unanimous consent that it be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1696

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Professional Sports Antitrust Clarification Act of 1996''.

SEC. 2. ACTIONS AUTHORIZED.

(a) IN GENERAL.—Notwithstanding any provision of the antitrust laws, and subject to section 3 and subsection (b) of this section, a professional sports league or its member franchises may establish and enforce rules and procedures for the purpose of deciding whether a member franchise may change its home territory.

(b) CONSTRUCTION.—Nothing in this section shall be construed to exempt from the antitrust laws any conduct which would be unlawful under any antitrust law if engaged in by a single entity.

SEC. 3. REQUIREMENTS FOR ANTITRUST PROTECTION.

(a) IN GENERAL.—This Act applies to a professional sports league and its member franchises if such league—

(1) establishes applicable rules and procedures to govern whether a member franchise may change its home territory that are available upon request to any interested party;

(2) affords due process, including 180 days notice and an opportunity to be heard, to interested parties prior to deciding whether a member franchise may change its home territory; and

(3) promotes comparable economic opportunities by sharing revenue among member franchises to account for disparities in revenue received or costs saved due to direct or indirect public benefits and subsidies, including publicly financed facilities, rent abatement, special tax treatment, favorable arrangements for parking, concessions, and other amenities, and other public benefits not generally available to businesses as a whole within the jurisdiction.

(b) RULES AND PROCEDURES.—Rules and procedures established under subsection (a)(1) shall require consideration of various factors to protect the public interest, including—

(1) the extent to which fan support for a member franchise has been demonstrated through attendance, ticket sales, and television ratings, during the period in which the member franchise played in its home territory;

(2) the extent to which the member franchise has, directly or indirectly, received public financial support through publicly financed facilities, rent abatement, special tax treatment, favorable arrangements for parking, concessions, and other amenities, and any other public benefits not generally

available to businesses as a whole within the jurisdiction, and the extent to which such support continues;

(3) the effect that relocation would have on contracts, agreements, and understandings between the member franchise and public and private parties;

(4) the extent of any net operating losses experienced by the member franchise in recent years and the extent to which the member franchise bears responsibility for such losses; and

(5) any bona fide offer to purchase the member franchise at fair market value, if such offer includes the continued location of such member franchise in its home territory.

SEC. 4. JUDICIAL REVIEW.

(a) STANDARD OF REVIEW.—The standard of judicial review shall be de novo in any action challenging the establishment and enforcement of rules and procedures for deciding whether a member franchise may change its home territory, except that the reviewing court shall give deference to actions of the professional sports league regarding compliance with paragraphs (1) and (3) of section 3(a).

(b) DECLARATORY ACTIONS.—A professional sports league or any interested party may seek a declaratory judgment with respect to whether paragraphs (1) and (3) of section 3(a) are adequately satisfied by the professional sports league for this Act to apply.

(c) LIMITATION ON MONETARY DAMAGES.—A judicial finding that a professional sports league did not comply with any provision of section 3 shall result only in further proceedings by the professional sports league and shall not result in liability under the antitrust laws or monetary damages, if—

(1) the professional sports league implemented a revenue sharing plan in a good faith attempt to comply with section 3(a)(3) prior to the specific dispute in issue; or

(2) a prior declaratory judgment held that the revenue sharing plan of the professional sports league complied with section 3(a)(3).

(d) VENUE.—In any action challenging the establishment and enforcement of rules and procedures to decide whether a member franchise may change its home territory, venue shall be proper only in the United States District Court for the District of Columbia, except that—

(1) venue shall be proper only in the United States District Court for the Southern District of New York if the existing or proposed home territory of a member franchise is located within 100 miles of the United States District Court for the District of Columbia; and

(2) venue shall be proper only in the United States District Court for the Northern District of Illinois if—

(A) the existing home territory of a member franchise is located within 100 miles of the United States District Court for the District of Columbia or the Southern District of New York; and

(B) the proposed home territory of the member franchise is located within 100 miles of the United States District Court for the District of Columbia or the Southern District of New York.

SEC. 5. DEFINITIONS.

For purposes of this Act—

(1) the term ''antitrust laws''—

(A) has the same meaning as in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section relates to unfair methods of competition; and

(B) includes any State law comparable to the laws referred to in subparagraph (A);

(2) the terms ''professional sports team'', ''team'', ''member franchise'', and ''franchise'' mean any team of professional athletes that is a member of a professional sports league;

(3) the terms ''professional sports league'' and ''league'' mean—

(A) an association of 2 or more professional sports teams that governs the conduct of its members and regulates the contests and exhibitions in which such teams regularly engage;

(B) whose decisions relating to franchise relocation would otherwise be subject to the antitrust laws; and

(C) that has combined franchise revenues of more than $10,000,000 per year;

(4) the term ''interested party'' means the member franchise at issue, local and State government officials, owners and operators of playing facilities, concessionaires, and others whose business relations would be directly and significantly affected by the franchise relocation at issue, and representatives of organized civic and fan groups; and

(5) the term ''playing facility'' means the stadium, arena, or other venue in which professional sports teams regularly conduct their contests and exhibitions.

SEC. 6. EFFECTIVE DATE.

This Act applies to any action occurring on or after the date of enactment of this Act.

ADDITIONAL COSPONSORS

S. 334

At the request of Mr. MCCONNELL, the name of the Senator from Colorado [Mr. CAMPBELL] was added as a cosponsor of S. 334, a bill to amend title I of the Omnibus Crime Control and Safe Streets Act of 1968 to encourage States to enact a Law Enforcement Officers' Bill of Rights, to provide standards and protection for the conduct of internal police investigations, and for other purposes.

S. 673

At the request of Mrs. KASSEBAUM, the name of the Senator from Alaska [Mr. MURKOWSKI] was added as a cosponsor of S. 673, a bill to establish a youth development grant program, and for other purposes.

S. 773

At the request of Mrs. KASSEBAUM, the name of the Senator from Minnesota [Mr. GRAMS] was added as a cosponsor of S. 773, a bill to amend the Federal Food, Drug, and Cosmetic Act to provide for improvements in the process of approving and using animal drugs, and for other purposes.

S. 837

At the request of Mr. WARNER, the name of the Senator from Oklahoma [Mr. INHOFE] was added as a cosponsor of S. 837, a bill to require the Secretary of the Treasury to mint coins in commemoration of the 250th anniversary of the birth of James Madison.

S. 1002

At the request of Mr. CHAFEE, the name of the Senator from Louisiana [Mr. BREAUX] was added as a cosponsor of S. 1002, a bill to amend the Internal Revenue Code of 1986 to provide a credit against income tax to individuals who rehabilitate historic homes or who are the first purchasers of rehabilitated historic homes for use as a principal residence.

S. 1493

At the request of Mr. LAUTENBERG, the names of the Senator from Hawaii [Mr. AKAKA], the Senator from California [Mrs. BOXER], the Senator from Nevada [Mr. REID], the Senator from Wisconsin [Mr. FEINGOLD], the Senator from Wisconsin [Mr. KOHL], the Senator from Massachusetts [Mr. KERRY], the Senator from Illinois [Mr. SIMON], the Senator from Maryland [Ms. MIKULSKI], and the Senator from New Jersey [Mr. BRADLEY] were added as cosponsors of S. 1493, a bill to amend title 18, United States Code, to prohibit certain interstate conduct relating to exotic animals.

S. 1524

At the request of Mr. LAUTENBERG, the name of the Senator from Washington [Mrs. MURRAY] was added as a cosponsor of S. 1524, a bill to amend title 49, United States Code, to prohibit smoking on any scheduled airline flight segment in intrastate, interstate, or foreign air transportation.

S. 1578

At the request of Mr. FRIST, the names of the Senator from Massachusetts [Mr. KENNEDY], the Senator from Idaho [Mr. KEMPTHORNE], the Senator from New Mexico [Mr. DOMENICI], the Senator from Illinois [Mr. SIMON], and the Senator from Rhode Island [Mr. PELL] were added as cosponsors of S. 1578, a bill to amend the Individuals with Disabilities Education Act to authorize appropriations for fiscal years 1997 through 2002, and for other purposes.

S. 1612

At the request of Mr. HELMS, the name of the Senator from Alaska [Mr. MURKOWSKI] was added as a cosponsor of S. 1612, a bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes.

S. 1628

At the request of Mr. BROWN, the names of the Senator from Colorado [Mr. CAMPBELL], and the Senator from Alaska [Mr. MURKOWSKI] were added as cosponsors of S. 1628, a bill to amend title 17, United States Code, relating to the copyright interests of certain musical performances, and for other purposes.

S. 1660

At the request of Mr. GLENN, the names of the Senator from Ohio [Mr. DEWINE] and the Senator from Illinois [Mr. SIMON] were added as cosponsors of S. 1660, a bill to provide for ballast water management to prevent the introduction and spread of nonindigenous species into the waters of the United States, and for other purposes.

S. 1690

At the request of Mr. CONRAD, the name of the Senator from Wisconsin [Mr. KOHL] was added as a cosponsor of S. 1690, a bill to provide a grace period for the prohibition on Consolidated Farm Service Agency lending to delinquent borrowers, and for other purposes.

SENATE JOINT RESOLUTION 21

At the request of Mr. THURMOND, his name was added as a cosponsor of Senate Joint Resolution 21, a joint resolution proposing a constitutional amendment to limit congressional terms.

At the request of Mr. THOMPSON, the name of the Senator from Minnesota [Mr. GRAMS] was added as a cosponsor of Senate Joint Resolution 21, supra.

SENATE JOINT RESOLUTION 51

At the request of Mr. DOLE, the names of the Senator from Michigan [Mr. LEVIN] and the Senator from Colorado [Mr. BROWN] were added as cosponsors of Senate Joint Resolution 51, a joint resolution saluting and congratulating Polish people around the world as, on May 3, 1996, they commemorate the 205th anniversary of the adoption of Poland's first constitution.

SENATE CONCURRENT RESOLUTION 42

At the request of Mrs. KASSEBAUM, the name of the Senator from Virginia [Mr. ROBB] was added as a cosponsor of Senate Concurrent Resolution 42, a concurrent resolution concerning the emancipation of the Iranian Baha'i community.

SENATE RESOLUTION 226

At the request of Mr. DOMENICI, the name of the Senator from Kentucky [Mr. FORD] was added as a cosponsor of Senate Resolution 226, a resolution to proclaim the week of October 13 through October 19, 1996, as ''National Character Counts Week.''

SENATE RESOLUTION 248

At the request of Mr. FEINGOLD, the name of the Senator from Connecticut [Mr. DODD] was added as a cosponsor of Senate Resolution 248, a resolution relating to the violence in Liberia.

AMENDMENT NO. 3693

At the request of Mr. THOMPSON the name of the Senator from Michigan [Mr. ABRAHAM] was added as a cosponsor of amendment No. 3693 proposed to Senate Joint Resolution 21, a joint resolution proposing a constitutional amendment to limit congressional terms.

AMENDMENT NO. 3695

At the request of Mr. THOMPSON the name of the Senator from Michigan [Mr. ABRAHAM] was added as a cosponsor of amendment No. 3695 proposed to Senate Joint Resolution 21, a joint resolution proposing a constitutional amendment to limit congressional terms.

AMENDMENT NO. 3697

At the request of Mr. THOMPSON the name of the Senator from Michigan [Mr. ABRAHAM] was added as a cosponsor of amendment No. 3697 proposed to Senate Joint Resolution 21, a joint resolution proposing a constitutional amendment to limit congressional terms.

AMENDMENT NO. 3699

At the request of Mr. THOMPSON the name of the Senator from Michigan [Mr. ABRAHAM] was added as a cosponsor of amendment No. 3699 proposed to Senate Joint Resolution 21, a joint resolution proposing a constitutional amendment to limit congressional terms.

SENATE CONCURRENT RESOLUTION 53 RELATIVE TO THE REPUBLIC OF SIERRA LEONE

Mr. JEFFORDS (for himself, Mrs. KASSEBAUM, Mr. SIMON, and Mr. FEINGOLD) submitted the following concurrent resolution; which was referred to the Committee on Foreign Relations:

S. CON. RES. 53

Whereas since 1991 the people of the Republic of Sierra Leone have endured a horrific civil war that has killed thousands of individuals and displaced more than half the population of the country;

Whereas for the first time in almost 30 years, the Republic of Sierra Leone held its first truly democratic multiparty elections to elect a president and parliament and put an end to military rule;

Whereas the elections held on February 26, 1996, and the subsequent runoff election held on March 15, 1996, were deemed by international and domestic observers to be free and fair and legitimate expressions of the will of the people of the Republic of Sierra Leone;

Whereas success of the newly elected democratic government led by President Ahmad Tejan Kabbah could have a positive effect on the West African neighbors of the Republic of Sierra Leone; and

Whereas the historic event of democratic multiparty elections in the Republic of Sierra Leone should be honored: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That the Congress—

(1) congratulates the people of the Republic of Sierra Leone for holding their first democratic multiparty presidential and parliamentary elections in nearly 30 years;

(2) encourages all people of the Republic of Sierra Leone to continue to negotiate an end to the civil war and work together after taking the critical first step of holding democratic elections in that country;

(3) reaffirms the commitment of the United States to help nations move toward freedom and democracy; and

(4) further reaffirms that the United States is committed to encouraging peace, democracy, and economic development on the African continent.

● Mr. JEFFORDS. Mr. President, I am submitting for myself and several of my colleagues a concurrent resolution recognizing the people of the Republic of Sierra Leone for their recent elections and democratic transition. The elections held this February and March were the first multiparty democratic elections in Sierra Leone in almost 30 years. They marked what could well be the key turning point in the civil war which has tormented Sierra Leone since 1991. In the face of ongoing civil war and violence, Sierra Leoneans—SEE-AIR-AH LEE-OH-NEE-UNS—turned out in impressive numbers to vote, literally putting their lives on the line for democracy. They clearly believed that the ballot is more powerful than the bullet, and voted to end military rule and the rule of the gun. Their courage and resolve remind us of the blessings of democracy and liberty which we so often take for granted in the United States. This example is particularly timely for us in this year of American elections.

As well as helping move Sierra Leone toward a peaceful resolution of its own civil conflict, this successful transition from military rule to democracy can serve as a positive example for the region. Sierra Leone's potential role in the region was underlined last week during the tragic events in Liberia. The new government of Sierra Leone allowed the United States to use the airport in Freetown as a transit point for the evacuation of Americans and third country nationals from Liberia. We are grateful for this assistance.

I also wish to take this opportunity to recognize the important contribution of the various Americans involved in Sierra Leone's transition, notably the United States Embassy in Freetown led by Ambassador John Hirsch, and the African-American Institute, which sent a nonpartisan election observation group to monitor the elections throughout Sierra Leone and train local monitors for this and future democratic elections there.

I have long believed that there are many positive developments in Africa, and that they often are overshadowed by the problems and crises. It is my pleasure today to be able to recognize one such positive development, and in that spirit, I hope that my colleagues in the Senate and in the House will join me and my colleagues to pass this resolution congratulating the Republic of Sierra Leone on its democratic transition.●

● Mrs. KASSEBAUM. Mr. President, I am pleased to join with Senator JEFFORDS, Senator FEINGOLD, and others in submitting this resolution commending the people of Sierra Leone on their successful transition to democracy.

At a time of much instability in west Africa—from Liberia, to the Gambia, to Nigeria—the changes in Sierra Leone represent a beacon of hope for the region.

Many people questioned the wisdom of proceeding with a multi-party election in the midst of a civil war, but the people of Sierra Leone would not be denied their opportunity to vote. They stood in line for many hours, desperate to cast their ballot. Their will was strong: the military simply had to go. Through their determination, the election succeeded, and on March 29, 1996, the military handed over power to a democratically elected head of state.

Mr. President, I am pleased to join with my distinguished colleagues in congratulating the new President, Ahmad Tejan Kabbah, on his election. He brings to the job a distinguished background in international affairs, and I believe is well prepared to lead Sierra Leone from its troubled past to a prosperous and peaceful future. It is my hope that the Senate Foreign Relations Committee will soon be able to welcome the new President to Washington.

The head of the Interim National Election Commission, Mr. James Jonah, also deserves special congratulations. Under extremely difficult circumstances—from financial to logistical to political—Mr. Jonah guided his country toward democracy and civilian rule. His steady hand contributed greatly to the success of the process.

I also want to pay special tribute to the United States Ambassador to Sierra Leone, John Hirsch. Despite limited resources, Ambassador Hirsch played a critically important role in pushing for democratic change. We often fail to recognize our skilled diplomats in small embassies like Freetown, but their dedicated efforts are extremely important and appreciated.

Finally, I want to commend the former military ruler of the country, Julius Amaada Bio, for respecting the results of the elections. Until the last moment, many questioned whether the military would actually hand over power. Of course, many military rulers—including some in west Africa—have ignored elections. But Brigadier Bio demonstrated statesmanlike leadership in guiding his country to democracy, and I believe history will look upon him kindly.

Mr. President, the path ahead for Sierra Leone will not be easy. While a tentative cease-fire holds, instability continues to plague the Sierra Leonian countryside. I hope the Revolutionary United Front [RUF] will negotiate in good faith with the new President of the country and that a lasting peace agreement can soon be reached. The time for fighting is over as Sierra Leone moves toward a new era.

At the same time, reform of the military must be a top priority. There is little doubt that the people of Sierra Leone lack confidence in the integrity and professionalism of their own protectors. That must change.

As the peace process moves forward, the South African mercenaries should also return to their homes. As I told Chairman Strasser, the former head of state, during his visit to Washington last October, the continued presence of mercenaries will only contribute to instability over the long-run.

While elections are important, Sierra Leone must get back on its feet economically for democracy to take root. The civil war and instability have devastated the formal economy. But Sierra Leone is gifted with many natural resources and great beauty. I urge the new government to work closely with the international financial institutions to move the economy forward, and I urge our Government to closely examine what contribution we can make to Sierra Leone's recovery.

Mr. President, as chair of the Africa subcommittee, many people ask whether I get frustrated watching events in Africa—and sometimes I do. But for every Rwanda or Liberia, there is a South Africa, a Mozambique, or even—as we recognize today—a Sierra Leone.

Again, I congratulate the people of Sierra Leone on their historic election and am pleased to join my colleagues in cosponsoring this important resolution.●

SENATE RESOLUTION 242—TO PROVIDE FOR THE APPROVAL OF FINAL REGULATIONS

Mr. WARNER submitted the following resolution; which was considered and agreed to on April 15, 1996:

S. RES. 242

Resolved, That the following regulations issued by the Office of Compliance on January 22, 1996 are hereby approved as follows:

PART 825—FAMILY AND MEDICAL LEAVE

825.1 Purpose and scope.
825.2 [Reserved].

SUBPART A—WHAT IS THE FAMILY AND MEDICAL LEAVE ACT, AND TO WHOM DOES IT APPLY UNDER THE CONGRESSIONAL ACCOUNTABILITY ACT?

825.100 What is the Family and Medical Leave Act?
825.101 What is the purpose of the FMLA?
825.102 When are the FMLA and the CAA effective for covered employees and employing offices?
825.103 How does the FMLA, as made applicable by the CAA, affect leave in progress on, or taken before, the effective date of the CAA?
825.104 What employing offices are covered by the FMLA, as made applicable by the CAA?
825.105 [Reserved].
825.106 How is ''joint employment'' treated under the FMLA as made applicable by the CAA?
825.107—825.109 [Reserved].
825.110 Which employees are ''eligible'' to take FMLA leave under these regulations?
825.111 [Reserved].
825.112 Under what kinds of circumstances are employing offices required to grant family or medical leave?
825.113 What do ''spouse'', ''parent'', and ''son or daughter'' mean for purposes of an employee qualifying to take FMLA leave?
825.114 What is a ''serious health condition'' entitling an employee to FMLA leave?
825.115 What does it mean that ''the employee is unable to perform the (functions of the position of the employee''?
825.116 What does it mean that an employee is ''needed to care for'' a family member?
825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by ''the medical necessity for'' such leave?
825.118 What is a ''health care provider''?

SUBPART B—WHAT LEAVE IS AN EMPLOYEE ENTITLED TO TAKE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT?

825.200 How much leave may an employee take?
825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?
825.202 How much leave may a husband and wife take if they are employed by the same employing office?
825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?
825.204 May an employing office transfer an employee to an ''alternative position'' in order to accommodate intermittent leave or a reduced leave schedule?
825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?
825.206 May an employing office deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, as made applicable by the CAA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee, or when utilizing the fluctuating workweek method for payment of overtime, under the Fair Labor Standards Act?
825.207 Is FMLA leave paid or unpaid?
825.208 Under what circumstances may an employing office designate leave, paid or unpaid, as FMLA leave and, as a result, enable leave to be counted against the employee's total FMLA leave entitlement?
825.209 Is an employee entitled to benefits while using FMLA leave?
825.210 How may employees on FMLA leave pay their share of group health benefit premiums?
825.211 What special health benefits maintenance rules apply to multi-employer health plans?
825.212 What are the consequences of an employee's failure to make timely health plan premium payments?
825.213 May an employing office recover costs it incurred for maintaining ''group health plan'' or other non-health benefits coverage during FMLA leave?
825.214 What are an employee's rights on returning to work from FMLA leave?
825.215 What is an equivalent position?
825.216 Are there any limitations on an employing office's obligation to reinstate an employee?
825.217 What is a ''key employee''?
825.218 What does ''substantial and grievous economic injury'' mean?
825.219 What are the rights of a key employee?
825.220 How are employees protected who request leave or otherwise assert FMLA rights?

SUBPART C—HOW DO EMPLOYEES LEARN OF THEIR RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA, AND WHAT CAN AN EMPLOYING OFFICE REQUIRE OF AN EMPLOYEE?

825.300 [Reserved].
825.301 What notices to employees are required of employing offices under the FMLA as made applicable by the CAA?
825.302 What notice does an employee have to give an employing office when the need for FMLA leave is foreseeable?
825.303 What are the requirements for an employee to furnish notice to an employing office where the need for FMLA leave is not foreseeable?
825.304 What recourse do employing offices have if employees fail to provide the required notice?

825.305 When must an employee provide medical certification to support FMLA leave?
825.306 How much information may be required in medical certifications of a serious health condition?
825.307 What may an employing office do if it questions the adequacy of a medical certification?
825.308 Under what circumstances may an employing office request subsequent recertifications of medical conditions?
825.309 What notice may an employing office require regarding an employee's intent to return to work?
825.310 Under what circumstances may an employing office require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a ''fitness-for-duty'' report)?
825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?
825.312 Under what circumstances may an employing office refuse to provide FMLA leave or reinstatement to eligible employees?

SUBPART D—WHAT ENFORCEMENT MECHANISMS DOES THE CAA PROVIDE?

825.400 What can employees do who believe that their rights under the FMLA as made applicable by the CAA have been violated?
825.401—825.404 [Reserved].

SUBPART E—[RESERVED]

SUBPART F—WHAT SPECIAL RULES APPLY TO EMPLOYEES OF SCHOOLS?

825.600 To whom do the special rules apply?
825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?
825.602 What limitations apply to the taking of leave near the end of an academic term?
825.603 Is all leave taken during ''periods of a particular duration'' counted against the FMLA leave entitlement?
825.604 What special rules apply to restoration to ''an equivalent position''?

SUBPART G—HOW DO OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS AFFECT EMPLOYEE RIGHTS UNDER THE FMLA AS MADE APPLICABLE BY THE CAA?

825.700 What if an employing office provides more generous benefits than required by FMLA as Made Applicable by the CAA?
825.701 [Reserved].
825.702 How does FMLA affect anti-discrimination laws as applied by section 201 of the CAA?

SUBPART H—DEFINITIONS

825.800 Definitions.
Appendix A to Part 825—[Reserved].
Appendix B to Part 825—Certification of Physician or Practitioner.
Appendix C to Part 825—[Reserved].
Appendix D to Part 825—Prototype Notice: Employing Office Response to Employee Request for Family and Medical Leave.
Appendix E to Part 825—[Reserved].

PART 825—FAMILY AND MEDICAL LEAVE

§ 825.1 Purpose and scope

(a) Section 202 of the Congressional Accountability Act (CAA) (2 U.S.C. 1312) applies the rights and protections of sections 101 through 105 of the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2611–2615) to covered employees. (The term ''covered employee'' is defined in section 101(3) of the CAA (2 U.S.C. 1301(3)). See § 825.800 of these regulations for that definition.) The purpose of this part is to set forth the regulations to carry out the provisions of section 202 of the CAA.

(b) These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 202(d) and 304 of the CAA, which direct the Board to promulgate regulations implementing section 202 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section''. The regulations issued by the Board herein are on all matters for which section 202 of the CAA requires regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 202 of the CAA]''.

(c) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

§ 825.2 [Reserved]

SUBPART A—WHAT IS THE FAMILY AND MEDICAL LEAVE ACT, AND TO WHOM DOES IT APPLY UNDER THE CONGRESSIONAL ACCOUNTABILITY ACT?

§ 825.100 What is the Family and Medical Leave Act?

(a) The Family and Medical Leave Act of 1993 (FMLA), as made applicable by the Congressional Accountability Act (CAA), allows ''eligible'' employees of an employing office to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (see § 825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employing office or a disbursing or other financial office of the Senate may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's immediate family member, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employing office has a right to 30 days advance notice from the employee where practicable. In addition, the employing office may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employing office may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (see § 825.311(c)). The employing office may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 What is the purpose of the FMLA?

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the FMLA accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns ''the needs of the American workforce, and the development of high-performance organizations''. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to

pressing family health obligations or their own serious illness.

§ 825.102 When are the FMLA and the CAA effective for covered employees and employing offices?

(a) The rights and protection of sections 101 through 105 of the FMLA have applied to certain Senate employees and certain employing offices of the Senate since August 5, 1993 (see section 501 of FMLA).

(b) The rights and protection of sections 101 through 105 of the FMLA have applied to any employee in an employment position and any employment authority of the House of Representatives since August 5, 1993 (see section 502 of FMLA).

(c) The rights and protections of sections 101 through 105 of the FMLA have applied to certain employing offices and covered employees other than those referred to in paragraphs (a) and (b) of this section for certain periods since August 5, 1993 (see, e.g., title V of the FMLA, sections 501 and 502).

(d) The provisions of section 202 of the CAA that apply rights and protections of the FMLA to covered employees are effective on January 23, 1996.

(e) The period prior to the effective date of the application of FMLA rights and protections under the CAA must be considered in determining employee eligibility.

§ 825.103 How does the FMLA, as made applicable by the CAA, affect leave in progress on, or taken before, the effective date of the CAA?

(a) An eligible employee's right to take FMLA leave began on the date that the rights and protections of the FMLA first went into effect for the employing office and employee (see § 825.102(a)). Any leave taken prior to the date on which the rights and protections of the FMLA first became effective for the employing office from which the leave was taken may not be counted for purposes of the FMLA as made applicable by the CAA. If leave qualifying as FMLA leave was underway prior to the effective date of the FMLA for the employing office from which the leave was taken and continued after the FMLA's effective date for that office, only that portion of leave taken on or after the FMLA's effective date may be counted against the employee's leave entitlement under the FMLA, as made applicable by the CAA.

(b) If an employing office-approved leave is underway when the application of the FMLA by the CAA takes effect, no further notice would be required of the employee unless the employee requests an extension of the leave. For leave which commenced on the effective date or shortly thereafter, such notice must have been given which was practicable, considering the foreseeability of the need for leave and the effective date.

(c) Starting on January 23, 1996, an employee is entitled to FMLA leave under these regulations if the reason for the leave is qualifying under the FMLA, as made applicable by the CAA, even if the event occasioning the need for leave (e.g., the birth of a child) occurred before such date (so long as any other requirements are satisfied).

§ 825.104 What employing offices are covered by the FMLA, as made applicable by the CAA?

(a) The FMLA, as made applicable by the CAA, covers all employing offices. As used in the CAA, the term ''employing office'' means—

(1) the personal office of a Member of the House of Representatives or of a Senator;

(2) a committee of the House of Representatives or the Senate or a joint committee;

(3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

(b) [Reserved]

(c) Separate entities will be deemed to be parts of a single employer for purposes of the FMLA, as made applicable by the CAA, if they meet the ''integrated employer'' test. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common financial control.

§ 825.105 [Reserved]

§ 825.106 How is "joint employment" treated under the FMLA as made applicable by the CAA?

(a) Where two or more employing offices exercise some control over the work or working conditions of the employee, the employing offices may be joint employers under FMLA, as made applicable by the CAA. Where the employee performs work which simultaneously benefits two or more employing offices, or works for two or more employing offices at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employing offices to share an employee's services or to interchange employees;

(2) Where one employing office acts directly or indirectly in the interest of the other employing office in relation to the employee; or

(3) Where the employing offices are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employing office controls, is controlled by, or is under common control with the other employing office.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when—

(1) an employee, who is employed by an employing office other than the personal office of a Member of the House of Representatives or of a Senator, is under the actual direction and control of the Member of the House of Representatives or Senator; or

(2) two or more employing offices employ an individual to work on common issues or other matters for both or all of them.

(c) When employing offices employ a covered employee jointly, they may designate one of themselves to be the primary employing office, and the other or others to be the secondary employing office(s). Such a designation shall be made by written notice to the covered employee.

(d) If an employing office is designated a primary employing office pursuant to paragraph (c) of this section, only that employing office is responsible for giving required notices to the covered employee, providing FMLA leave, and maintenance of health benefits. Job restoration is the primary responsibility of the primary employing office, and the secondary employing office(s) may, subject to the limitations in § 825.216, be responsible for accepting the employee returning from FMLA leave.

(e) If employing offices employ an employee jointly, but fail to designate a primary employing office pursuant to paragraph (c) of this section, then all of these employing offices shall be jointly and severally liable for giving required notices to the employee, for providing FMLA leave, for assuring that health benefits are maintained, and for job restoration. The employee may give notice of need for FMLA leave, as described in §§ 825.302 and 825.303, to whichever of these employing offices the employee chooses. If the employee makes a written request for restoration to one of these employing offices, that employing office shall be primarily responsible for job restoration, and the other employing office(s) may, subject to the limitations in § 825.216, be responsible for accepting the employee returning from FMLA leave.

§ 825.107 [Reserved]

§ 825.108 [Reserved]

§ 825.109 [Reserved]

§ 825.110 Which employees are "eligible" to take FMLA leave under these regulations?

(a) An ''eligible employee'' under these regulations means a covered employee who has been employed in any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months.

(b) The 12 months an employee must have been employed by any employing office need not be consecutive months. If an employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals 12 months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months'', 52 weeks is deemed to be equal to 12 months.

(c) If an employee was employed by two or more employing offices, either sequentially or concurrently, the hours of service will be aggregated to determine whether the minimum of 1,250 hours has been reached. Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA), as applied by section 203 of the CAA (2 U.S.C. 1313), for determining compensable hours of work. The determining factor is the number of hours an employee has worked for one or more employing offices. The determination is not limited by methods of record-keeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employing office. Any accurate accounting of actual hours worked may be used. For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employing office must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not ''eligible'' for FMLA leave.

(d) The determinations of whether an employee has worked for any employing office for at least 1,250 hours in the previous 12 months and has been employed by any employing office for a total of at least 12

months must be made as of the date leave commences. The ''previous 12 months'' means the 12 months immediately preceding the commencement of the leave. If an employee notifies the employing office of need for FMLA leave before the employee meets these eligibility criteria, the employing office must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employing office confirms eligibility at the time the notice for leave is received, the employing office may not subsequently challenge the employee's eligibility. In the latter case, if the employing office does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employing office does advise. If the employing office fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employing office may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employing office fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the effective date of the application of FMLA rights and protections under the CAA must be considered in determining employee's eligibility.

(f) [Reserved]

§ 825.111 [Reserved]

§ 825.112 Under what kinds of circumstances are employing offices required to grant family or medical leave?

(a) Employing offices are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child;

(2) For placement with the employee of a son or daughter for adoption or foster care;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

(b) The right to take leave under FMLA as made applicable by the CAA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child.

(c) Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave pursuant to paragraph (a)(4) of this section before the birth of the child for prenatal care or if her condition makes her unable to work.

(d) Employing offices are required to grant FMLA leave pursuant to paragraph (a)(2) of this section before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(e) Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

(f) In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

(g) FMLA leave is available for treatment for substance abuse provided the conditions of § 825.114 are met. However, treatment for substance abuse does not prevent an employing office from taking employment action against an employee. The employing office may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employing office has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employing office may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

§ 825.113 What do "spouse", "parent", and "son or daughter" mean for purposes of an employee qualifying to take FMLA leave?

(a) Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(b) Parent means a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter as defined in (c) below. This term does not include parents ''in law''.

(c) Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability''.

(1) ''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) ''Physical or mental disability'' means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. See the Americans with Disabilities Act (ADA), as made applicable by section 201(a)(3) of the CAA (2 U.S.C. 1311(a)(3)).

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) For purposes of confirmation of family relationship, the employing office may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employing office is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider

or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.115 What does it mean that ''the employee is unable to perform the functions of the position of the employee''?

An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as made applicable by section 201(a)(3) of the CAA (2 U.S.C. 1311(a)(3)). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employing office has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

§ 825.116 What does it mean that an employee is ''needed to care for'' a family member?

(a) The medical certification provision that an employee is ''needed to care for'' a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently ''such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

§ 825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by ''the medical necessity for'' such leave?

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (see § 825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employing office's operations. In addition, an employing office may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

§ 825.118 What is a ''health care provider''?

(a)(1) The term ''health care provider'' means:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Office of Compliance to be capable of providing health care services.

(2) In making a determination referred to in subparagraph (1)(ii), and absent good cause shown to do otherwise, the Office of Compliance will follow any determination made by the Secretary of Labor (under section 101(6)(B) of the FMLA, 29 U.S.C. 2611(6)(B)) that a person is capable of providing health care services, provided the Secretary's determination was not made at the request of a person who was then a covered employee.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employing office that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(4) Any health care provider from whom an employing office or the employing office's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.

SUBPART B—WHAT LEAVE IS AN EMPLOYEE ENTITLED TO TAKE UNDER THE FAMILY AND MEDICAL LEAVE ACT, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT?

§ 825.200 How much leave may an employee take?

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employing office is permitted to choose any one of the following methods for determining the ''12-month period'' in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month ''leave year'', such as a fiscal year or a year starting on an employee's ''anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before the date on which the application of FMLA rights and protections first becomes effective for the employing office; see §825.102).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1997, four weeks beginning June 1, 1997, and four weeks beginning December 1, 1997, the employee would not be entitled to any additional leave until February 1, 1998. However, beginning on February 1, 1998, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, etc.

(d)(1) Employing offices will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employing office wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the CAA's FMLA leave requirements.

(2) [Reserved]

(e) If an employing office fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employing office may subsequently select an option only by providing the 60-day notice to all employees of the option the employing office intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employing office may implement the selected option.

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employing office's activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employing office closing the office for repairs), the days the employing office's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in §825.205.

(g)(1) If employing offices jointly employ an employee, and if they designate a primary employer pursuant to §825.106(c), the primary employer may choose any one of the alternatives in paragraph (b) of this section for measuring the 12-month period, provided that the alternative chosen is applied consistently and uniformly to all employees of the primary employer including the jointly employed employee.

(2) If employing offices fail to designated a primary employer pursuant to §825.106(c), an employee jointly employed by the employing offices may, by so notifying one of the employing offices, select that employing office to be the primary employer of the employee for purposes of the application of paragraphs (d) and (e) of this section.

§825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement, unless the employing office permits leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period.

§825.202 How much leave may a husband and wife take if they are employed by the same employing office?

(a) A husband and wife who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken—

(1) for birth of the employee's son or daughter or to care for the child after birth;

(2) for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement; or

(3) to care for the employee's parent with a serious health condition.

(b) This limitation on the total weeks of leave applies to leave taken for the reasons specified in paragraph (a) of this section as long as a husband and wife are employed by the ''same employing office''. It would apply, for example, even though the spouses are employed at two different work sites of an employing office. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave.

(c) Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the purposes in paragraph (a) of this section, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than those contained in paragraph (a) of this section. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

§825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?

(a) FMLA leave may be taken ''intermittently or on a reduced leave schedule'' under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employing office agrees. Such a schedule reduction might occur, for example, where an employee, with the employing office's agreement, works part-time after the birth of a child, or takes leave in several segments. The employing office's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employing office may limit leave increments to the shortest period of time that the employing office's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in §§825.601 and 825.602.

§825.204 May an employing office transfer an employee to an "alternative position" in order to accommodate intermittent leave or a reduced leave schedule?

(a) If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employing office agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employing office may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. See §825.601 for

special rules applicable to instructional employees of schools.

(b) Transfer to an alternative position may require compliance with any applicable collective bargaining agreement and any applicable law (such as the Americans with Disabilities Act, as made applicable by the CAA). Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

(c) The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employing office may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employing office may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employing office may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employing office may proportionately reduce benefits such as vacation leave where an employing office's normal practice is to base such benefits on the number of hours worked.

(d) An employing office may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employing office to make such a transfer will be held to be contrary to the prohibited-acts provisions of the FMLA, as made applicable by the CAA.

(e) When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

(a) If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use ⅕ of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use ½ week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employing office has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

§ 825.206 May an employing office deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, as made applicable by the CAA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee, or when utilizing the fluctuating workweek method for payment of overtime, under the Fair Labor Standards Act?

(a) Leave taken under FMLA, as made applicable by the CAA, may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), as made applicable by the CAA, as a salaried executive, administrative, or professional employee (under regulations issued by the Board, at part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employing office may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employing office provides FMLA leave, whether paid or unpaid, or maintains any records regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of the Board's regulations at part 541.

(b) For an employee paid in accordance with a fluctuating workweek method of payment for overtime, where permitted by section 203 of the CAA (2 U.S.C. 1313), the employing office, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employing office chooses to follow this exception from the fluctuating workweek method of payment, the employing office must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employing office does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

(c) This special exception to the ''salary basis'' requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of employing offices who are eligible for FMLA leave, and to leave which qualifies as (one of the four types of) FMLA leave. Hourly or other deductions which are not in accordance with the Board's regulations at part 541 or with a permissible fluctuating workweek method of payment for overtime may not be taken, for example, where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by the Board's regulations at part 541 or by a permissible fluctuating workweek method of payment for overtime be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under an employing office's policy or practice for a reason which does not qualify as FMLA leave, e.g., leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition; or for leave which is more generous than provided by FMLA as made applicable by the CAA, such as leave in excess of 12 weeks in a year. The employing office may comply with the employing office's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an ''hourly'' employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA, as made applicable by the CAA, permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employing office may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term ''family leave'' as used in FMLA refers to paid leave provided by the employing office covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employing office's leave plan allows use of family leave to care for a child but not for a parent, the employing office is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employing office's usual requirements for the use of sick/medical leave. An employing office is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave ''in any situation'' where

the employing office's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employing office's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employing office's leave plan.

(d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA as made applicable by the CAA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employing office may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employing office's temporary disability plan are more stringent than those of FMLA as made applicable by the CAA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(2) The FMLA as made applicable by the CAA provides that a serious health condition may result from injury to the employee ''on or off'' the job. If the employing office designates the leave as FMLA leave in accordance with §825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employing office's offer of a ''light duty job''. As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employing office may require the use of accrued paid leave. See also §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing ''paid time off'', may be substituted, at either the employee's or the employing office's option, for any qualified FMLA leave. No limitations may be placed by the employing office on substitution of paid vacation or personal leave for these purposes.

(f) If neither the employee nor the employing office elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employing office's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employing office elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employing office's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA as made applicable by the CAA (e.g., notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employing office's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA as made applicable by the CAA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employing office's sick leave program. See §§825.302(g), 825.305(e) and 825.306(c).

(i) Compensatory time off, if any is authorized under applicable law, is not a form of accrued paid leave that an employing office may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employing office permits the accrual of compensatory time to be used in compliance with applicable Board regulations, the absence which is paid from the employee's accrued compensatory time ''account'' may not be counted against the employee's FMLA leave entitlement.

§825.208 Under what circumstances may an employing office designate leave, paid or unpaid, as FMLA leave and, as a result, enable leave to be counted against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employing office's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employing office's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employing office of the need to take FMLA leave). In any circumstance where the employing office does not have sufficient information about the reason for an employee's use of paid leave, the employing office should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employing office to determine that the leave qualifies under the FMLA, as made applicable by the CAA. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employing office to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in §825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the FMLA as made applicable by the CAA or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employing office of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employing office's established policy or practice—and the employing office denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employing office is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employing office may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employing office has acquired knowledge that the leave is being taken for an FMLA required reason, the employing office must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employing office and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employing office. Such discussions and the decision must be documented.

(2) The employing office's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employing office requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employing office within two business days of the time the employee gives notice of the need for leave, or, where the employing office does not initially have sufficient information to make a determination, when the employing office determines that the leave qualifies as FMLA leave if this happens later. The employing office's designation must be made before the leave starts, unless the employing office does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employing office has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employing office may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the FMLA,

as made applicable by the CAA, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employing office learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employing office for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employing office may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employing offices may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employing office did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employing office may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employing office was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employing office within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employing office knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employing office has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employing office should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employing office must withdraw the designation (with written notice to the employee).

(f) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office, except that, if the FMLA leave began after the effective date of these regulations (or if the FMLA leave was subject to other applicable requirement under which the employing office was to have designated the leave as FMLA leave), the prior employing office must have properly designated the leave as FMLA under these regulations or other applicable requirement.

§825.209 Is an employee entitled to benefits while using FMLA leave?

(a) During any FMLA leave, the employing office must maintain the employee's coverage under the Federal Employees Health Benefits Program or any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employing offices are subject to the requirements of the FMLA, as made applicable by the CAA, to maintain health coverage. The definition of ''group health plan'' is set forth in §825.800. For purposes of FMLA, the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that—

(1) no contributions are made by the employing office;

(2) participation in the program is completely voluntary for employees;

(3) the sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) the employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained during leave if provided in an employing office's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employing office provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employing office changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employing office.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc. See §825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) or 5 U.S.C. 8905a, whichever is applicable, and for ''key'' employees (as discussed below), an employing office's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employing office of his or her intent not to return from leave (including before starting the leave if the employing office is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ''key employee'' (see §825.218) does not return from leave when notified by the employing office that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employing office that the employee does not desire restoration to employment at the end of the leave period, or FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employing office's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

§825.210 How may employees on FMLA leave pay their share of group health benefit premiums?

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employing office's group health plan, as described in §825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employing office has a number of options for obtaining payment from the employee. The employing office may require that payment be made to the employing office or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employing office may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA or 5 U.S.C. 8905a, whichever is applicable;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employing office's existing rules for payment by employees on ''leave without pay'' would be followed, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(5) Another system voluntarily agreed to between the employing office and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employing office must provide the employee with advance written notice of the terms and conditions under which these payments must be made. (See §825.301.)

(e) An employing office may not require more of an employee using FMLA leave than the employing office requires of other employees on ''leave without pay''.

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employing office for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. See paragraph (c) of this section and §825.207(d)(2).

§825.211 What special health benefits maintenance rules apply to multi-employer health plans?

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employing office under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use ''banked'' hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in §825.209(f), group health plan coverage must be maintained for an employee on FMLA leave until:

(1) the employee's FMLA leave entitlement is exhausted;

(2) the employing office can show that the employee would have been laid off and the employment relationship terminated; or

(3) the employee provides unequivocal notice of intent not to return to work.

§825.212 What are the consequences of an employee's failure to make timely health plan premium payments?

(a)(1) In the absence of an established employing office policy providing a longer grace period, an employing office's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employing office must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employing office has established policies regarding other forms of unpaid leave that provide for the employing office to cease coverage retroactively to the date the unpaid premium payment was due, the employing office may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employing office has no obligation regarding the maintenance of a health insurance policy which is not a ''group health plan''. See §825.209(a).

(3) All other obligations of an employing office under FMLA would continue; for example, the employing office continues to have an obligation to reinstate an employee upon return from leave.

(b) The employing office may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employing office maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employing office must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. See §825.215(d)(1)–(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.

§825.213 May an employing office recover costs it incurred for maintaining "group health plan" or other non-health benefits coverage during FMLA leave?

(a) In addition to the circumstances discussed in §825.212(b), the share of health plan premiums paid by or on behalf of the employing office during a period of unpaid FMLA leave may be recovered from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA;

(2) Other circumstances beyond the employee's control. Examples of ''other circumstances beyond the employee's control'' are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a ''key employee'' who decides not to return to work upon being notified of the employing office's intention to deny restoration because of substantial and grievous economic injury to the employing office's operations and is not reinstated by the employing office. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child; or

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employing office from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition. Such certification is not required unless requested by the employing office. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employing office's request. For purposes of medical certification, the employee may use the optional form developed for this purpose (see §825.306(a) and Appendix B of this part). If the employing office requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employing office may recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employing office may elect to maintain other benefits, e.g., life insurance, disability insurance, etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employing office can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employing office elects to maintain such benefits during the leave, at the conclusion of leave, the employing office is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have ''returned'' to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employing office requires paid leave to be substituted for FMLA leave, the employing office may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employing offices may recover is limited to only the employing office's share of allowable ''premiums'' as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employing office to recover are a debt owed by the non-returning employee to the employing office. The existence of this

debt caused by the employee's failure to return to work does not alter the employing office's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employing office may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, etc.), provided such deductions do not otherwise violate applicable wage payment or other laws. Alternatively, the employing office may initiate legal action against the employee to recover such costs.

§825.214 What are an employee's rights on returning to work from FMLA leave?

(a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. See also §825.106(e) for the obligations of employing offices that are joint employing offices.

(b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employing office's obligations may be governed by the Americans with Disabilities Act (ADA), as made applicable by the CAA. See §825.702.

§825.215 What is an equivalent position?

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent Pay:

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employing office's policy or practice to do so with respect to other employees on ''leave without pay''. In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, etc., excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employing offices pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. See §825.220 (b) and (c). A monthly production bonus, on the other hand, does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). See paragraph (d)(2) of this section.

(d) Equivalent Benefits. ''Benefits'' include all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office through an employee benefit plan.

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employing offices may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See §825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employing office is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employing office has no established policy, the employee and the employing office are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, §825.209 addresses health benefits.)

(e) Equivalent Terms and Conditions of Employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employing office transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employing office from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employing office to accept a different position against the employee's wishes.

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis or intangible, unmeasurable aspects of the job. However, restoration to a job slated for lay-off, when the employee's original position is not, would not meet the requirements of an equivalent position.

§825.216 Are there any limitations on an employing office's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employing office must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employing office's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee ceases at the time the employee is laid off, provided the employing office has no continuing obligations under a collective bargaining agreement or otherwise. An employing office would have the burden of proving that an employee would

have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employing office has no obligation to restore the employee if the employment term or project is over and the employing office would not otherwise have continued to employ the employee.

(c) In addition to the circumstances explained above, an employing office may deny job restoration to salaried eligible employees (''key employees'', as defined in paragraph (c) of §825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employing office; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in §825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA, as made applicable by the CAA, for any relief or protections.

§825.217 What is a "key employee"?

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employing office within 75 miles of the employee's worksite.

(b) The term ''salaried'' means paid on a salary basis, within the meaning of the Board's regulations at part 541, implementing section 203 of the CAA (2 U.S.C. 1313) (regarding employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA, as executive, administrative, and professional employees).

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees ''both salaried and non-salaried, eligible and ineligible ''who are employed by the employing office within 75 miles of the worksite'':

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, e.g., benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employing office's employees within 75 miles of the worksite may be ''key employees''.

§825.218 What does "substantial and grievous economic injury" mean?

(a) In order to deny restoration to a key employee, an employing office must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employing office, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employing office may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the employing office of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employing office which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the employing office, that would constitute ''substantial and grievous economic injury''. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employing office would experience in the normal course would certainly not constitute ''substantial and grievous economic injury''.

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (see, also §825.702).

§825.219 What are the rights of a key employee?

(a) An employing office which believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employing office must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employing office should determine that substantial and grievous economic injury to the employing office's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employing office who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employing office makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employing office shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employing office will ordinarily be able to give such notice prior to the employee starting leave. The employing office must serve this notice either in person or by certified mail. This notice must explain the basis for the employing office's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employing office's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employing office may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until either the employee gives notice that he or she no longer wishes to return to work, or the employing office actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employing office's notice. The employing office must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employing office shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA, as made applicable by the CAA, prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employing office is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the FMLA as made applicable by the CAA.

(2) An employing office is prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) for opposing or complaining about any unlawful practice under the FMLA as made applicable by the CAA.

(3) All employing offices are prohibited from discharging or in any other way discriminating against any covered employee (whether or not an eligible employee) because that covered employee has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to the FMLA, as made applicable by the CAA;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA, as made applicable by the CAA.

(b) Any violations of the FMLA, as made applicable by the CAA, or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA as made applicable by the CAA. ''Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by an employing office to avoid responsibilities under FMLA, for example—

(1) [Reserved];

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employing office is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave.

By the same token, employing offices cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ''no fault'' attendance policies.

(d) Employees cannot waive, nor may employing offices induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot ''trade off'' the right to take FMLA leave against some other benefit offered by the employing office. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment while recovering from a serious health condition (see §825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of ''light duty''.

(e) Covered employees, and not merely eligible employees, are protected from retaliation for opposing (e.g., file a complaint about) any practice which is unlawful under the FMLA, as made applicable by the CAA. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the FMLA, as made applicable by the CAA or regulations.

SUBPART C—HOW DO EMPLOYEES LEARN OF THEIR RIGHTS AND OBLIGATIONS UNDER THE FMLA, AS MADE APPLICABLE BY THE CAA, AND WHAT CAN AN EMPLOYING OFFICE REQUIRE OF AN EMPLOYEE?

§825.300 [Reserved]

§825.301 What notices to employees are required of employing offices under the FMLA as made applicable by the CAA?

(a)(1) If an employing office has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning both entitlements and employee obligations under the FMLA, as made applicable by the CAA, must be included in the handbook or other document. For example, if an employing office provides an employee handbook to all employees that describes the employing office's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employing office's policies regarding the FMLA, as made applicable by the CAA. Informational publications describing the provisions of the FMLA as made applicable by the CAA are available from the Office of Compliance and may be incorporated in such employing office handbooks or written policies.

(2) If such an employing office does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employing office shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA as made applicable by the CAA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employing offices may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the Office of Compliance to provide such guidance.

(b)(1) The employing office shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate. Such specific notice must include, as appropriate—

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see §825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see §825.305);

(iii) the employee's right to substitute paid leave and whether the employing office will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see §825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see §825.310);

(vi) the employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see §825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§ 825.214 and 825.604); and

(viii) the employee's potential liability for payment of health insurance premiums paid by the employing office during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see §825.213).

(2) The specific notice may include other information—e.g., whether the employing office will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from the Office of Compliance, which employing offices may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employing office shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employing office may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employing office is requiring medical certification or a ''fitness-for-duty'' report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-month period and the employing office handbook or other written documents (if any) describing the employing office's leave policies, clearly provided that certification or a ''fitness-for-duty'' report would be required (e.g., by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a ''fitness-for-duty'' report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. (See §825.305(a).)

(d) Employing offices are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA as made applicable under the CAA.

(e) Employing offices furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under law.

(f) If an employing office fails to provide notice in accordance with the provisions of this section, the employing office may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

§825.302 What notice does an employee have to give an employing office when the need for FMLA leave is foreseeable?

(a) An employee must provide the employing office at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employing office as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.

(b) ''As soon as practicable'' means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, ''as soon as practicable'' ordinarily would mean at least verbal notification to the employing office within one or two business days of when the need for leave becomes known to the employee.

(c) An employee shall provide at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA as made applicable by the CAA, or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employing office should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employing office may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see §825.305).

(d) An employing office may also require an employee to comply with the employing office's usual and customary notice and procedural requirements for requesting leave.

For example, an employing office may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employing office procedures will not permit an employing office to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee must consult with the employing office and make a reasonable effort to schedule the leave so as not to disrupt unduly the employing office's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employing offices prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employing office and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employing office to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employing office's operations, the employing office may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employing office, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employing office shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employing office's operations, subject to the approval of the health care provider.

(g) An employing office may waive employees' FMLA notice requirements. In addition, an employing office may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement or applicable leave plan allow less advance notice to the employing office. For example, if an employee (or employing office) elects to substitute paid vacation leave for unpaid FMLA leave (see §825.207), and the employing office's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employing office imposes lesser notice requirements on employees taking leave without pay.

§825.303 What are the requirements for an employee to furnish notice to an employing office where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employing office of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employing office within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employing office's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employing office either in person or by telephone, telegraph, facsimile (''fax'') machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA, as made applicable by the CAA, or even mention the FMLA, but may only state that leave is needed. The employing office will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§825.304 What recourse do employing offices have if employees fail to provide the required notice?

(a) An employing office may waive employees' FMLA notice obligations or the employing office's own internal rules on leave notice requirements.

(b) If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employing office may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employing office of the need for FMLA leave.

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employing office's proper posting, at the worksite where the employee is employed, of the information regarding the FMLA provided (pursuant to section 301(h)(2) of the CAA, 2 U.S.C. 1381(h)(2)) by the Office of Compliance to the employing office in a manner suitable for posting. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

§825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employing office may require that an employee's leave to care for the employee's seriously ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employing office must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by §825.301. An employing office's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employing office should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employing office may request certification at some later date if the employing office later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employing office requests certification, the employing office must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employing office shall advise an employee whenever the employing office finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employing office's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employing office elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see §825.207), only the employing office's less stringent sick leave certification requirements may be imposed.

§825.306 How much information may be required in medical certifications of a serious health condition?

(a) The Office of Compliance has made available an optional form (''Certification of Physician or Practitioner'') for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

(b) The Certification of Physician or Practitioner form is modeled closely on Form WH–380, as revised, which was developed by the Department of Labor (see 29 C.F.R. Part 825, Appendix B). The employing office may use the Office of Compliance's form, or Form WH–380, as revised, or another form containing the same basic information; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of ''serious health condition'' (see §825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2)(i) The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

(ii) Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (i.e., part-time) as a result of the serious health condition (see §825.117 and §825.203), and if so, the probable duration of such schedule.

(iii) If the condition is pregnancy or a chronic condition within the meaning of

§825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(3)(i)(A) If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

(B) If the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

(ii) If any of the treatments referred to in subparagraph (i) will be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.

(iii) If a regimen of continuing treatment by the patient is required under the supervision of the health care provider, a general description of the regimen (see §825.114(b)).

(4) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee—

(i) is unable to perform work of any kind;

(ii) is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (see §825.115), based on either information provided on a statement from the employing office of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

(iii) must be absent from work for treatment.

(5)(i) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

(ii) If the employee's family member will need care only intermittently or on a reduced leave schedule basis (i.e., part-time), the probable duration of the need.

(c) If the employing office's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements of these regulations, and the employee or employing office elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see §825.207), only the employing office's lesser sick leave certification requirements may be imposed.

§825.307 What may an employing office do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employing office may not request additional information from the employee's health care provider. However, a health care provider representing the employing office may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employing office or the employing office's representative to have direct contact with the employee's workers' compensation health care provider, the employing office may follow the workers' compensation provisions.

(2) An employing office that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employing office's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the FMLA as made applicable by the CAA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employing office's established leave policies. The employing office is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employing office. See also paragraphs (e) and (f) of this section.

(b) The employing office may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employing office is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employing office's designated health care providers differ, the employing office may require the employee to obtain certification from a third health care provider, again at the employing office's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employing office and the employee. The employing office and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employing office does not attempt in good faith to reach agreement, the employing office will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employing office that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

(d) The employing office is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

(e) If the employing office requires the employee to obtain either a second or third opinion the employing office must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employing office may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) In circumstances when the employee or a family member is visiting in another country, or a family member resides in a another country, and a serious health condition develops, the employing office shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

§825.308 Under what circumstances may an employing office request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in §825.114(a)(2) (ii), (iii) or (iv)), an employing office may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or

(2) The employing office receives information that casts doubt upon the employee's stated reason for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employing office may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c) (1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employing office may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c) (1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employing office may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or

(3) The employing office receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employing office within the time frame requested by the employing office (which must allow at least 15 calendar days after the employing office's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employing office shall be at the employee's expense unless the employing office provides otherwise. No second or third opinion on recertification may be required.

§825.309 What notice may an employing office require regarding an employee's intent to return to work?

(a) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employing office's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employing office's obligations under FMLA, as made applicable by the CAA, to maintain health benefits (subject to requirements of COBRA or 5 U.S.C. 8905a, whichever is applicable) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more

FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employing office may require that the employee provide the employing office reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employing office may also obtain information on such changed circumstances through requested status reports.

§ 825.310 Under what circumstances may an employing office require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a "fitness-for-duty" report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employing office may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA), as made applicable by the CAA, that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employing office may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employing office may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employing office may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employing office may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) The notice that employing offices are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations as made applicable by the CAA (see § 825.301) shall advise the employee if the employing office will require fitness-for-duty certification to return to work. If the employing office has a handbook explaining employment policies and benefits, the handbook should explain the employing office's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time notice of the need for leave is given or immediately after leave commences and the employing office is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employing office's practice or policy. No second or third fitness-for-duty certification may be required.

(f) An employing office may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employing office has failed to provide the notices required in paragraph (e) of this section.

(g) An employing office is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in § 825.203.

(h) When an employee is unable to return to work after FMLA leave because of the continuation, recurrence, or onset of the employee's or family member's serious health condition, thereby preventing the employing office from recovering its share of health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employing office may require medical certification of the employee's or the family member's serious health condition. (See § 825.213(a)(3).) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

§ 825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?

(a) In the case of foreseeable leave, an employing office may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employing office to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the time frame requested by the employing office (which must allow at least 15 days after the employing office's request) or as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employing office may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employing office pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see § 825.310(a)) if the employing office has provided the required notice (see § 825.301(c)); the employing office may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also § 825.213(a)(3).

§ 825.312 Under what circumstances may an employing office refuse to provide FMLA leave or reinstatement to eligible employees?

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employing office may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employing office of the need for FMLA leave. (See § 825.302.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employing office may delay continuation of FMLA leave until an employee submits the certificate. (See §§ 825.305 and 825.311.) If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employing office may delay restoration until the employee submits the certificate. (See §§ 825.310 and 825.311.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Thus, an employee's rights to continued leave, maintenance of health benefits, and restoration cease under FMLA, as made applicable by the CAA, if and when the employment relationship terminates (e.g., layoff), unless that relationship continues, for example, by the employee remaining on paid FMLA leave. If the employee is recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason. An employing office must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (See § 825.216.)

(e) An employing office may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (See § 825.309.) If an employee unequivocally advises the employing office either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on paid leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employing office two business days notice where feasible; the employing office is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(f) An employing office may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible employee only under the terms of the ''key employee'' exemption. Denial of reinstatement must be necessary to prevent ''substantial and grievous economic injury'' to the employing office's operations. The employing office must notify the employee of the employee's status as a ''key employee'' and of the employing office's intent to deny reinstatement on that basis when the employing office makes these determinations. If leave has started, the employee must be given a reasonable opportunity to return to work after being so notified. (See § 825.219.)

(g) An employee who fraudulently obtains FMLA leave from an employing office is not protected by job restoration or maintenance of health benefits provisions of the FMLA as made applicable by the CAA.

(h) If the employing office has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on

FMLA leave. An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA as made applicable by the CAA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section.

SUBPART D—WHAT ENFORCEMENT MECHANISMS DOES THE CAA PROVIDE?

§ 825.400 What can employees do who believe that their rights under the FMLA as made applicable by the CAA have been violated?

(a) To commence a proceeding, a covered employee alleging a violation of the rights and protections of the FMLA made applicable by the CAA must request counseling by the Office of Compliance not later than 180 days after the date of the alleged violation. If a covered employee misses this deadline, the covered employee will be unable to obtain a remedy under the CAA.

(b) The following procedures are available under title IV of the CAA for covered employees who believe that their rights under FMLA as made applicable by the CAA have been violated—

(1) counseling;

(2) mediation; and

(3) election of either—

(A) a formal complaint, filed with the Office of Compliance, and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(c) Regulations of the Office of Compliance describing and governing these procedures are found at [proposed rules can be found at 141 Cong. Rec. S17012 (November 14, 1995)].

§ 825.401 [Reserved]
§825.402 [Reserved]
§ 825.403 [Reserved]
§ 825.404 [Reserved]

SUBPART E—[RESERVED]

SUBPART F—WHAT SPECIAL RULES APPLY TO EMPLOYEES OF SCHOOLS?

§ 825.600 To whom do the special rules apply?

(a) Certain special rules apply to employees of ''local educational agencies'', including public school boards and elementary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA as made applicable by the CAA (and these special rules). The usual requirements for employees to be ''eligible'' apply.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. ''Instructional employees'' are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employing office may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. ''Periods of a particular duration'' means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (see §825.302) to be taken intermittently or on a reduced leave schedule, the employing office may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employing office may require the employee to delay the taking of leave until the notice provision is met. See §825.207(h).

§ 825.602 What limitations apply to the taking of leave near the end of an academic term?

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) the leave will last at least three weeks, and

(ii) the employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of a term. The employing office may require the employee to continue taking leave until the end of the term if—

(i) the leave will last more than two weeks, and

(ii) the employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave for a purpose other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last more than five working days. The employing office may require the employee to continue taking leave until the end of the term.

(b) For purposes of these provisions, ''academic term'' means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA as made applicable by the CAA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employing office could require the employee to stay out on leave until the end of the term.

§ 825.603 Is all leave taken during "periods of a particular duration" counted against the FMLA leave entitlement?

(a) If an employee chooses to take leave for ''periods of a particular duration'' in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employing office has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employing office to the end of the school term is not counted as FMLA leave; however, the employing office shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 What special rules apply to restoration to "an equivalent position"?

The determination of how an employee is to be restored to ''an equivalent position'' upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements''. The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to ''an equivalent position'' must provide substantially the same protections as provided in the FMLA, as made applicable by the CAA, for reinstated employees. See §825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an ''equivalent position'' with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

SUBPART G—HOW DO OTHER LAWS, EMPLOYING OFFICE PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS AFFECT EMPLOYEE RIGHTS UNDER THE FMLA AS MADE APPLICABLE BY THE CAA?

§ 825.700 What if an employing office provides more generous benefits than required by FMLA as made applicable by the CAA?

(a) An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the FMLA, as made applicable by the CAA, may not be diminished by any employment benefit program or plan. For example, a provision of a collective bargaining agreement (CBA) which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employing office provides greater unpaid family leave rights than are afforded by FMLA, the employing office is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA or 5 U.S.C. 8905a, whichever is applicable), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employing office does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in the FMLA, as made applicable by the CAA, prevents an employing office from amending existing leave and employee benefit programs, provided they comply with FMLA as made applicable by the CAA. However, nothing in the FMLA, as made applicable by the CAA, is intended to discourage employing offices from adopting or retaining more generous leave policies.

(c) [Reserved]

§ 825.701 [Reserved]

§ 825.702 How does FMLA affect anti-discrimination laws as applied by section 201 of the CAA?

(a) Nothing in FMLA modifies or affects any applicable law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act), as made applicable by the CAA. FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that Act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA] * * * or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employing offices within its coverage, and not to limit already existing rights and protection''. S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employing office must therefore provide leave under whichever statutory provision provides the greater rights to employees.

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employing office must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employing office must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employing offices to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employing office did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employing office to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an ''eligible employee'' entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employing office grants because it is not an undue hardship. The employing office advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employing office maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employing office policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the employee would be shielded from FMLA's provision for temporary assignment to a different alternative position. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employing office to part-time employees.

(4) At the end of the FMLA leave entitlement, an employing office is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employing office's FMLA obligations would be satisfied if the employing office offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employing office to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employing office may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employing office offer an employee the opportunity to take such a position. An employing office may not change the essential functions of the job in order to deny FMLA leave. See § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employing office). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a ''light duty'' position. If the employing office offers such a position, the employee is permitted but not required to accept the position (see § 825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See § 825.207(d)(2). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employing office requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and as made applicable by the CAA, an employing office should provide the same benefits for women who are pregnant as the employing office provides to other employees with short-term disabilities. Because title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by any employing office (and, therefore, not an ''eligible'' employee under FMLA, as made applicable by the CAA) may not be denied maternity leave if the employing office normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) For further information on Federal anti-discrimination laws applied by section 201 of the CAA (2 U.S.C. 1311), including title VII, the Rehabilitation Act, and the ADA, individuals are encouraged to contact the Office of Compliance.

SUBPART H—DEFINITIONS

§ 825.800 Definitions.

For purposes of this part:

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 et seq.).

CAA means the Congressional Accountability Act of 1995 (Pub. Law 104–1, 109 Stat. 3, 2 U.S.C. 1301 et seq.).

COBRA means the continuation coverage requirements of title X of the Consolidated Omnibus Budget Reconciliation Act of 1986 (Pub. Law 99–272, title X, section 10002; 100 Stat. 227; as amended; 29 U.S.C. 1161–1168).

Continuing treatment means: A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(1) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(2) Any period of incapacity due to pregnancy, or for prenatal care.

(3) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(4) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

Covered employee—The term ''covered employee'', as defined in the CAA, means any employee of—(1) the House of Representatives; (2) the Senate; (3) the Capitol Guide Service; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Office of Compliance; or (9) the Office of Technology Assessment.

Eligible employee—The term ''eligible employee'', as defined in the CAA, means a covered employee who has been employed in any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months.

Employ means to suffer or permit to work.

Employee means an employee as defined in the CAA and includes an applicant for employment and a former employee.

Employee employed in an instructional capacity: See Teacher.

Employee of the Capitol Police—The term ''employee of the Capitol Police'' includes any member or officer of the Capitol Police.

Employee of the House of Representatives—The term ''employee of the House of Representatives'' includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (9) under ''covered employee'' above.

Employee of the Office of the Architect of the Capitol—The term ''employee of the Office of the Architect of the Capitol'' includes any employee of the Office of the Architect of the Capitol, the Botanic Garden, or the Senate Restaurants.

Employee of the Senate—The term ''employee of the Senate'' includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (9) under ''covered employee'' above.

Employing Office—The term ''employing office'', as defined in the CAA, means—

(1) the personal office of a Member of the House of Representatives or of a Senator;

(2) a committee of the House of Representatives or the Senate or a joint committee;

(3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or

(4) the Capitol Guide Board, the Capitol Police Board, the Congessional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

Employment benefits means all benefits provided or made available to employees by an employing office, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employing office or through an employee benefit plan. The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (See § 825.209(a)).

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

FMLA means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 et seq.).

Group health plan means the Federal Employees Health Benefits Program and any other plan of, or contributed to by, an employing office (including a self-insured plan) to provide health care (directly or otherwise) to the employing office's employees, former employees, or the families of such employees or former employees. For purposes of FMLA, as made applicable by the CAA, the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that—

(1) no contributions are made by the employing office;

(2) participation in the program is completely voluntary for employees;

(3) the sole functions of the employing office with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) the employing office receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices; or

(2) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; and

(3) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; and

(4) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

(5) Any health care provider from whom an employing office or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.

(6) A health care provider as defined above who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country.

''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See Teacher.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Mental disability: See Physical or mental disability.

Office of Compliance means the independent office established in the legislative branch under section 301 of the CAA (2 U.S.C. 1381).

Parent means the biological parent of an employee or an individual who stands or stood in loco parentis to an employee when the employee was a child.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. See the Americans with Disabilities Act (ADA), as made applicable by section 201(a)(3) of the CAA (2 U.S.C. 1311(a)(3)).

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Secretary means the Secretary of Labor or authorized representative.

Serious health condition entitling an employee to FMLA leave means:

(1) An illness, injury, impairment, or physical or mental condition that involves:

(i) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(ii) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes:

(A) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(B) Any period of incapacity due to pregnancy, or for prenatal care.

(C) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(D) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(E) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(2) Treatment for purposes of paragraph (1) of this definition includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (1)(ii)(A)(2) of this definition, a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(3) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(4) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(5) Absences attributable to incapacity under paragraphs (1)(ii) (B) or (C) of this definition qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

APPENDIX A TO PART 825—[RESERVED]

APPENDIX B TO PART 825—CERTIFICATION OF PHYSICIAN OR PRACTITIONER

CERTIFICATION OF HEALTH CARE PROVIDER

(FAMILY AND MEDICAL LEAVE ACT OF 1993 AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995)

1. Employee's Name:

2. Patient's Name (if different from employee):

3. The attached sheet describes what is meant by a ''serious health condition'' under the Family and Medical Leave Act as made applicable by the Congressional Accountability Act. Does the patient's condition[1] qualify under any of the categories described? If so, please check the applicable category.

(1) _____
(2) _____
(3) _____
(4) _____
(5) _____
(6) _____, or
None of the above _____

4. Describe the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5.a. State the approximate date the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present incapacity[2] if different):

b. Will it be necessary for the employee to take work only intermittently or to work on a less than full schedule as a result of the condition (including for treatment described in Item 6 below)? _____

If yes, give probable duration:

c. If the condition is a chronic condition (condition #4) or pregnancy, state whether the patient is presently incapacitated[2] and the likely duration and frequency of episodes of incapacity[2]:

6.a. If additional treatments will be required for the condition, provide an estimate of the probable number of such treatments:

If the patient will be absent from work or other daily activities because of treatment on an intermittent or part-time basis, also provide an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by another provider of health services (e.g., physical therapist), please state the nature of the treatments:

c. If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7.a. If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind? _____

b. If able to perform some work, is the employee unable to perform any one or more of

the essential functions of the employee's job (the employee or the employer should supply you with information about the essential job functions)? _____ If yes, please list the essential functions the employee is unable to perform: _____

c. If neither a. nor b. applies, is it necessary for the employee to be absent from work for treatment? _____

8.a. If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation? _____

b. If no, would the employee's presence to provide psychological comfort be beneficial to the patient or assist in the patient's recovery? _____

c. If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:

(Signature of Health Care Provider)

(Type of Practice)

(Address)

(Telephone number)

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

(Employee signature)

(Date)

A ''Serious Health Condition'' means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Hospital Care.—Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity[1] or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment.—A period of incapacity[2] of more than three consecutive calendar days (including any subsequent treatment or period of incapacity[2] relating to the same condition), that also involves:

(1) Treatment[3] two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment[4] under the supervision of the health care provider.

3. Pregnancy.—Any period of incapacity due to pregnancy, or for prenatal care.

4. Chronic Conditions Requiring Treatments.—A chronic condition which:

(1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity[2] (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision.—A period of incapacity[2] which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions).—Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity[2] of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

FOOTNOTES

[1] Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

[2] ''Incapacity'', for purposes of FMLA as make applicable by the CAA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

[3] Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[4] A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

APPENDIX C TO PART 825—[RESERVED]

APPENDIX D TO PART 825—PROTOTYPE NOTICE: EMPLOYING OFFICE RESPONSE TO EMPLOYEE REQUEST FOR FAMILY AND MEDICAL LEAVE

EMPLOYING OFFICE RESPONSE TO EMPLOYEE REQUEST FOR FAMILY OR MEDICAL LEAVE

(OPTIONAL USE FORM—SEE §825.301(B)(1) OF THE REGULATIONS OF THE OFFICE OF COMPLIANCE)

(FAMILY AND MEDICAL LEAVE ACT OF 1993, AS MADE APPLICABLE BY THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995)

(Date)

To:_____

(Employee's name)

From:_____

(Name of appropriate employing office representative)

Subject: Request for Family/Medical Leave

On_____, (date) you notified us of your need to take family/medical leave due to:

(Date)

The birth of your child, or the placement of a child with you for adoption or foster care; or

A serious health condition that makes you unable to perform the essential functions of your job; or

A serious health condition affecting your spouse, child, parent, for which you are needed to provide care.

You notified us that you need this leave beginning on _____(date) and that you expect leave to continue until on or about_____ (date).

Except as explained below, you have a right under the FMLA, as made applicable by the CAA, for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check appropriate boxes; explain where indicated)

1. You are ☐ eligible ☐ not eligible for leave under the FMLA as made applicable by the CAA.

2. The requested leave ☐ will ☐ will not be counted against your annual FMLA leave entitlement.

3. You ☐ will ☐ will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by_____ (insert date) (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We ☐ will ☐ will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (Explain)

5(a). If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: (Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.).

(b). You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled: *Provided*, That we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We ☐ will ☐ will not pay your share of health insurance premiums while you are on leave.

(c). We ☐ will ☐ will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you ☐ will ☐ will not be expected to reimburse us for the payments made on your behalf.

6. You ☐ will ☐ will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until the certification is provided.

7(a). You ☐ are ☐ are not a ''key employee'' as described in §825.218 of the Office of Compliance's FMLA regulations. If you are a ''key employee'', restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.

(b). We ☐ have ☐ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. (Explain (a) and/or (b) below. See §825.219 of the Office of Compliance's FMLA regulations.)

8. While on leave, you ☐ will ☐ will not be required to furnish us with periodic reports every _____ (indicate interval of periodic reports, as appropriate for the particular leave situation) of your status and intent to return to work (see §825.309 of the Office of Compliance's FMLA regulations). If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you ☐ will ☐ will not be required to notify us at least two work days prior to the date you intend to report for work.

9. You ☐ will ☐ will not be required to furnish recertification relating to a serious

health condition. (Explain below, if necessary, including the interval between certifications as prescribed in §825.308 of the Office of Compliance's FMLA regulations.)

Subtitle A—Regulations Relating to the Senate and Its Employing Offices—S Series

CHAPTER III—REGULATIONS RELATING TO THE RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

PART S501—GENERAL PROVISIONS

Sec.
S501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S501.101 Purpose and scope.
S501.102 Definitions.
S501.103 Coverage.
S501.104 Administrative authority.
S501.105 Effect of Interpretations of the Labor Department.
S501.106 Application of the Portal-to-Portal Act of 1947.
S501.107 [Reserved]

§S501.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the parts of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding parts of the Office of Compliance (OC) Regulations under section 203 of the CAA:

Secretary of Labor regulations	*OC regulations*
Part 531 Wage payments under the Fair Labor Standards Act of 1938	Part S531
Part 541 Defining and delimiting the terms ''bona fide executive'', ''administrative'', and ''professional'' employees	Part S541
Part 547 Requirements of a ''Bona fide thrift or savings plan''	Part S547
Part 553 Application of the FLSA to employees of public agencies	Part S553
Part 570 Child labor	Part S570

SUBPART A—MATTERS OF GENERAL APPLICABILITY

§S501.101 Purpose and scope.

(a) Section 203 of the Congressional Accountability Act (CAA) provides that the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §§206 (a)(1) and (d), 207, 212(c)) shall apply to covered employees of the legislative branch of the Federal Government. Section 301 of the CAA creates the Office of Compliance as an independent office in the legislative branch for enforcing the rights and protections of the FLSA, as applied by the CAA.

(b) The FLSA as applied by the CAA provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included also in the FLSA are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the FLSA exempts specified employees or groups of employees from the application of certain of its provisions.

(c) This chapter contains the substantive regulations with respect to the FLSA that the Board of Directors of the Office of Compliance has adopted pursuant to sections 203(c) and 304 of the CAA, which require that the Board promulgate regulations that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of §203 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section''.

(d) These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 203(c) and 304 of the CAA, which directs the Board to promulgate regulations implementing section 203 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 203 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section''. The regulations issued by the Board herein are on all matters for which section 203 of the CAA requires regulations to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of the promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 203 of the CAA]''.

(e) In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

§S501.102 Definitions.

For purposes of this chapter:

(a) CAA means the Congressional Accountability Act of 1995 (P.L. 104–1, 109 Stat. 3, 2 U.S.C. §§1301–1438).

(b) FLSA or Act means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §201 et seq.), as applied by section 203 of the CAA to covered employees and employing offices.

(c) Covered employee means any employee of the Senate, including an applicant for employment and a former employee, but shall not include an intern.

(d) Employee of the Senate includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Office of Compliance; or (7) the Office of Technology Assessment.

(e) Employing office and employer mean (1) the personal office of a Senator; (2) a committee of the Senate or a joint committee; or (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the Senate.

(f) Board means the Board of Directors of the Office of Compliance.

(g) Office means the Office of Compliance.

(h) Intern is an individual who (a) is performing services in an employing office as part of a demonstrated educational plan, and (b) is appointed on a temporary basis for a period not to exceed 12 months: *Provided*, That if an intern is appointed for a period shorter than 12 months, the intern may be reappointed for additional periods as long as the total length of the internship does not exceed 12 months: *Provided further*, That an intern for purposes of section 203(a)(2) of the CAA also includes an individual who is a senior citizen appointed under S. Res. 219 (May 5, 1978, as amended by S. Res. 96, April 9, 1991), but does not include volunteers, fellows or pages.

§S501.103 Coverage.

The coverage of section 203 of the CAA extends to any covered employee of an employing office without regard to whether the covered employee is engaged in commerce or the production of goods for interstate commerce and without regard to size, number of employees, amount of business transacted, or other measure.

§S501.104 Administrative authority.

(a) The Office of Compliance is authorized to administer the provisions of section 203 of the Act with respect to any covered employee or covered employer.

(b) The Board is authorized to promulgate substantive regulations in accordance with the provisions of sections 203(c) and 304 of the CAA.

§S501.105 Effect of Interpretation of the Department of Labor.

(a) In administering the FLSA, the Wage and Hour Division of the Department of Labor has issued not only substantive regulations but also interpretative bulletins. Substantive regulations represent an exercise of statutory-delegated lawmaking authority from the legislative branch to an administrative agency. Generally, they are proposed in accordance with the notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. §553. Once promulgated, such regulations are considered to have the force and effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). See also 29 CFR §790.17(b) (1994). Unlike substantive regulations, interpretative statements, including bulletins and other releases of the Wage and Hour Division, are not issued pursuant to the provisions of the APA and may not have the force and effect of law. Rather, they may only constitute official interpretations of the Department of Labor with respect to the meaning and application of the minimum wage, maximum hour, and overtime pay requirements of the FLSA. See 29 C.F.R. §790.17(c) (citing Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st Sess., at p. 27 (1941)). The purpose of such statements is to make available in one place the interpretations of the FLSA which will guide the Secretary of Labor and the Wage and Hour Administrator in the performance of their duties unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. The Supreme Court has observed: ''[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its

reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control'', Skidmore v. Swift, 323 U.S. 134, 140 (1944).

(b) Section 203(c) of the CAA provides that the substantive regulations implementing section 203 of the CAA shall be ''the same as substantive regulations promulgated by the Secretary of Labor'' except where the Board finds, for good cause shown, that a modification would more effectively implement the rights and protections established by the FLSA. Thus, the CAA by its terms does not mandate that the Board adopt the interpretative statements of the Department of Labor or its Wage and Hour Division. The Board is thus not adopting such statements as part of its substantive regulations.

§ S501.106 Application of the Portal-to-Portal Act of 1947.

(a) Consistent with section 225 of the CAA, the Portal-to-Portal Act (PPA), 29 U.S.C. §§216 and 251 et seq., is applicable in defining and delimiting the rights and protections of the FLSA that are prescribed by the CAA. Section 10 of the PPA, 29 U.S.C. §259, provides in pertinent part: ''[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . if he pleads and proves that the act of omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval or interpretation of [the Administrator of the Wage and Hour Division of the Department of Labor] . . . or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect''.

(b) In defending any action or proceeding based on any act or omission arising out of section 203 of the CAA, an employing office may satisfy the standards set forth in subsection (a) by pleading and proving good faith reliance upon any written administrative regulation, order, ruling, approval or interpretation, of the Administrator of the Wage and Hour Division of the Department of Labor: *Provided*, That such regulation, order, ruling approval or interpretation had not been superseded at the time or reliance by any regulation, order, decision, or ruling of the Board or the courts.

§ S501.107 [Reserved].

PART S531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

SUBPART A—PRELIMINARY MATTERS

Sec.
S531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S531.1 Definitions.
S531.2 Purpose and scope.

SUBPART B—DETERMINATIONS OF ''REASONABLE COSTS''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

S531.3 General determinations of ''reasonable cost''.
S531.6 Effects of collective bargaining agreements.

SUBPART A—PRELIMINARY MATTERS

§ S531.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under section 203 of the CAA:

Secretary of Labor Regulations	*OC Regulations*
531.1 Defintions	S531.1
531.2 Purpose and scope	S531.2
531.3 General determinations of ''reasonable cost''	S531.3
531.6 Effects of collective bargaining agreements	S531.6

§ S531.1 Definitions.

(a) Administrator means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) Act means the Fair Labor Standards Act of 1938, as amended.

§ S531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term ''wage'' to include the ''reasonable cost'', as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the ''fair value'' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of ''fair value''. Whenever so determined and when applicable and pertinent, the ''fair value'' of the facilities involved shall be includable as part of ''wages'' instead of the actual measure of the costs of those facilities. The section provides, however, the cost of board, lodging, or other facilities shall not be included as part of ''wages'' if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This part 531 contains any determinations made as to the ''reasonable cost'' and ''fair value'' of board, lodging, or other facilities have general application.

SUBPART B—DETERMINATIONS OF ''REASONABLE COST'' AND ''FAIR VALUE''; EFFECTS OF COLLECTIVE BARGAINING AGREEMENTS

§ S531.3 General determinations of "reasonable cost".

(a) The term ''reasonable cost'' as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliated person.

(c) The reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5½ percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term good accounting practices does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term depreciation includes obsolescence.

(d)(1) The cost of furnishing ''facilities'' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

§ S531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be ''bona fide'' when pursuant to the provisions of section 7(b)(1) or 7(b)(2) of the FLSA it is made with the certified representative of the employees under the provisions of the CAA.

PART S541—DEFINING AND DELIMITING THE TERMS ''BONA FIDE EXECUTIVE'', ''ADMINISTRATIVE'', OR ''PROFESSIONAL'' CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN SECONDARY SCHOOL)

SUBPART A—GENERAL REGULATIONS

Sec.
S541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S541.01 Application of the exemptions of section 13(a)(1) of the FLSA.
S541.1 Executive.
S541.2 Administrative.
S541.3 Professional.
S541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees.
S541.5d Special provisions applicable to employees of public agencies.

§ S541.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations at Title 29 of the Code of Federal Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under section 203 of the CAA:

Secretary of Labor Regulations	*OC Regulations*
541.1 Executive	S541.1
541.2 Administrative	S541.2
541.3 Professional	S541.3

Secretary of Labor Regulations	*OC Regulations*
541.5b Equal pay provisions of section 6(d) of the FLSA apply to executive, administrative, and professional employees	S541.5b
541.5d Special provisions applicable to employees of public agencies	S541.5d

§ S541.01 Application of the exemptions of section 13(a)(1) of the FLSA

(a) Section 13(a)(1) of the FLSA, which provides certain exemptions for employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in a capacity of academic administrative personnel or teacher in a secondary school), applies to covered employees by virtue of section 225(f)(1) of the CAA.

(b) The substantive regulations set forth in this part are promulgated under the authority of sections 203(c) and 304 of the CAA, which require that such regulations be the same as the substantive regulations promulgated by the Secretary of Labor except where the Board determines for good cause shown that modifications would be more effective for the implementation of the rights and protections under § 203.

§ S541.1 Executive

The term employee employed in a bona fide executive * * * capacity in section 13(a)(1) of the FSLA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the management of an employing office in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided,* That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities: *Provided,* That an employee who is compensated on a salary basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the employing office in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of work of two or more other employees therein, shall be deemed to meet all the requirements of this section

§ S541.2 Administrative

The term employee employed in a bona fide * * * administrative * * * capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists the head of an employing office, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week, exclusive of board, lodging or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment or institution by which employed: *Provided,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§ S541.3 Professional

The term employee employed in a bona fide * * * professional capacity in section 13(a)(1) of the FLSA as applied by the CAA shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system, educational establishment or institution by which employed, or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities: *Provided,* That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further,* That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a)(1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further,* That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6½ times the minimum wage provided by section 6 of the FLSA as applied by the CAA.

§ S541.5b Equal pay provisions of section 6(d) of the FLSA as applied by the CAA extend to executive, administrative, and professional employees

The FLSA, as amended and as applied by the CAA, includes within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) under section 13(a)(1) of the FLSA. Thus, for example, where an exempt administrative employee and another employee of the employing office are performing substantially ''equal work'', the sex discrimination prohibitions of section 6(d) are applicable with respect to any wage differential between those two employees.

§ S541.5d Special provisions applicable to employees of public agencies

(a) An employee of a public agency who otherwise meets the requirement of being paid on a salary basis shall not be disqualified from exemption under section S541.1, S541.2, or S541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy for practice established

pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay for an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid ''on a salary basis'' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

PART S547—REQUIREMENTS OF A ''BONA FIDE THRIFT OR SAVINGS PLAN''

Sec.
S547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S547.0 Scope and effect of part.
S547.1 Essential requirements of qualifications.
S547.2 Disqualifying provisions.

§ S547.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under section 203 of the CAA:

Secretary of Labor Regulations	*OC Regulations*
547.0 Scope and effect of part	S547.0
547.1 Essential requirements of qualifications	S547.1
547.2 Disqualifying provisions	S547.2

§ S547.0 Scope and effect of part

(a) The regulations in this part set forth the requirements of a ''bona fide thrift or savings plan'' under section 7(3)(e)(b) of the Fair Labor Standards Act of 1938, as amended (FLSA), as applied by the CAA. In determining the total remuneration for employment which section 7(e) of the FLSA requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the Act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations.

§ S547.1 Essential requirements for qualifications

(a) A ''bona fide thrift or savings plan'' for the purpose of section 7(e)(3)(b) of the FLSA as applied by the CAA is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § S547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees: *Provided, however,* That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: *Provided,* That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

§ S547.2 Disqualifying provisions

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

PART S553—OVERTIME COMPENSATION: PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION; OVERTIME AND COMPENSATORY TIME-OFF FOR EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE HOUSE INTRODUCTION

Sec.
S553.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S553.1 Definitions
S553.2 Purpose and scope
SUBPART C—PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION
S553.201 Statutory provisions: section 7(k).
S553.202 Limitations.
S553.211 Law enforcement activities.
S553.212 Twenty percent limitation on nonexempt work.
S553.213 Public agency employees engaged in both fire protection and law enforcement activities.
S553.214 Trainees.
S553.215 Ambulance and rescue service employees.
S553.216 Other exemptions.
S553.220 ''Tour of duty'' defined.
S553.221 Compensable hours of work.
S553.222 Sleep time.
S553.223 Meal time.
S553.224 ''Work period'' defined.
S553.225 Early relief.
S553.226 Training time.
S553.227 Outside employment.
S553.230 Maximum hours standard for work periods of 7 to 28 days—section 7(k).
S553.231 Compensatory time off.
S553.232 Overtime pay requirements.
S553.233 ''Regular rate'' defined.
SUBPART D—COMPENSATORY TIME-OFF FOR OVERTIME EARNED BY EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE HOUSE
S553.301 Definiton of ''directly depends''.
S553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the House.
S553.303 Using compensatory time off.
S553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service.

INTRODUCTION

§ S553.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance (OC) Regulations under section 203 of the CAA:

Secretary of Labor Regulations	*OC Regulations*
553.1 Definitions	S553.1
553.2 Purpose and scope	S553.2
553.201 Statutory provisions: section 7(k)	S553.201
553.202 Limitations	S553.202
553.211 Law enforcement activities	S553.211
553.212 Twenty percent limitation on nonexempt work	S553.212
553.213 Public agency employees engaged in both fire protection and law enforcement activities	S553.213
553.214 Trainees	S553.214
553.215 Ambulance and rescue service employees	S553.215
553.216 Other exemptions	S553.216
553.220 ''Tour of duty'' defined	S553.220
553.221 Compensable hours of work	S553.221
553.222 Sleep time	S553.222
553.223 Meal time	S553.223
553.224 ''Work period'' defined	S553.224
553.225 Early relief	S553.225
553.226 Training time	S553.226
553.227 Outside employment	S553.227
553.230 Maximum hours standard for work periods of 7 to 28 days—section 7(k)	S553.230
553.231 Compensatory time off	S553.231

Secretary of Labor Regulations	*OC Regulations*
553.232 Overtime pay requirements	S553.232
553.233 ''Regular rate'' defined	S553.233

INTRODUCTION

§ S553.1 Definitions

(a) Act or FLSA means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201–219), as applied by the CAA.

(b) 1985 Amendments means the Fair Labor Standards Act Amendments of 1985 (Pub. L. 99–150).

(c) Public agency means an employing office as the term is defined in §501.102 of this chapter, including the Capitol Police.

(d) Section 7(k) means the provisions of §7(k) of the FLSA as applied to covered employees and employing offices by §203 of the CAA.

§ S553.2 Purpose and scope

The purpose of part S553 is to adopt with appropriate modifications the regulations of the Secretary of Labor to carry out those provisions of the FLSA relating to public agency employees as they are applied to covered employees and employing offices of the CAA. In particular, these regulations apply section 7(k) as it relates to fire protection and law enforcement employees of public agencies.

SUBPART C—PARTIAL EXEMPTION FOR EMPLOYEES ENGAGED IN LAW ENFORCEMENT AND FIRE PROTECTION

§ S553.201 Statutory provisions: section 7(k)

Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in § S553.230 of this part, the 216-hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

§ S553.202 Limitations

The application of §7(k), by its terms, is limited to public agencies, and does not apply to any private organization engaged in furnishing fire protection or law enforcement services. This is so even if the services are provided under contract with a public agency.

EXEMPTION REQUIREMENTS

§ S553.211 Law enforcement activities

(a) As used in §7(k) of the Act, the term ''any employee . . . in law enforcement activities'' refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by law to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as ''trainee'', ''probationary'', or ''permanent'', and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See section S553.215.

(c) Typically, employees engaged in law enforcement activities include police who are regularly employed and paid as such. Other agency employees with duties not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, any law enforcement employee within the legislative branch concerned with keeping public peace and order and protecting life and property.

(d) Employees who do not meet each of the three tests described above are not engaged in ''law enforcement activities'' as that term is used in section 7(k). Employees who normally would not meet each of these tests include:

(1) Building inspectors (other than those defined in section S553.213(a)),

(2) Health inspectors,

(3) Sanitarians,

(4) Civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points,

(5) Civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices,

(6) Wage and hour compliance officers,

(7) Equal employment opportunity compliance officers, and

(8) Building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term ''any employee in law enforcement activities'' also includes, by express reference, ''security personnel in correctional institutions''. Typically, such facilities may include precinct house lockups. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution. These employees are considered to be engaged in law enforcement activities regardless of their rank or of their status as ''trainee'', ''probationary'', or ''permanent'', and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term ''employee in law enforcement activities'' are the so-called ''civilian'' employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ S553.212 Twenty percent limitation on nonexempt work

(a) Employees engaged in fire protection or law enforcement activities as described in sections S553.210 and S553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat the §7(k) exemption unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. The performance of such work does not affect the application of the §7(k) exemption with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in paragraph (a) of this section.

§ S553.213 Public agency employees engaged in both fire protection and law enforcement activities

(a) Some public agencies have employees (often called ''public safety officers'') who engage in both fire protection and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat the section 7(k) exemption: *Provided*, That each of the activities performed meets the appropriate tests set forth in sections S553.210 and S553.211. This is so regardless of how the employee's time is divided between the two activities. However, all time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in section S553.212.

(b) As specified in section S553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

§ S553.214 Trainees

The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under section 7(k) only when the employee meets all the applicable tests described in section S553.210 or section S553.211 (except for the power of arrest for law enforcement personnel), as the S3985case may be. If the applicable

tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

§ S553.215 Ambulance and rescue service employees

Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by §7(k) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in section S553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

§ S553.216 Other exemptions

Although the 1974 Amendments to the FLSA as applied by the CAA provide special exemptions for employees of public agencies engaged in fire protection and law enforcement activities, such workers may also be subject to other exemptions in the Act, and public agencies may claim such other applicable exemptions in lieu of §7(k). For example, section 13(a)(1) as applied by the CAA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in Part S541. The section 13(a)(1) exemption can be claimed for any fire protection or law enforcement employee who meets all of the tests specified in Part S541 relating to duties, responsibilities, and salary. Thus, high ranking police officials who are engaged in law enforcement activities, may also, depending on the facts, qualify for the section 13(a)(1) exemption as ''executive'' employees. Similarly, certain criminal investigative agents may qualify as ''administrative'' employees under section 13(a)(1).

TOUR OF DUTY AND COMPENSABLE HOURS OF WORK RULES

§ S553.220 "Tour of duty" defined

(a) The term ''tour of duty'' is a unique concept applicable only to employees for whom the section 7(k) exemption is claimed. This term, as used in section 7(k), means the period of time during which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Such periods include ''shifts'' assigned to employees often days in advance of the performance of the work. Scheduled periods also include time spent in work outside the ''shift'' which the public agency employer assigns. For example, a police officer may be assigned to crowd control during a parade or other special event outside of his or her shift.

(b) Unscheduled periods include time spent in court by police officers, time spent handling emergency situations, and time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance.

(c) The tour of duty does not include time spent working for a separate and independent employer in certain types of special details as provided in section S553.227.

§ S553.221 Compensable hours of work

(a) The rules under the FLSA as applied by the CAA on compensable hours of work are applicable to employees for whom the section 7(k) exemption is claimed. Special rules for sleep time (section S553.222) apply to both law enforcement and firefighting employees for whom the section 7(k) exemption is claimed. Also, special rules for meal time apply in the case of firefighters (section S553.223).

(b) Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses.

(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, where a police station must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits.

(d) An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

(e) Normal home to work travel is not compensable, even where the employee is expected to report to work at a location away from the location of the employer's premises.

(f) A police officer, who has completed his or her tour of duty and who is given a patrol car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls is compensable.

§ S553.222 Sleep time

(a) Where a public agency elects to pay overtime compensation to firefighters and/or law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude sleep time from hours worked if all the conditions for the exclusion of such time are met.

(b) Where the employer has elected to use the section 7(k) exemption, sleep time cannot be excluded from the compensable hours of work where—

(1) the employee is on a tour of duty of less than 24 hours, and

(2) the employee is on a tour of duty of exactly 24 hours.

(c) Sleep time can be excluded from compensable hours of work, however, in the case of police officers or firefighters who are on a tour of duty of more than 24 hours, but only if there is an expressed or implied agreement between the employer and the employees to exclude such time. In the absence of such an agreement, the sleep time is compensable. In no event shall the time excluded as sleep time exceed 8 hours in a 24-hour period. If the sleep time is interrupted by a call to duty, the interruption must be counted as hours worked. If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes means at least 5 hours), the entire time must be counted as hours of work.

§ S553.223 Meal time

(a) If a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude meal time from hours worked if all the statutory tests for the exclusion of such time are met.

(b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less: *Provided*, That the employee is completely relieved from duty during the meal period, and all the other statutory tests for the exclusion of such time are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., stakeouts), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

(c) With respect to firefighters employed under section 7(k), who are confined to a duty station, the legislative history of the Act indicates congressional intent to mandate a departure from the usual FLSA ''hours of work'' rules and adoption of an overtime standard keyed to the unique concept of ''tour of duty'' under which firefighters are employed. Where the public agency elects to use the section 7(k) exemption for firefighters, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, and (2) where the firefighter is on a tour of duty of exactly 24 hours.

(d) In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the statutory tests for exclusion of such hours are met.

§ S553.224 "Work period" defined

(a) As used in section 7(k), the term ''work period'' refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed: *Provided*, That the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

(b) An employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees.

§ S553.225 Early relief

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift prior to the scheduled starting time. Such early relief time may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work for employees employed under section 7(k) where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer, the time involved must be added to the employee's tour of duty and treated as compensable hours of work.

§ S553.226 Training time

(a) The general rules for determining the compensability of training time under the FLSA apply to employees engaged in law enforcement or fire protection activities.

(b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees in required training is considered to be noncompensable:

(1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of Government, does not constitute compensable hours of work.

(3) Time spent in the training described in paragraphs (b) (1) or (2) of this section is not compensable, even if all or part of the costs of the training is borne by the employer.

(c) Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

§ S553.227 Outside employment

(a) Section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.

(b) Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

(c) Whether two employers are, in fact, separate and independent can only be determined on a case-by-case basis.

(d) The primary employer may facilitate the employment or affect the conditions of employment of such employees. For example, a police department may maintain a roster of officers who wish to perform such work. The department may also select the officers for special details from a list of those wishing to participate, negotiate their pay, and retain a fee for administrative expenses. The department may require that the separate and independent employer pay the fee for such services directly to the department, and establish procedures for the officers to receive their pay for the special details through the agency's payroll system. Finally, the department may require that the officers observe their normal standards of conduct during such details and take disciplinary action against those who fail to do so.

(e) Section 7(p)(1) applies to special details even where a State law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. For example, a city ordinance may require the presence of city police officers at a convention center during concerts or sports events. If the officers perform such work at their own option, the hours of work need not be combined with the hours of work for their primary employer in computing overtime compensation.

(f) The principles in paragraphs (d) and (e) of this section with respect to special details of public agency fire protection and law enforcement employees under section 7(p)(1) are exceptions to the usual rules on joint employment set forth in part 791 of this title.

(g) Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. Thus, assignments of police officers outside of their normal work hours to perform crowd control at a parade, where the assignments are not solely at the option of the officers, would not qualify as special details subject to this exception. This would be true even if the parade organizers reimburse the public agency for providing such services.

(h) Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees.

OVERTIME COMPENSATION RULES

§ S553.230 Maximum hours standards for work periods of 7 to 28 days—section 7(k)

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

§ S553.231 Compensatory time off

(a) Law enforcement and fire protection employees who are subject to the section 7(k) exemption may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum for their work period as set forth in section S553.230.

(b) Section 7(k) permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a firefighter's work period is 28 consecutive days, and he or she works 80 hours in each of the first two weeks, but only 52 hours in the third week, and does not work in the fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation or compensatory time off would be due for 54 hours (160 minus 106 hours) in the first 14 day work period.

§ S553.232 Overtime pay requirements

If a public agency pays employees subject to section 7(k) for overtime hours worked in cash wages rather than compensatory time off, such wages must be paid at one and one-half times the employees' regular rates of pay.

§ S553.233 "Regular rate" defined

The statutory rules for computing an employee's ''regular rate'', for purposes of the Act's overtime pay requirements are applicable to employees for whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages.

SUBPART D—COMPENSATORY TIME-OFF FOR OVERTIME EARNED BY EMPLOYEES WHOSE WORK SCHEDULE DIRECTLY DEPENDS UPON THE SCHEDULE OF THE SENATE

§ S553.301 Definition of "directly depends"

For the purposes of this Part, a covered employee's work schedule ''directly depends'' on the schedule of the Senate only if the eligible employee performs work that directly supports the conduct of legislative or other business in the chamber and works hours that regularly change in response to the schedule of the House and the Senate.

§ S553.302 Overtime compensation and compensatory time off for an employee whose work schedule directly depends upon the schedule of the Senate

No employing office shall be deemed to have violated section 203(a)(1) of the CAA, which applies the protections of section 7(a) of the Fair Labor Standards Act (''FLSA'') to covered employees and employing office, by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under section 7(a) of the FLSA where the employee's work schedule directly depends on the schedule of the Senate within the meaning of § S553.301, and: (a) the employee is compensated at the rate

of time-and-a-half in pay for all hours in excess of 40 and up to 60 hours in a workweek, and (b) the employee is compensated at the rate of time-and-a-half in either pay or in time off for all hours in excess of 60 hours in a workweek.

§ S553.303 Using compensatory time off

An employee who has accrued compensatory time off under § S553.302, upon his or her request, shall be permitted by the employing office to use such time within a reasonable period after making the request, unless the employing office makes a bona fide determination that the needs of the operations of the office do not allow the taking of compensatory time off at the time of the request. An employee may renew the request at a subsequent time. An employing office may also, upon reasonable notice, require an employee to use accrued compensatory time-off.

§ S553.304 Payment of overtime compensation for accrued compensatory time off as of termination of service

An employee who has accrued compensatory time authorized by this regulation shall, upon termination of employment, be paid for the unused compensatory time at the rate earned by the employee at the time the employee receives such payment.

PART S570—CHILD LABOR REGULATIONS

SUBPART A—GENERAL

Sec.
S570.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.
S570.1 Definitions.
S570.2 Minimum age standards.

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

S570.31 Determination.
S570.32 Effect of this subpart.
S570.33 Occupations.
S570.35 Periods and conditions of employment.

SUBPART A—GENERAL

§ S570.00 Corresponding section table of the FLSA regulations of the Labor Department and the CAA regulations of the Office of Compliance.

The following table lists the sections of the Secretary of Labor Regulations under the FLSA with the corresponding sections of the Office of Compliance Regulations under section 202 of the CAA:

Secretary of Labor Regulations	*OC Regulations*
570.1 Definitions	S570.1
570.2 Minimum age standards	S570.2
570.31 Determinations	S570.31
570.32 Effect of this subpart	S570.32
570.33 Occupations	S570.33
570.35 Periods and conditions of employment	S570.35

§ S570.1 Definitions

As used in this part:

(a) Act means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201–219).

(b) Oppressive child labor means employment of a minor in an occupation for which he does not meet the minimum age standards of the Act, as set forth in section S570.2 of this subpart.

(c) Oppressive child labor age means an age below the minimum age established under the Act for the occupation in which a minor is employed or in which his employment is contemplated.

(d) [Reserved]

(e) [Reserved]

(f) Secretary or Secretary of Labor means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(g) Wage and Hour Division means the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

(h) Administrator means the Administrator of the Wage and Hour Division or his authorized representative.

§ S570.2 Minimum age standards

(a) All occupations except in agriculture. (1) The Act, in section 3(1), sets a general 16-year minimum age which applies to all employment subject to its child labor provisions in any occupation other than in agriculture, with the following exceptions:

(i) The Act authorizes the Secretary of Labor to provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor, if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being (see subpart C of this part); and

(ii) The Act sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being.

(2) The Act exempts from its minimum age requirements the employment by a parent of his own child, or by a person standing in place of a parent of a child in his custody, except in occupations to which the 18-year age minimum applies and in manufacturing and mining occupations.

SUBPART B—[RESERVED]

SUBPART C—EMPLOYMENT OF MINORS BETWEEN 14 AND 16 YEARS OF AGE (CHILD LABOR REG. 3)

§ S570.31 Determination

The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions hereafter specified does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child labor.

§ S570.32 Effect of this subpart

In all occupations covered by this subpart the employment (including suffering or permitting to work) by an employer of minor employees between 14 and 16 years of age for the periods and under the conditions specified in § S570.35 shall not be deemed to be oppressive child labor within the meaning of the Fair Labor Standards Act of 1938.

§ S570.33 Occupations

This subpart shall apply to all occupations other than the following:

(a) Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;

(b) Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(c) The operation of motor vehicles or service as helpers on such vehicles;

(d) Public messenger service;

(e) Occupations which the Secretary of Labor may, pursuant to section 3(1) of the Fair Labor Standards Act and Reorganization Plan No. 2, issued pursuant to the Reorganization Act of 1945, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being;

(f) Occupations in connection with:

(1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means;

(2) Warehousing and storage;

(3) Communications and public utilities;

(4) Construction (including demolition and repair); except such office (including ticket office) work, or sales work, in connection with paragraphs (f) (1), (2), (3), and (4) of this section, as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

§ S570.35 Periods and conditions of employment

(a) Except as provided in paragraph (b) of this section, employment in any of the occupations to which this subpart is applicable shall be confined to the following periods:

(1) Outside school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

APPLICATION OF RIGHTS AND PROTECTIONS OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

SUBPART A—GENERAL

Sec.
1.1 Purpose and scope.
1.2 Definitions.
1.3 Coverage.
1.4 Prohibitions on lie detector use.
1.5 Effect on other laws or agreements.
1.6 Notice of protection.
1.7 Authority of the Board.
1.8 Employment relationship.

SUBPART B—EXEMPTIONS

1.10 Exclusion for employees of the Capitol Police. [Reserved]
1.11 Exemption for national defense and security.
1.12 Exemption for employing offices conducting investigations of economic loss or injury.
1.13 Exemption for employing offices authorized to manufacture, distribute, or dispense controlled substances.

SUBPART C—RESTRICTIONS ON POLYGRAPH USAGE UNDER EXEMPTIONS

1.20 Adverse employment action under ongoing investigation exemption.
1.21 Adverse employment action under controlled substance exemption.
1.22 Rights of examinee—general.
1.23 Rights of examinee—pretest phase.
1.24 Rights of examinee—actual testing phase.
1.25 Rights of examinee—post-test phase.
1.26 Qualifications of and requirements for examiners.

SUBPART D—RECORDKEEPING AND DISCLOSURE REQUIREMENTS

1.30 Records to be preserved for 3 years.
1.35 Disclosure of test information.

SUBPART E—[RESERVED]

1.40 [Reserved]
Appendix A—Notice to Examinee

Authority: Pub. L. 104–1, 109 Stat. 3, 2 U.S.C. 1314(c)

SUBPART A—GENERAL

SEC. 1.1 PURPOSE AND SCOPE.

Enacted into law on January 23, 1995, the Congressional Accountability Act (''CAA'') directly applies the rights and protections of eleven Federal labor and employment law statutes to covered employees and employing offices within the legislative branch. Section 204(a) of the CAA, 2 U.S.C. §1314(a) provides that no employing office may require any covered employee (including a covered employee who does not work in that employing office) to take a lie detector test where such test would be prohibited if required by an employer under paragraphs (1), (2) or (3) of section 3 of the Employee Polygraph Protection Act of 1988 (EPPA), 29 U.S.C. §2002 (1), (2) or (3). The purpose of this Part is to set forth the regulations to carry out the provisions of section 204 of the CAA.

Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use. Subpart B sets forth rules regarding the statutory exemptions from application of section 204 of the CAA. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the rules on recordkeeping and the disclosure of polygraph test information.

SEC. 1.2 DEFINITIONS.

For purposes of this part:

(a) Act or CAA means the Congressional Accountability Act of 1995 (P.L. 104–1, 109 Stat. 3, 2 U.S.C. §§1301–1438).

(b) EPPA means the Employee Polygraph Protection Act of 1988 (Pub. L. 100–347, 102 Stat. 646, 29 U.S.C. §§2001–2009) as applied to covered employees and employing offices by section 204 of the CAA.

(c) The term covered employee means any employee of (1) the House of Representatives; (2) the Senate; (3) the Capitol Guide Service; (4) the Congressional Budget Office; (5) the Office of the Architect of the Capitol; (6) the Office of the Attending Physician; (7) the Office of Compliance; or (8) the Office of Technology Assessment.

(d) The term employee includes an applicant for employment and a former employee.

(e) The term employee of the Office of the Architect of the Capitol includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.

(f) The term employee of the Capitol Police includes any member or officer of the Capitol Police.

(g) The term employee of the House of Representatives includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (8) of paragraph (c) above.

(h) The term employee of the Senate includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (8) of paragraph (c) above.

(i) The term employing office means (1) the personal office of a Member of the House of Representatives or of a Senator; (2) a committee of the House of Representatives or the Senate or a joint committee; (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or (4) the Capitol Guide Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. The term employing office includes any person acting directly or indirectly in the interest of an employing office in relation to an employee or prospective employee. A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an employing office with respect to the examinees. Any reference to ''employer'' in these regulations includes employing offices.

(j)(1) The term lie detector means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual. Voice stress analyzers, or psychological stress evaluators, include any systems that utilize voice stress analysis, whether or not an opinion on honesty or dishonesty is specifically rendered.

(2) The term lie detector does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. Also not included in the definition of lie detector are written or oral tests commonly referred to as ''honesty'' or ''paper and pencil'' tests, machine-scored or otherwise; and graphology tests commonly referred to as handwriting tests.

(k) The term polygraph means an instrument that—

(1) records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(l) Board means the Board of Directors of the Office of Compliance.

(m) Office means the Office of Compliance.

SEC. 1.3 COVERAGE.

The coverage of section 204 of the Act extends to any ''covered employee'' or ''covered employing office'' without regard to the number of employees or the employing office's effect on interstate commerce.

SEC. 1.4 PROHIBITIONS ON LIE DETECTOR USE.

(a) Section 204 of the CAA provides that, subject to the exemptions of the EPPA incorporated into the CAA under section 225(f) of the CAA, as set forth in section 1.10 through 1.12 of this Part, employing offices are prohibited from:

(1) Requiring, requesting, suggesting or causing, directly or indirectly, any covered employee or prospective employee to take or submit to a lie detector test;

(2) Using, accepting, or inquiring about the results of a lie detector test of any covered employee or prospective employee; and

(3) Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any covered employee or prospective employee to take such action for refusal or failure to take or submit to such test, or on the basis of the results of a test.

The above prohibitions apply irrespective of whether the covered employee referred to in paragraphs (1), (2) or (3), above, works in that employing office.

(b) An employing office that reports a theft or other incident involving economic loss to police or other law enforcement authorities is not engaged in conduct subject to the prohibitions under paragraph (a) of this section if, during the normal course of a subsequent investigation, such authorities deem it necessary to administer a polygraph test to a covered employee(s) suspected of involvement in the reported incident. Employing offices that cooperate with police authorities during the course of their investigations into criminal misconduct are likewise not deemed engaged in prohibitive conduct: *Provided*, That such cooperation is passive in nature. For example, it is not uncommon for police authorities to request employees suspected of theft or criminal activity to submit to a polygraph test during the employee's tour of duty since, as a general rule, suspect employees are often difficult to locate away from their place of employment. Allowing a test on the employing office's premises, releasing a covered employee during working hours to take a test at police headquarters, and other similar types of cooperation at the request of the police authorities would not be construed as ''requiring, requesting, suggesting, or causing, directly or indirectly, any covered employee * * * to take or submit to a lie detector test''. Cooperation of this type must be distinguished from actual participation in the testing of employees suspected of wrongdoing, either through the administration of a test by the employing office at the request or direction of police authorities, or through reimbursement by the employing office of tests administered by police authorities to employees. In some communities, it may be a practice of police authorities to request testing by employing offices of employees before a police investigation is initiated on a reported incident. In other communities, police examiners are available to covered employing offices, on a cost reimbursement basis, to conduct tests on employees suspected by an employing office of wrongdoing. All such conduct on the part of employing offices is deemed within the prohibitions of section 204 of the CAA.

(c) The receipt by an employing office of information from a polygraph test administered by police authorities pursuant to an investigation is prohibited by section 3(2) of the EPPA. (See paragraph (a)(2) of this section.)

(d) The simulated use of a polygraph instrument so as to lead an individual to believe that an actual test is being or may be performed (e.g., to elicit confessions or admissions of guilt) constitutes conduct prohibited by paragraph (a) of this section. Such use includes the connection of a covered employee or prospective employee to the instrument without any intention of a diagnostic purpose, the placement of the instrument in a room used for interrogation unconnected to the covered employee or prospective employee, or the mere suggestion that the instrument may be used during the course of the interview.

(e) The Capitol Police may not require a covered employee not employed by the Capitol Police to take a lie detector test (on its own initiative or at the request of another employing office) except where the Capitol Police administers such lie detector test as part of an ''ongoing investigation'' by the Capitol Police. For the purpose of this subsection, the definition of ''ongoing investigation'' contained in section 1.12(b) shall apply.

SEC. 1.5 EFFECT ON OTHER LAWS OR AGREEMENTS.

(a) Section 204 of the CAA does not preempt any otherwise applicable provision of Federal law or any rule or regulation of the House or Senate or any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to the use of lie detector tests.

(b)(1) This provision applies to all aspects of the use of lie detector tests, including procedural safeguards, the use of test results, the rights and remedies provided examinees, and the rights, remedies, and responsibilities of examiners and employing offices.

(2) For example, a collective bargaining agreement that provides greater protection to an examinee would apply in addition to the protection provided in section 204 of the CAA.

SEC. 1.6 NOTICE OF PROTECTION.

Pursuant to section 301(h) of the CAA, the Office shall prepare, in a manner suitable for posting, a notice explaining the provisions of section 204 of the CAA. Copies of such notice may be obtained from the Office of Compliance.

SEC. 1.7 AUTHORITY OF THE BOARD.

Pursuant to sections 204 and 304 of the CAA, the Board is authorized to issue regulations to implement the rights and protections of the EPPA. Section 204(c) directs the Board to promulgate regulations implementing section 204 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) [of section 204 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section''. The regulations issued by the Board herein are on all matters for which section 204 of the CAA requires a regulation to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of promulgation of these regulations, that, with the exception of the regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsections (a) and (b) [of section 204 of the CAA]''.

In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the Secretary from which they are derived. Moreover such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

SEC. 1.8 EMPLOYMENT RELATIONSHIP.

Subject to the exemptions incorporated into the CAA by section 225(f), section 204 applies the prohibitions on the use of lie detectors by employing offices with respect to covered employees irrespective of whether a covered employee works in that employing office. Sections 101 (3), (4) and 204 of the CAA also apply EPPA prohibitions against discrimination to applicants for employment and former employees of a covered employing office. For example, an employee may quit rather than take a lie detector test. The employing office cannot discriminate or threaten to discriminate in any manner against that person (such as by providing bad references in the future) because of that person's refusal to be tested. Similarly, an employing office cannot discriminate or threaten to discriminate in any manner against that person because that person files a complaint, institutes a proceeding, testifies in a proceeding, or exercises any right under section 204 of the CAA. (See section 207 of the CAA.)

SUBPART B—EXEMPTIONS

SEC. 1.10 EXCLUSION FOR EMPLOYEES OF THE CAPITOL POLICE [RESERVED].

SEC. 1.11 EXEMPTION FOR NATIONAL DEFENSE AND SECURITY.

(a) The exemptions allowing for the administration of lie detector tests in the following paragraphs (b) through (e) of this section apply only to the Federal Government; they do not allow covered employing offices to administer such tests. For the purposes of this section, the term ''Federal Government'' means any agency or entity within the Federal Government authorized to administer polygraph examinations which is otherwise exempt from coverage under section 7(a) of the EPPA, 29 U.S.C. §2006(a).

(b) Section 7(b)(1) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides that nothing in the EPPA shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any expert, consultant or employee of any contractor under contract with the Department of Defense; or with the Department of Energy, in connection with the atomic energy defense activities of such Department.

(c) Section 7(b)(2)(A) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides that nothing in the EPPA shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function of the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency, to any individual employed by, assigned to, or detailed to any such agency; or any expert or consultant under contract to any such agency; or any employee of a contractor to such agency; or any individual applying for a position in any such agency; or any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency.

(d) Section 7(b)(2)(B) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides that nothing in the EPPA shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function, to any covered employee whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2 (a) of Executive Order 12356 (or a successor Executive order).

(c) Counterintelligence for purposes of the above paragraphs means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, terrorist activities, or assassinations conducted for or on behalf of foreign governments, or foreign or domestic organizations or persons.

(d) Lie detector tests of persons described in the above paragraphs will be administered in accordance with applicable Department of Defense directives and regulations, or other regulations and directives governing the use of such tests by the United States Government, as applicable.

SEC. 1.12 EXEMPTION FOR EMPLOYING OFFICES CONDUCTING INVESTIGATIONS OF ECONOMIC LOSS OR INJURY.

(a) Section 7(d) of the EPPA, incorporated into the CAA under section 225(f) of the CAA, provides a limited exemption from the general prohibition on lie detector use for employers conducting ongoing investigations of economic loss or injury to the employer's business. An employing office may request an employee, subject to the conditions set forth in sections 8 and 10 of the EPPA and sections 1.20, 1.22, 1.23, 1.24, 1.25, 1.26 and 1.35 of this part, to submit to a polygraph test, but no other type of lie detector test, only if—

(1) The test is administered in connection with an ongoing investigation involving economic loss or injury to the employing office's operations, such as theft, embezzlement, misappropriation or an act of unlawful industrial espionage or sabotage;

(2) The employee had access to the property that is the subject of the investigation;

(3) The employing office has a reasonable suspicion that the employee was involved in the incident or activity under investigation;

(4) The employing office provides the examinee with a statement, in a language understood by the examinee, prior to the test which fully explains with particularity the specific incident or activity being investigated and the basis for testing particular employees and which contains, at a minimum:

(i) An identification with particularity of the specific economic loss or injury to the operations of the employing office;

(ii) A description of the employee's access to the property that is the subject of the investigation;

(iii) A description in detail of the basis of the employing office's reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(iv) Signature of a person (other than a polygraph examiner) authorized to legally bind the employing office; and

(5) The employing office retains a copy of the statement and proof of service described in paragraph (a)(4) of this section for at least 3 years.

(b) For the exemption to apply, the condition of an ''ongoing investigation'' must be met. As used in section 7(d) of the EPPA, the ongoing investigation must be of a specific incident or activity. Thus, for example, an employing office may not request that an employee or employees submit to a polygraph test in an effort to determine whether or not any thefts have occurred. Such random testing by an employing office is precluded by the EPPA. Further, because the exemption is limited to a specific incident or activity, an employing office is precluded from using the exemption in situations where the so-called ''ongoing investigation'' is continuous. For example, the fact that items are frequently missing would not be a sufficient basis, standing alone, for administering a polygraph test. Even if the employing office can establish that unusually high amounts of property are missing in a given month, this, in and of itself, would not be a sufficient basis to meet the specific incident requirement. On the other hand, polygraph testing in response to missing property would be permitted where additional evidence is obtained through subsequent investigation of specific items missing through intentional wrongdoing, and a reasonable suspicion that the employee to be polygraphed was involved in the incident under investigation. Administering a polygraph test in circumstances where the missing property is merely unspecified, statistical shortages, without identification of a specific incident or activity that produced the missing property and a ''reasonable suspicion that the employee was involved'', would amount to little more than a fishing expedition and is prohibited by the EPPA as applied to covered employees and employing offices by the CAA.

(c)(1)(i) The terms economic loss or injury to the employing office's operations include both direct and indirect economic loss or injury.

(ii) Direct loss or injury includes losses or injuries resulting from theft, embezzlement,

misappropriation, espionage or sabotage. These examples, cited in the EPPA, are intended to be illustrative and not exhaustive. Another specific incident which would constitute direct economic loss or injury is the misappropriation of confidential or trade secret information.

(iii) Indirect loss or injury includes the use of an employing office's operations to commit a crime, such as check-kiting or money laundering. In such cases, the ongoing investigation must be limited to criminal activity that has already occurred, and to use of the employing office's operations (and not simply the use of the premises) for such activity. For example, the use of an employing office's vehicles, warehouses, computers or equipment to smuggle or facilitate the importing of illegal substances constitutes an indirect loss or injury to the employing office's business operations. Conversely, the mere fact that an illegal act occurs on the employing office's premises (such as a drug transaction that takes place in the employing office's parking lot or rest room) does not constitute an indirect economic loss or injury to the employing office.

(iv) Indirect loss or injury also includes theft or injury to property of another for which the employing office exercises fiduciary, managerial or security responsibility, or where the office has custody of the property (but not property of other offices to which the employees have access by virtue of the employment relationship). For example, if a maintenance employee of the manager of an apartment building steals jewelry from a tenant's apartment, the theft results in an indirect economic loss or injury to the employer because of the manager's management responsibility with respect to the tenant's apartment. A messenger on a delivery of confidential business reports for a client firm who steals the reports causes an indirect economic loss or injury to the messenger service because the messenger service is custodian of the client firm's reports, and therefore is responsible for their security. Similarly, the theft of property protected by a security service employer is considered an economic loss or injury to that employer.

(v) A theft or injury to a client firm does not constitute an indirect loss or injury to an employing office unless that employing office has custody of, or management, or security responsibility for, the property of the client that was lost or stolen or injured. For example, a cleaning contractor has no responsibility for the money at a client bank. If money is stolen from the bank by one of the cleaning contractor's employees, the cleaning contractor does not suffer an indirect loss or injury.

(vi) Indirect loss or injury does not include loss or injury which is merely threatened or potential, e.g., a threatened or potential loss of an advantageous business relationship.

(2) Economic losses or injuries which are the result of unintentional or lawful conduct would not serve as a basis for the administration of a polygraph test. Thus, apparently unintentional losses or injuries stemming from truck, car, workplace, or other similar type accidents or routine inventory or cash register shortages would not meet the economic loss or injury requirement. Any economic loss incident to lawful union or employee activity also would not satisfy this requirement.

(3) It is the operations of the employing office which must suffer the economic loss or injury. Thus, a theft committed by one employee against another employee of the same employing office would not satisfy the requirement.

(d) While nothing in the EPPA as applied by the CAA prohibits the use of medical tests to determine the presence of controlled substances or alcohol in bodily fluids, the section 7(d) exemption of the EPPA does not permit the use of a polygraph test to learn whether an employee has used drugs or alcohol, even where such possible use may have contributed to an economic loss to the employing office (e.g., an accident involving an employing office's vehicle).

(e) Section 7(d)(2) of the EPPA provides that, as a condition for the use of the exemption, the employee must have had access to the property that is the subject of the investigation.

(1) The word access, as used in section 7(d)(2), refers to the opportunity which an employee had to cause, or to aid or abet in causing, the specific economic loss or injury under investigation. The term ''access'', thus, includes more than direct or physical contact during the course of employment. For example, as a general matter, all employees working in or with authority to enter a property storage area have ''access'' to unsecured property in the area. All employees with the combination to a safe have ''access'' to the property in a locked safe. Employees also have ''access'' who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of investigation. For example, a bookkeeper in a jewelry store with access to inventory records may aid or abet a clerk who steals an expensive watch by removing the watch from the employing office's inventory records. In such a situation, it is clear that the bookkeeper effectively has ''access'' to the property that is the subject of the investigation.

(2) As used in section 7(d)(2), property refers to specifically identifiable property, but also includes such things of value as security codes and computer data, and proprietary, financial or technical information, such as trade secrets, which by its availability to competitors or others would cause economic harm to the employing office.

(f)(1) As used in section 7(d)(3), the term reasonable suspicion refers to an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss. Access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for ''reasonable suspicion''. Information from a co-worker, or an employee's behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion. While access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding the access or opportunity (such as its unauthorized or unusual nature or the fact that access was limited to a single individual) may constitute a factor in determining whether there is a reasonable suspicion.

(2) For example, in an investigation of a theft of an expensive piece of jewelry, an employee authorized to open the establishment's safe no earlier than 9 a.m., in order to place the jewelry in a window display case, is observed opening the safe at 7:30 a.m. In such a situation, the opening of the safe by the employee one and one-half hours prior to the specified time may serve as the basis for reasonable suspicion. On the other hand, in the example given, if the employee is asked to bring the piece of jewelry to his or her office at 7:30 a.m., and the employee then opened the safe and reported the jewelry missing, such access, standing alone, would not constitute a basis for reasonable suspicion that the employee was involved in the incident unless access to the safe was limited solely to the employee. If no one other than the employee possessed the combination to the safe, and all other possible explanations for the loss are ruled out, such as a break-in, a basis for reasonable suspicion may be formulated based on sole access by one employee.

(3) The employing office has the burden of establishing that the specific individual or individuals to be tested are ''reasonably suspected'' of involvement in the specific economic loss or injury for the requirement in section 7(d)(3) of the EPPA to be met.

(g)(1) As discussed in paragraph (a)(4) of this section, section 7(d)(4) of the EPPA sets forth what information, at a minimum, must be provided to an employee if the employing office wishes to claim the exemption.

(2) The statement required under paragraph (a)(4) of this section must be received by the employee at least 48 hours, excluding weekend days and holidays, prior to the time of the examination. The statement must set forth the time and date of receipt by the employee and be verified by the employee's signature. This will provide the employee with adequate pre-test notice of the specific incident or activity being investigated and afford the employee sufficient time prior to the test to obtain and consult with legal counsel or an employee representative.

(3) The statement to be provided to the employee must set forth with particularity the specific incident or activity being investigated and the basis for testing particular employees. Section 7(d)(4)(A) of the EPPA requires specificity beyond the mere assertion of general statements regarding economic loss, employee access, and reasonable suspicion. For example, an employing office's assertion that an expensive watch was stolen, and that the employee had access to the watch and is therefore a suspect, would not meet the ''with particularity'' criterion. If the basis for an employing office's requesting an employee (or employees) to take a polygraph test is not articulated with particularity, and reduced to writing, then the standard is not met. The identity of a co-worker or other individual providing information used to establish reasonable suspicion need not be revealed in the statement.

(4) It is further required that the statement provided to the examinee be signed by the employing office, or an employee or other representative of the employing office with authority to legally bind the employing office. The person signing the statement must not be a polygraph examiner unless the examiner is acting solely in the capacity of an employing office with respect to his or her own employees and does not conduct the examination. The standard would not be met, and the exemption would not apply if the person signing the statement is not authorized to legally bind the employing office.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the EPPA, as discussed in sections 1.20, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employing office to remedial actions, as provided for in section 6(c) of the EPPA.

SEC. 1.13 EXEMPTION OF EMPLOYING OFFICES AUTHORIZED TO MANUFACTURE, DISTRIBUTE, OR DISPENSE CONTROLLED SUBSTANCES.

(a) Section 7(f) of the EPPA, incorporated into the CAA by section 225(f) of the CAA, provides an exemption from the EPPA's general prohibition regarding the use of polygraph tests for employers authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of

section 202 of the Controlled Substances Act (21 U.S.C. §812). This exemption permits the administration of polygraph tests, subject to the conditions set forth in sections 8 and 10 of the EPPA and sections 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part, to:

(1) A prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(2) A current employee if the following conditions are met:

(i) The test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employing office; and

(ii) The employee had access to the person or property that is the subject of the investigation.

(b)(1) The terms manufacture, distribute, distribution, dispense, storage, and sale, for the purposes of this exemption, are construed within the meaning of the Controlled Substances Act (21 U.S.C. §812 et seq.), as administered by the Drug Enforcement Administration (DEA), United States Department of Justice.

(2) The exemption in section 7(f) of the EPPA applies only to employing offices that are authorized by DEA to manufacture, distribute, or dispense a controlled substance. Section 202 of the Controlled Substances Act (21 U.S.C. §812) requires every person who manufactures, distributes, or dispenses any controlled substance to register with the Attorney General (i.e., with DEA). Common or contract carriers and warehouses whose possession of the controlled substance is in the usual course of their business or employment are not required to register. Truck drivers and warehouse employees of the persons or entities registered with DEA and authorized to manufacture, distribute, or dispense controlled substances, are within the scope of the exemption where they have direct access or access to the controlled substances, as discussed below.

(c) In order for a polygraph examination to be performed, section 7(f) of the Act requires that a prospective employee have ''direct access'' to the controlled substance(s) manufactured, dispensed, or distributed by the employing office. Where a current employee is to be tested as a part of an ongoing investigation, section 7(f) requires that the employee have ''access'' to the person or property that is the subject of the investigation.

(1) A prospective employee would have ''direct access'' if the position being applied for has responsibilities which include contact with or which affect the disposition of a controlled substance, including participation in the process of obtaining, dispensing, or otherwise distributing a controlled substance. This includes contact or direct involvement in the manufacture, storage, testing, distribution, sale or dispensing of a controlled substance and may include, for example, packaging, repackaging, ordering, licensing, shipping, receiving, taking inventory, providing security, prescribing, and handling of a controlled substance. A prospective employee would have ''direct access'' if the described job duties would give such person access to the products in question, whether such employee would be in physical proximity to controlled substances or engaged in activity which would permit the employee to divert such substances to his or her possession.

(2) A current employee would have ''access'' within the meaning of section 7(f) if the employee had access to the specific person or property which is the subject of the on-going investigation, as discussed in section 1.12(e) of this part. Thus, to test a current employee, the employee need not have had ''direct'' access to the controlled substance, but may have had only infrequent, random, or opportunistic access. Such access would be sufficient to test the employee if the employee could have caused, or could have aided or abetted in causing, the loss of the specific property which is the subject of the investigation. For example, a maintenance worker in a drug warehouse, whose job duties include the cleaning of areas where the controlled substances which are the subject of the investigation were present, but whose job duties do not include the handling of controlled substances, would be deemed to have ''access'', but normally not ''direct access'', to the controlled substances. On the other hand, a drug warehouse truck loader, whose job duties include the handling of outgoing shipment orders which contain controlled substances, would have ''direct access'' to such controlled substances. A pharmacy department in a supermarket is another common situation which is useful in illustrating the distinction between ''direct access'' and ''access''. Store personnel receiving pharmaceutical orders, i.e., the pharmacist, pharmacy intern, and other such employees working in the pharmacy department, would ordinarily have ''direct access'' to controlled substances. Other store personnel whose job duties and responsibilities do not include the handling of controlled substances but who had occasion to enter the pharmacy department where the controlled substances which are the subject of the investigation were stored, such as maintenance personnel or pharmacy cashiers, would have ''access''. Certain other store personnel whose job duties do not permit or require entrance into the pharmacy department for any reason, such as produce or meat clerks, checkout cashiers, or baggers, would not ordinarily have ''access''. However, any current employee, regardless of described job duties, may be polygraphed if the employing office's investigation of criminal or other misconduct discloses that such employee in fact took action to obtain ''access'' to the person or property that is the subject of the investigation—e.g., by actually entering the drug storage area in violation of company rules. In the case of ''direct access'', the prospective employee's access to controlled substances would be as a part of the manufacturing, dispensing or distribution process, while a current employee's ''access'' to the controlled substances which are the subject of the investigation need only be opportunistic.

(d) The term prospective employee, for the purposes of this section, includes a current employee who presently holds a position which does not entail direct access to controlled substances, and therefore is outside the scope of the exemption's provisions for preemployment polygraph testing, provided the employee has applied for and is being considered for transfer or promotion to another position which entails such direct access. For example, an office secretary may apply for promotion to a position in the vault or cage areas of a drug warehouse, where controlled substances are kept. In such a situation, the current employee would be deemed a ''prospective employee'' for the purposes of this exemption, and thus could be subject to preemployment polygraph screening, prior to such a change in position. However, any adverse action which is based in part on a polygraph test against a current employee who is considered a ''prospective employee'' for purposes of this section may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(e) Section 7(f) of the EPPA, as applied by the CAA, makes no specific reference to a requirement that employing offices provide current employees with a written statement prior to polygraph testing. Thus, employing offices to whom this exemption is available are not required to furnish a written statement such as that specified in section 7(d) of the EPPA and section 1.12(a)(4) of this part.

(f) For the section 7(f) exemption to apply, the polygraph testing of current employees must be administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employing office.

(1) Current employees may only be administered polygraph tests in connection with an ongoing investigation of criminal or other misconduct, relating to a specific incident or activity, or potential incident or activity. Thus, an employing office is precluded from using the exemption in connection with continuing investigations or on a random basis to determine if thefts are occurring. However, unlike the exemption in section 7(d) of the EPPA for employing offices conducting ongoing investigations of economic loss or injury, the section 7(f) exemption includes ongoing investigations of misconduct involving potential drug losses. Nor does the latter exemption include the requirement for ''reasonable suspicion'' contained in the section 7(d) exemption. Thus, a drug store operator is permitted to polygraph all current employees who have access to a controlled substance stolen from the inventory, or where there is evidence that such a theft is planned. Polygraph testing based on an inventory shortage of the drug during a particular accounting period would not be permitted unless there is extrinsic evidence of misconduct.

(2) In addition, the test must be administered in connection with loss or injury, or potential loss or injury, to the manufacture, distribution, or dispensing of a controlled substance.

(i) Retail drugstores and wholesale drug warehouses typically carry inventory of so-called health and beauty aids, cosmetics, over-the-counter drugs, and a variety of other similar products, in addition to their product lines of controlled drugs. The non-controlled products usually constitute the majority of such firms' sales volumes. An economic loss or injury related to such non-controlled substances would not constitute a basis of applicability of the section 7(f) exemption. For example, an investigation into the theft of a gross of cosmetic products could not be a basis for polygraph testing under section 7(f), but the theft of a container of valium could be.

(ii) Polygraph testing, with respect to an ongoing investigation concerning products other than controlled substances might be initiated under section 7(d) of the EPPA and section 1.12 of this part. However, the exemption in section 7(f) of the EPPA and this section is limited solely to losses or injury associated with controlled substances.

(g) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the EPPA, as discussed in sections 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, and 1.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employing office to the remedies authorized in section 204 of the CAA. The administration of such tests is also subject to collective bargaining agreements, which may either prohibit lie detector tests, or

contain more restrictive provisions with respect to polygraph testing.

SUBPART C—RESTRICTIONS ON POLYGRAPH USAGE UNDER EXEMPTIONS

SEC. 1.20 ADVERSE EMPLOYMENT ACTION UNDER ONGOING INVESTIGATION EXEMPTION.

(a) Section 8(a)(1) of the EPPA provides that the limited exemption in section 7(d) of the EPPA and section 1.12 of this part for ongoing investigations shall not apply if an employing office discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence.

(b) ''Additional supporting evidence'', for purposes of section 8(a) of the EPPA, includes, but is not limited to, the following:

(1)(i) Evidence indicating that the employee had access to the missing or damaged property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employing office's reasonable suspicion that the employee was involved in the incident or activity under investigation; or

(2) Admissions or statements made by an employee before, during or following a polygraph examination.

(c) Analysis of a polygraph test chart or refusal to take a polygraph test may not serve as a basis for adverse employment action, even with additional supporting evidence, unless the employing office observes all the requirements of sections 7(d) and 8(b) of the EPPA, as applied by the CAA and described in sections 1.12, 1.22, 1.23, 1.24 and 1.25 of this part.

SEC. 1.21 ADVERSE EMPLOYMENT ACTION UNDER CONTROLLED SUBSTANCE EXEMPTION.

(a) Section 8(a)(2) of the EPPA provides that the controlled substance exemption in section 7(f) of the EPPA and section 1.13 of this part shall not apply if an employing office discharges, disciplines, denies employment or promotion, or otherwise discriminates in any manner against a current employee or prospective employee based solely on the analysis of a polygraph test chart or the refusal to take a polygraph test.

(b) Analysis of a polygraph test chart or refusal to take a polygraph test may serve as one basis for adverse employment actions of the type described in paragraph (a) of this section: *Provided*, That the adverse action was also based on another bona fide reason, with supporting evidence therefor. For example, traditional factors such as prior employment experience, education, job performance, etc. may be used as a basis for employment decisions. Employment decisions based on admissions or statements made by an employee or prospective employee before, during or following a polygraph examination may, likewise, serve as a basis for such decisions.

(c) Analysis of a polygraph test chart or the refusal to take a polygraph test may not serve as a basis for adverse employment action, even with another legitimate basis for such action, unless the employing office observes all the requirements of section 7(f) of the EPPA, as appropriate, and section 8(b) of the EPPA, as described in sections 1.13, 1.22, 1.23, 1.24 and 1.25 of this part.

SEC. 1.22 RIGHTS OF EXAMINEE—GENERAL.

(a) Pursuant to section 8(b) of the EPPA, the limited exemption in section 7(d) of the EPPA for ongoing investigations (described in sections 1.12 and 1.13 of this part) shall not apply unless all of the requirements set forth in this section and sections 1.23 through 1.25 of this part are met.

(b) During all phases of the polygraph testing the person being examined has the following rights:

(1) The examinee may terminate the test at any time.

(2) The examinee may not be asked any questions in a degrading or unnecessarily intrusive manner.

(3) The examinee may not be asked any questions dealing with:

(i) Religious beliefs or affiliations;

(ii) Beliefs or opinions regarding racial matters;

(iii) Political beliefs or affiliations;

(iv) Sexual preferences or behavior; or

(v) Beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations.

(4) The examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase. ''Sufficient written evidence'' shall constitute, at a minimum, a statement by a physician specifically describing the examinee's medical or psychological condition or treatment and the basis for the physician's opinion that the condition or treatment might result in such abnormal responses.

(5) An employee or prospective employee who exercises the right to terminate the test, or who for medical reasons with sufficient supporting evidence is not administered the test, shall be subject to adverse employment action only on the same basis as one who refuses to take a polygraph test, as described in sections 1.20 and 1.21 of this part.

(c) Any polygraph examination shall consist of one or more pretest phases, actual testing phases, and post-test phases, which must be conducted in accordance with the rights of examinees described in sections 1.23 through 1.25 of this part.

SEC. 1.23 RIGHTS OF EXAMINEE—PRETEST PHASE.

(a) The pretest phase consists of the questioning and other preparation of the prospective examinee before the actual use of the polygraph instrument. During the initial pretest phase, the examinee must be:

(1) Provided with written notice, in a language understood by the examinee, as to when and where the examination will take place and that the examinee has the right to consult with counsel or an employee representative before each phase of the test. Such notice shall be received by the examinee at least forty-eight hours, excluding weekend days and holidays, before the time of the examination, except that a prospective employee may, at the employee's option, give written consent to administration of a test anytime within 48 hours but no earlier than 24 hours after receipt of the written notice. The written notice or proof of service must set forth the time and date of receipt by the employee or prospective employee and be verified by his or her signature. The purpose of this requirement is to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative. Provision shall also be made for a convenient place on the premises where the examination will take place at which the examinee may consult privately with an attorney or an employee representative before each phase of the test. The attorney or representative may be excluded from the room where the examination is administered during the actual testing phase.

(2) Informed orally and in writing of the nature and characteristics of the polygraph instrument and examination, including an explanation of the physical operation of the polygraph instrument and the procedure used during the examination.

(3) Provided with a written notice prior to the testing phase, in a language understood by the examinee, which shall be read to and signed by the examinee. Use of Appendix A to this part, if properly completed, will constitute compliance with the contents of the notice requirement of this paragraph. If a format other than in Appendix A is used, it must contain at least the following information:

(i) Whether or not the polygraph examination area contains a two-way mirror, a camera, or other device through which the examinee may be observed;

(ii) Whether or not any other device, such as those used in conversation or recording will be used during the examination;

(iii) That both the examinee and the employing office have the right, with the other's knowledge, to make a recording of the entire examination;

(iv) That the examinee has the right to terminate the test at any time;

(v) That the examinee has the right, and will be given the opportunity, to review all questions to be asked during the test;

(vi) That the examinee may not be asked questions in a manner which degrades, or needlessly intrudes;

(vii) That the examinee may not be asked any questions concerning religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations;

(viii) That the test may not be conducted if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination;

(ix) That the test is not and cannot be required as a condition of employment;

(x) That the employing office may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against the examinee based on the analysis of a polygraph test, or based on the examinee's refusal to take such a test, without additional evidence which would support such action;

(xi)(A) In connection with an ongoing investigation, that the additional evidence required for the employing office to take adverse action against the examinee, including termination, may be evidence that the examinee had access to the property that is the subject of the investigation, together with evidence supporting the employing office's reasonable suspicion that the examinee was involved in the incident or activity under investigation;

(B) That any statement made by the examinee before or during the test may serve as additional supporting evidence for an adverse employment action, as described in paragraph (a)(3)(x) of this section, and that any admission of criminal conduct by the examinee may be transmitted to an appropriate Government law enforcement agency;

(xii) That information acquired from a polygraph test may be disclosed by the examiner or by the employing office only:

(A) To the examinee or any other person specifically designated in writing by the examinee to receive such information;

(B) To the employing office that requested the test;

(C) To a court, governmental agency, arbitrator, or mediator pursuant to a court order;

(D) By the employing office, to an appropriate governmental agency without a court

order where, and only insofar as, the information disclosed is an admission of criminal conduct;

(xiii) That if any of the examinee's rights or protections under the law are violated, the examinee has the right to take action against the employing office under sections 401–404 of the CAA. Employing offices that violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees;

(xiv) That the examinee has the right to obtain and consult with legal counsel or other representative before each phase of the test, although the legal counsel or representative may be excluded from the room where the test is administered during the actual testing phase.

(xv) That the employee's rights under the CAA may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the CAA, agreed to and signed by the parties.

(b) During the initial or any subsequent pretest phases, the examinee must be given the opportunity, prior to the actual testing phase, to review all questions in writing that the examiner will ask during each testing phase. Such questions may be presented at any point in time prior to the testing phase.

SEC. 1.24 RIGHTS OF EXAMINEE—ACTUAL TESTING PHASE.

(a) The actual testing phase refers to that time during which the examiner administers the examination by using a polygraph instrument with respect to the examinee and then analyzes the charts derived from the test. Throughout the actual testing phase, the examiner shall not ask any question that was not presented in writing for review prior to the testing phase. An examiner may, however, recess the testing phase and return to the pre-test phase to review additional relevant questions with the examinee. In the case of an ongoing investigation, the examiner shall ensure that all relevant questions (as distinguished from technical baseline questions) pertain to the investigation.

(b) No testing period subject to the provisions of the Act shall be less than ninety minutes in length. Such ''test period'' begins at the time that the examiner begins informing the examinee of the nature and characteristics of the examination and the instruments involved, as prescribed in section 8(b)(2)(B) of the EPPA and section 1.23(a)(2) of this part, and ends when the examiner completes the review of the test results with the examinee as provided in section 1.25 of this part. The ninety-minute minimum duration shall not apply if the examinee voluntarily acts to terminate the test before the completion thereof, in which event the examiner may not render an opinion regarding the employee's truthfulness.

SEC. 1.25 RIGHTS OF EXAMINEE—POST-TEST PHASE.

(a) The post-test phase refers to any questioning or other communication with the examinee following the use of the polygraph instrument, including review of the results of the test with the examinee. Before any adverse employment action, the employing office must:

(1) Further interview the examinee on the basis of the test results; and

(2) Give to the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as the questions asked during the test, with the corresponding charted responses. The term ''corresponding charted responses'' refers to copies of the entire examination charts recording the employee's physiological responses, and not just the examiner's written report which describes the examinee's responses to the questions as ''charted'' by the instrument.

SEC. 1.26 QUALIFICATIONS OF AND REQUIREMENTS FOR EXAMINERS.

(a) Section 8 (b) and (c) of the EPPA provides that the limited exemption in section 7(d) of the EPPA for ongoing investigations shall not apply unless the person conducting the polygraph examination meets specified qualifications and requirements.

(b) An examiner must meet the following qualifications:

(1) Have a valid current license, if required by the State in which the test is to be conducted; and

(2) Carry a minimum bond of $50,000 provided by a surety incorporated under the laws of the United States or of any State, which may under those laws guarantee the fidelity of persons holding positions of trust, or carry an equivalent amount of professional liability coverage.

(c) An examiner must also, with respect to examinees identified by the employing office pursuant to section 1.30(c) of this part:

(1) Observe all rights of examinees, as set out in sections 1.22, 1.23, 1.24, and 1.25 of this part;

(2) Administer no more than five polygraph examinations in any one calendar day on which a test or tests subject to the provisions of EPPA are administered, not counting those instances where an examinee voluntarily terminates an examination prior to the actual testing phase;

(3) Administer no polygraph examination subject to the provisions of the EPPA which is less than ninety minutes in duration, as described in section 1.24(b) of this part; and

(4) Render any opinion or conclusion regarding truthfulness or deception in writing. Such opinion or conclusion must be based solely on the polygraph test results. The written report shall not contain any information other than admissions, information, case facts, and interpretation of the charts relevant to the stated purpose of the polygraph test and shall not include any recommendation concerning the employment of the examinee.

(5) Maintain all opinions, reports, charts, written questions, lists, and other records relating to the test, including, statements signed by examinees advising them of rights under the CAA (as described in section 1.23(a)(3) of this part) and any electronic recordings of examinations, for at least three years from the date of the administration of the test. (See section 1.30 of this part for recordkeeping requirements.)

SUBPART D—RECORDKEEPING AND DISCLOSURE REQUIREMENTS

SEC. 1.30 RECORDS TO BE PRESERVED FOR 3 YEARS.

(a) The following records shall be kept for a minimum period of three years from the date the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted):

(1) Each employing office that requests an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific incident or activity under investigation and the basis for testing that particular covered employee, as required by section 7(d)(4) of the EPPA and described in 1.12(a)(4) of this part.

(2) Each examiner retained to administer examinations pursuant to any of the exemptions under section 7 (d), (e) or (f) of the EPPA (described in sections 1.12 and 1.13 of this part) shall maintain all opinions, reports, charts, written questions, lists, and other records relating to polygraph tests of such persons.

SEC. 1.35 DISCLOSURE OF TEST INFORMATION.

This section prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employing office (other than an employing office exempt under section 7 (a) or (b) of the EPPA (described in sections 1.10 and 1.11 of this part)) may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in writing by the examinee to receive such information;

(2) The employing office that requested the polygraph test pursuant to the provisions of the EPPA (including management personnel of the employing office where the disclosure is relevant to the carrying out of their job responsibilities);

(3) Any court, governmental agency, arbitrator, or mediator pursuant to an order from a court of competent jurisdiction requiring the production of such information;

(b) An employing office may disclose information from the polygraph test at any time to an appropriate governmental agency without the need of a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records), to another examiner(s) for examination and analysis, provided that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. Such action would not constitute disclosure under this part provided that the other examiner has no direct or indirect interest in the matter.

SUBPART E—[RESERVED]

SEC. 1.40 [RESERVED].

APPENDIX A TO PART 801—NOTICE TO EXAMINEE

Section 204 of the Congressional Accountability Act, which applies the rights and protections of section 8(b) of the Employee Polygraph Protection Act to covered employees and employing offices, and the regulations of the Board of Directors of the Office of Compliance (sections 1.22, 1.23, 1.24, and 1.25), require that you be given the following information before taking a polygraph examination:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.

(b) Another device, such as those used in conversation or recording [will] [will not] be used during the examination.

(c) Both you and the employing office have the right, with the other's knowledge, to record electronically the entire examination.

2. (a) You have the right to terminate the test at any time.

(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.

(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.

(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual preference or behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

(f) You have the right to consult with legal counsel or other representative before each phase of the test, although the legal counsel or other representative may be excluded from the room where the test is administered during the actual testing phase.

3. (a) The test is not and cannot be required as a condition of employment.

(b) The employing office may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.

(c)(1) In connection with an ongoing investigation, the additional evidence required for an employing office to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employing office's reasonable suspicion that you were involved in the incident or activity under investigation.

(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate Government law enforcement agency.

4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employing office only:

(1) To you or any other person specifically designated in writing by you to receive such information;

(2) To the employing office that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order.

(b) Information acquired from a polygraph test may be disclosed by the employing office to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to take action against the employing office by filing a request for counseling with the Office of Compliance under section 402 of the Congressional Accountability Act. Employing offices that violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees.

6. Your rights under the CAA may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the CAA, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

_____

(Date)

_____

(Signature)

APPLICATION OF RIGHTS AND PROTECTIONS OF THE WORKER ADJUSTMENT RETRAINING AND NOTIFICATION ACT OF 1988 (IMPLEMENTING SECTION 204 OF THE CAA)

Sec.

639.1 Purpose and scope.
639.2 What does WARN require?
639.3 Definitions.
639.4 Who must give notice?
639.5 When must notice be given?
639.6 Who must receive notice?
639.7 What must the notice contain?
639.8 How is the notice served?
639.9 When may notice be given less than 60 days in advance?
639.10 When may notice be extended?
639.11 [Reserved].

§ 639.1 Purpose and scope

(a) PURPOSE OF WARN AS APPLIED BY THE CAA.—Section 205 of the Congressional Accountability Act, Public Law 104–1 (''CAA''), provides protection to covered employees and their families by requiring employing offices to provide notification 60 calendar days in advance of office closings and mass layoffs within the meaning of section 3 of the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §2102. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. As used in these regulations, WARN shall refer to the provisions of WARN applied to covered employing offices by section 205 of the CAA.

(b) SCOPE OF THESE REGULATIONS.—These regulations are issued by the Board of Directors, Office of Compliance, pursuant to sections 205(c) and 304 of the CAA, which directs the Board to promulgate regulations implementing section 205 that are ''the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 205 of the CAA] except insofar as the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section''. The regulations issued by the Board herein are on all matters for which section 205 of the CAA requires a regulation to be issued. Specifically, it is the Board's considered judgment, based on the information available to it at the time of promulgation of these regulations, that, with the exception of regulations adopted and set forth herein, there are no other ''substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions referred to in subsection (a) [of section 205 of the CAA]''.

In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the Secretary. Such changes are intended to make the provisions adopted accord more naturally to situations in the legislative branch. However, by making these changes, the Board does not intend a substantive difference between these sections and those of the Secretary from which they are derived. Moreover, such changes, in and of themselves, are not intended to constitute an interpretation of the regulation or of the statutory provisions of the CAA upon which they are based.

These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The objective of these regulations is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, it is recognized that rulemaking cannot address the multitude of employing office-specific situations in which advance notice will be given.

(c) NOTICE IN AMBIGUOUS SITUATIONS.—It is civically desirable and it would appear to be good business practice for an employing office to provide advance notice, where reasonably possible, to its workers or unions when terminating a significant number of employees. The Office encourages employing offices to give notice in such circumstances.

(d) WARN NOT TO SUPERSEDE OTHER LAWS AND CONTRACTS.—The provisions of WARN do not supersede any otherwise applicable laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

§ 639.2 What does WARN require?

WARN requires employing offices that are planning an office closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employing offices from voluntarily providing longer periods of advance notice. Not all office closings and layoffs are subject to WARN, and certain employment thresholds must be reached before WARN applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Remedies authorized under section 205 of the CAA may be assessed against employing offices that violate WARN requirements.

§ 639.3 Definitions

(a) EMPLOYING OFFICE.—(1) The term ''employing office'' means any of the entities listed in section 101(9) of the CAA, 2 U.S.C. §1301(9) that employs—

(i) 100 or more employees, excluding part-time employees; or

(ii) employs 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a ''reasonable expectation of recall'' when he/she understands, through notification or through common practice, that his/her employment with the employing office has been temporarily interrupted and that he/she will be recalled to the same or to a similar job.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN, are nonetheless counted as employees for purposes of determining coverage as an employing office.

(3) An employing office may have one or more sites of employment under common control.

(b) OFFICE CLOSING.—The term ''office closing'' means the permanent or temporary shutdown of a ''single site of employment'', or one or more ''facilities or operating units'' within a single site of employment, if the shutdown results in an ''employment loss'' during any 30-day period at the single site of employment for 50 or more employees, excluding any part-time employees. An employment action that results in the effective cessation of the work performed by a unit, even if a few employees remain, is a shutdown. A ''temporary shutdown'' triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of ''employment loss''.

(c) MASS LAYOFF.—(1) The term ''mass layoff'' means a reduction in force which first, is not the result of an office closing, and second, results in an employment loss at the

single site of employment during any 30-day period for:

(i) At least 33 percent of the active employees, excluding part-time employees, and

(ii) At least 50 employees, excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33 percent requirement does not apply, and notice is required if the other criteria are met. Office closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an office closing or mass layoff. For example, if an employing office closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered office closing has occurred although only 10 workers are entitled to notice.

(d) REPRESENTATIVE.—The term ''representative'' means an exclusive representative of employees within the meaning of 5 U.S.C. §§7101 et seq., as applied to covered employees and employing offices by section 220 of the CAA, 2 U.S.C. §1351.

(e) AFFECTED EMPLOYEES.—The term ''affected employees'' means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed office closing or mass layoff by their employing office. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term affected employees includes managerial and supervisory employees. Consultant or contract employees who have a separate employment relationship with another employing office or employer and are paid by that other employing office or employer, or who are self-employed, are not ''affected employees'' of the operations to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) EMPLOYMENT LOSS.—(1) The term employment loss means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50 percent during each month of any 6-month period.

(2) Where a termination or a layoff (see paragraphs (f)(1) (i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employing office-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employing office's operations and, prior to the closing or layoff—

(i) The employing office offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or

(ii) The employing office offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A ''relocation or consolidation'' of part or all of an employing office's operations, for purposes of paragraph §639.3(f)(3), means that some definable operations are transferred to a different site of employment and that transfer results in an office closing or mass layoff.

(g) PART-TIME EMPLOYEE.—The term ''part-time'' employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as ''seasonal'' employees. The period to be used for calculating whether a worker has worked ''an average of fewer than 20 hours per week'' is the shorter of the actual time the worker has been employed or the most recent 90 days.

(h) SINGLE SITE OF EMPLOYMENT.—(1) A single site of employment can refer to either a single location or a group of contiguous locations. Separate facilities across the street from one another may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employing offices conduct activities within such a building. For example, an office building housing 50 different employing offices will contain 50 single sites of employment. The offices of each employing office will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site.

(5) Contiguous buildings operated by the same employing office which have separate management and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employing office's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. United States workers at such sites are counted to determine whether an employing office is covered as an employing office under §639.3(a).

(8) The term ''single site of employment'' may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of WARN to provide notice is not acceptable.

(i) FACILITY OR OPERATING UNIT.—The term ''facility'' refers to a building or buildings. The term ''operating unit'' refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.

§639.4 Who must give notice?

Section 205(a)(1) of the CAA states that ''[n]o employing office shall be closed or a mass layoff ordered within the meaning of section 3 of [WARN] until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff . . . ''. Therefore, an employing office that is anticipating carrying out an office closing or mass layoff is required to give notice to affected employees or their representative(s). (See definitions in §639.3 of this part.)

(a) It is the responsibility of the employing office to decide the most appropriate person within the employing office's organization to prepare and deliver the notice to affected employees or their representative(s). In most instances, this may be the local site office manager, the local personnel director or a labor relations officer.

(b) An employing office that has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to circumstances not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement.

(c) In the case of the privatization or sale of part or all of an employing office's operations, the employing office is responsible for providing notice of any office closing or mass layoff which takes place up to and including the effective date (time) of the privatization or sale, and the contractor or buyer is responsible for providing any required notice of any office closing or mass layoff that takes place thereafter.

(1) If the employing office is made aware of any definite plans on the part of the buyer or contractor to carry out an office closing or mass layoff within 60 days of purchase, the employing office may give notice to affected employees as an agent of the buyer or contractor, if so empowered. If the employing office does not give notice, the buyer or contractor is, nevertheless, responsible to give notice. If the employing office gives notice as the agent of the buyer or contractor, the responsibility for notice still remains with the buyer or contractor.

(2) It may be prudent for the buyer or contractor and employing office to determine the impacts of the privatization or sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or office closing is planned.

§639.5 When must notice be given?

(a) GENERAL RULE.—(1) With certain exceptions discussed in paragraphs (b) and (c) of this section and in §639.9 of this part, notice must be given at least 60 calendar days prior to any planned office closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employing office to decide whether issuing notice is required, the employing office should—

(i) look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for an office closing or a mass layoff and thus trigger the notice requirement; and

(ii) look ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger

WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for an office closing or a mass layoff and thus trigger the notice requirement. An employing office is not, however, required under section 3(d) to give notice if the employing office demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this ''snapshot'' of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) TRANSFERS.—(1) Notice is not required in certain cases involving transfers, as described under the definition of ''employment loss'' at §639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a ''transfer'' if the new job constitutes a constructive discharge.

(3) The meaning of the term ''reasonable commuting distance'' will vary with local conditions. In determining what is a ''reasonable commuting distance'', consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employing office may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employing office, the normal 60-day notice period may have expired and the office closing or mass layoff may have occurred. An employing office is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) TEMPORARY EMPLOYMENT.—(1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of other employing offices or a locality, but the burden of proof will lie with the employing office to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

§639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at that time, to each affected employee.

(a) REPRESENTATIVE(S) OF AFFECTED EMPLOYEES.—Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) AFFECTED EMPLOYEES.—Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employing office cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employing office must provide notice to the incumbent in that position. While part-time employees are not counted in determining whether office closing or mass layoff thresholds are reached, such workers are due notice.

§639.7 What must the notice contain?

(a) NOTICE MUST BE SPECIFIC.—(1) All notice must be specific.

(2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employing office must ensure that all of the information required by this section is provided in writing to the parties listed in §639.6 at least 60 days in advance of a covered employment action.

(3) Notice may be given conditional upon the occurrence or nonoccurrence of an event only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of operations, lead to a covered office closing or mass layoff less than 60 days after the event. The notice must contain each of the elements set out in this section.

(4) The information provided in the notice shall be based on the best information available to the employing office at the time the notice is served. It is not the intent of the regulations that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN.

(b) DEFINITION.—As used in this section, the term ''date'' refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

(c) NOTICE.—Notice to each representative of affected employees is to contain:

(1) The name and address of the employment site where the office closing or mass layoff will occur, and the name and telephone number of an employing office official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire office is to be closed, a statement to that effect;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(d) EMPLOYEES NOT REPRESENTED.—Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain:

(1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire office is to be closed, a statement to that effect;

(2) The expected date when the office closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist;

(4) The name and telephone number of an employing office official to contact for further information.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

§639.8 How is the notice served?

Any reasonable method of delivery to the parties listed under §639.6 of this part which is designed to ensure receipt of notice of at least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

§639.9 When may notice be given less than 60 days in advance?

Section 3(b) of WARN, as applied by section 205 of the CAA, sets forth two conditions under which the notification period may be reduced to less than 60 days. The employing office bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employing office must give as much notice as is practicable to the union and non-represented employees and this may, in some circumstances, be notice after the fact. The employing office must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in §639.7.

(a) The ''unforeseeable business circumstances'' exception under section 3(b)(2)(A) of WARN, as applied under the CAA, applies to office closings and mass layoffs caused by circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employing office's control.

(2) The test for determining when circumstances are not reasonably foreseeable focuses on an employing office's business judgment. The employing office must exercise such reasonable business judgment as would a similarly situated employing office in predicting the demands of its operations. The employing office is not required, however, to accurately predict general economic conditions that also may affect its operations.

(b) The ''natural disaster'' exception in section 3(b)(2)(B) of WARN applies to office

closings and mass layoffs due to any form of a natural disaster.

(1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.

(2) To qualify for this exception, an employing office must be able to demonstrate that its office closing or mass layoff is a direct result of a natural disaster.

(3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in §639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.

(4) Where an office closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the ''unforeseeable business circumstance'' exception described in paragraph (a) of this section may be applicable.

§639.10 When may notice be extended?

Additional notice is required when the date or schedule of dates of a planned office closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in §639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.

(b) If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to the provisions of §§639.5, 639.6 and 639.7 of this part. Rolling notice, in the sense of routine periodic notice, given whether or not an office closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

§639.11 [Reserved]

AMENDMENTS SUBMITTED

CONGRESSIONAL TERMS LIMIT CONSTITUTIONAL AMENDMENT

LEAHY AMENDMENT NO. 3703

(Ordered to lie on the table.)

Mr. LEAHY submitted an amendment intended to be proposed by him to amendment No. 3692 proposed by Mr. ASHCROFT to the joint resolution (S.J. Res. 21) proposing a constitutional amendment to limit congressional terms; as follows:

In lieu of the matter proposed, insert the following: ''(two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE—

''SECTION 1. No person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than thrice; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than twice.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

''SECTION 3. A member of the Senate serving a term of office on the date of the ratification of this article, who upon completion of that term will have served two or more terms in the Senate, may complete that term. A member of the House of Representatives serving a term of office on the date of ratification of this article, who upon completion of that term will have served six or more terms in the House of Representatives, may complete that term.''.

LEAHY AMENDMENT NO. 3704

(Ordered to lie on the table.)

Mr. LEAHY submitted an amendment intended to be proposed by him to amendment No. 3694 proposed by Mr. ASHCROFT to the joint resolution (S.J. Res. 21) supra; as follows:

In lieu of the matter proposed, insert the following: ''of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE—

''SECTION 1. No person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than thrice; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than twice.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the states by the Congress.

''SECTION 3. A member of the Senate serving a term of office on the date of the ratification of this article, who upon completion of that term will have served two or more terms in the Senate, may complete that term. A member of the House of Representatives serving a term of office on the date of ratification of this article, who upon completion of that term will have served six or more terms in the House of Representatives, may complete that term.''.

LEAHY AMENDMENT NO. 3705

(Ordered to lie on the table.)

Mr. LEAHY submitted an amendment intended to be proposed by him to amendment No. 3696 proposed by Mr. THOMPSON to the joint resolution (S.J. Res. 21) supra; as follows:

In lieu of the matter proposed, insert the following: ''of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE—

''SECTION 1. No person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than thrice; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than twice.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

''SECTION 3. A member of the Senate serving a term of office on the date of the ratification of this article, who upon completion of that term will have served two or more terms in the Senate, may complete that term. A member of the House of representatives serving a term of office on the date of ratification of this article, who upon completion of that term will have served six or more terms in the House of Representatives, may complete that term.''.

LEAHY AMENDMENT NO. 3706

(Ordered to lie on the table.)

Mr. LEAHY submitted an amendment intended to be proposed by him to amendment No. 3698 proposed by Mr. ASHCROFT to the joint resolution (S.J. Res. 21) supra; as follows:

Strike all after ''SECTION 1.'' and insert the following: ''No person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than thrice; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than twice.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

''SECTION 3. A member of the Senate serving a term of office on the date of the ratification of this article, who upon completion of that term will have served two or more terms in the Senate, may complete that term. A member of the House of Representatives serving a term of office on the date of ratification of this article, who upon completion of that term will have served six or more terms in the House of Representatives, may complete that term.''.

THOMPSON AMENDMENTS NOS. 3707–3720

(Ordered to lie on the table.)

Mr. ASHCROFT (for Mr. THOMPSON) submitted 14 amendments intended to be proposed by Mr. THOMPSON to the joint resolution (S.J. Res. 21) supra; as follows:

AMENDMENT NO. 3707

In lieu of the matter proposed to be inserted, insert the following: ''*two-thirds of each House concurring therein*), That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE—

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than six times; no person who has been a Senator for more than three years of a term to which

some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislature of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3708

In lieu of the matter proposed to be inserted, insert the following: *''of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE —

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than six times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3709

In lieu of the matter proposed to be inserted, insert the following: *''of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE —

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than six times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3710

Strike all after the first word and insert the following: ''instructions to report the resolution back to the Senate forthwith with an amendment as follows: *two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE —

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than six times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3711

In lieu of the matter proposed to be inserted, insert the following: *two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE —

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than three times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3712

In lieu of the matter proposed to be inserted, insert the following: *''of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE —

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than three times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3713

In lieu of the matter proposed to be inserted, insert the following: *''of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE —

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than three times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3714

Strike all after the first word and insert the following: ''instructions to report the resolution back to the Senate forthwith with an amendment as follows: *two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE —

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than three times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3715

In lieu of the matter proposed to be inserted, insert the following: ''After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than six times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States

within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3716

In lieu of the matter proposed to be inserted, insert the following ''After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than six times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3717

Strike all after the first word and insert the following: ''instructions to report the resolution back to the Senate forthwith with an amendment as follows: *two-thirds of each House concurring therein)*, That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE—

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than six times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3718

In lieu of the matter proposed to be inserted, insert the following: ''After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than three times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3719

In lieu of the matter proposed to be inserted, insert the following: ''After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than three times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occurring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

AMENDMENT NO. 3720

Strike all after the first word and insert the following: ''instructions to report the resolution back to the Senate forthwith with an amendment as follows: *two-thirds of each House concurring therein*, That the following article is proposed as an amendment to the Constitution of the United States:

''ARTICLE—

''SECTION 1. After this article becomes operative, no person shall be elected to a full term as a Senator more than twice, or to a full term as a Representative more than three times; no person who has been a Senator for more than three years of a term to which some other person was elected shall subsequently be elected as a Senator more than once; and no person who has been a Representative for more than a year of a term to which some other person was elected shall subsequently be elected as a Representative more than five times.

''SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within eight years from the date of its submission to the States by the Congress.

''SECTION 3. No election or service occuring before ratification of this article shall be taken into account when determining eligibility for election under section 1.''.

THE IMMIGRATION AND NATIONALITY ACT AMENDMENT ACT OF 1996

ABRAHAM (AND OTHERS) AMENDMENT NO. 3721

(Ordered to lie on the table.)

Mr. ABRAHAM (for himself, Mr. FEINGOLD, Mr. DEWINE, Mr. INHOFE, and Mr. LIEBERMAN) submitted an amendment intended to be proposed by them to the bill (S. 1664) to amend the Immigration and Nationality Act to increase control over immigration to the United States by increasing border patrol and investigative personnel and detention facilities, improving the system used by employers to verify citizenship or work-authorized alien status, increasing penalties for alien smuggling and document fraud, and reforming asylum, exclusion, and deportation law and procedures; to reduce the use of welfare by aliens; and for other purposes; as follows:

Strike sections 111–115.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the Committee on Banking, Housing, and Urban Affairs be authorized to meet during the session of the Senate on Tuesday, April 23, 1996, to conduct a hearing about the status of assets held in Swiss banks deposited by European Jews and others in the years preceding the Holocaust.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the Committee on Commerce, Science, and Transportation be allowed to meet during the Tuesday, April 23, 1996 session of the Senate for the purpose of conducting a hearing on the reauthorization of the Consumer Product Safety Commission.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the full Committee on Environment and Public Works be granted permission to conduct a hearing Tuesday, April 23, at 9:30 a.m., Hearing Room (SD–406), on S. 1285, the Accelerated Cleanup and Environmental Recovery Act of 1996 (''Superfund''), as modified by an amendment in the nature of a substitute, Senate Amendment Number 3563, dated March 21, 1996.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON FOREIGN RELATIONS

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the Committee on Foreign Relations be authorized to meet during the session of the Senate on Tuesday, April 23, 1996, at 11:00 a.m. to hold a hearing.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON INDIAN AFFAIRS

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the Committee on Indian Affairs be authorized to meet to conduct a mark up during the session of the Senate on Tuesday, April 23, 1996 on the committee's letter to the Senate Committee on the Budget containing the committee's budget views and estimates on the President's budget request for fiscal year 1997 for Indian programs. The business meeting/mark up will be held at 9 p.m. in

room 485 of the Russell Senate Office Building.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON THE JUDICIARY

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the Committee on the Judiciary be authorized to meet during the session of the Senate on Tuesday, April 23, 1996, at 10 a.m. to hold a hearing on ''Proposed Constitutional Amendment To Establish a Bill of Rights for Crime Victims''.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON LABOR AND HUMAN RESOURCES

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the Committee on Labor and Human Resources be authorized to meet during the session of the Senate at 9:30 a.m., Tuesday, April 23, 1996, for a hearing on organ tissue donation awareness.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMITTEE ON SMALL BUSINESS

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the Committee on Small Business be authorized to meet during the session of the Senate for a hearing on Tuesday, April 23, 1996, at 10 a.m., in room 428A of the Russell Senate Office Building, to conduct a hearing entitled ''Keeping Up With the Trend: Issues Affecting Home-Based Business Owners.''

The PRESIDING OFFICER. Without objection, it is so ordered.

SPECIAL COMMITTEE ON AGING

Mrs. KASSEBAUM. Mr. President, I ask unanimous consent that the Special Committee on Aging be authorized to meet during the session of the Senate on Tuesday, April 23 at 10 a.m., to hold a hearing to discuss Alzheimer's disease.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

EARTH DAY

● Mr. BURNS. Mr. President, I rise today with my colleagues to recognize April 22, 1996, as Earth Day.

On their 1804 expedition through my present day State of Montana, Meriwether Lewis and William Clark wrote of the abundant game, vast horizons, shining mountains and crystal clear streams littered with rainbow and cutthroat trout.

Today the Treasure State remains largely unchanged. As stewards of the land, Montana's farmers realize the importance of sound conservation methods in cultivating the soil. Montana ranchers have employed grazing practices that renew healthy foragable grasslands.

In an effort to increase the sustainability of Montana's ranges, Montana stockgrowers with grazing lands around Fleecer Mountain just south of Butte and in the Wall Creek area near Ennis participate in a rotational grazing practice that utilizes and stimulates healthier forage on state lands.

This new grazing practice ensures that livestock and wildlife alike will have access to healthy forage without overgrazing lands managed by the Montana Fish, Wildlife, and Parks Department.

This effort of cooperation is just one example of what can be accomplished when local decisions are made in place of those coming out of Washington, DC. It is another piece of evidence that Montanans make sound environmental decisions compared to what has been mandated at a Federal level.

I believe we need to protect our environment. Generations of Montanans have made their living off the land and in return have learned to reap the benefits of preserving the land.

I greatly appreciate the environmental beauty of Big Sky Country, and I want my children and grandchildren to be able to appreciate it in the same way I have been able to.●

DOCTORS WILLING TO ACCEPT MEDICAID PATIENTS

Mr. BAUCUS. Mr. President, I would like to call to your attention to the extraordinary generosity of a few outstanding citizens in my home State. Dr. James Elliot, Dr. Rae Johnston, and Dr. Van Kirke Nelson treated more Medicaid patients than any other doctors in Montana. These doctors are willing to accept Medicaid patients—and lots of them—even though they know that Medicaid will reimburse only a fraction of what a private insurance company would pay.

I want to publicly thank these doctors for their dedication to the medical profession and for helping people who depend on Medicaid. Dr. Elliot, Dr. Johnston, and Dr. Nelson are willing to make sacrifices for the benefit of others. We can learn from their benevolence and their valuable community service.

On average, Medicaid pays only 70 percent of what a doctor charges. The doctor is forced to either swallow the cost, or choose not to see Medicaid patients. This is what makes physicians like Dr. Elliot, Dr. Johnston, and Dr. Nelson so special.

For example, Dr. Elliot averages a staggering caseload of 40 to 60 patients a day, not counting the trips he makes to the emergency room. In 1995, he treated more Medicaid patients than any other doctor in Montana. His Medicaid caseload was so high that the State audited him a few years ago. The State not only found no evidence of improprieties, they also found that Dr. Elliot charges less than average for most services.

And listen to Dr. Nelson, a personal friend of mine, describe his Medicaid patients to the Daily Inter Lake:

> These are real people who may be on tough luck—

He explains,—

> people struggling to make ends meet on low-paying jobs, and single mothers with little income. These are the sons and daughters of a lot of my friends.

So when the Senate debates legislation concerning Medicaid, I urge you to remember these outstanding citizens—these doctors who are willing to make sacrifices in order to assure that ''people on tough luck'' receive the health care they deserve. Dr. Elliot, who serves Medicaid recipients in the Havre area; Dr. Johnston, a Missoula area physician; and Dr. Nelson of Kalispell, whose daughter and daughter-in-law, both physicians, will probably continue the tradition of caring for underprivileged patients, deserve our admiration. The State of Montana is indebted to them, and to all the physicians in my State who serve Medicaid patients, regardless of their income or ability to pay. I am proud to commend them before the U.S. Senate today.

WELCOME TO MICHIGAN CONSTITUENTS

● Mr. ABRAHAM. Mr. President, I rise today to welcome a large group of Michigan constituents who have come here to Washington, DC, to express their opinions on the recent violence in Lebanon. I was pleased to be able to welcome them to the Senate this morning and host them for morning coffee prior to their planned events for the day.

Mr. President, this group comes here today with very deep sentiments and emotions about this issue. In fact many of them have family or friends who have lost their loved ones in the tragic bombing of the U.N. shelter in Qana. I share their deep sentiments and support the overall message of the urgency of an immediate end to this bloodshed in the form of a cease-fire and the need to deliver humanitarian aid to the refugees in Lebanon.

As I have been reiterating the past 2 days on the floor of the Senate, I urge the administration to persist in trying to negotiate a cease-fire in this region and to bring an end to the hostility immediately. The resulting peace will benefit everyone, but especially those innocent civilians and refugees in Lebanon, who have been most affected by the violence.●

IN MEMORY OF JUDGE WILL

● Ms. MOSELEY-BRAUN. Mr. President, today, there is a memorial service for Judge Hugh Will, a distinguished Illinois jurist and active humanitarian, who died in December after a long and productive career. Unfortunately, my Senate duties prevent me from being in Illinois to share my memories of Judge Will with his family, friends, and colleagues, so I would like to take this opportunity to express my gratitude for his many contributions and my sense of loss at his passing.

Judge Will had a long history of public service. Upon graduation from University of Chicago Law School in 1937, Judge Will came to Washington, working at the Securities and Exchange Commission, and then the Department of Justice. When the United States entered World War II, he served as chief of the Office of Strategic Services counterespionage branch in Europe. His country awarded him a Bronze Star for his work in organizing counterintelligence groups, which handled captured German agents. In 1946, he returned to Chicago, first working at the firm of Pope & Ballard, and then becoming a partner at Nelson, Boodell & Will, where he worked until 1961, when President Kennedy appointed him to the Federal bench.

Thousands of cases came before Judge Will, all of which received the same high level of careful attention. His handling of complex, high profile cases was widely renowned, but he derived as much pleasure and satisfaction from smaller cases, where he provided solutions for the problems of ordinary people. He considered judging to be an art form, comparing the perfect trial to the perfect symphony. And what a conductor he was! No jurist, in any court, engendered the respect and admiration commanded by Hugh Will. He was at once a judges' judge and a ''people person.'' His extraordinary intellect could at times be astonishing, but his overarching humanity was so much a part of his approach to the law that litigants were forewarned not to expect special interests ever to overcome the public good. He was a patriot, who retained an optimistic vision of America. That vision guided a consistent search for a living Constitution which kept faith with the highest ideals of our Nation. Had timing and opportunity been otherwise, Hugh Will would have distinguished himself and honored his country by serving on the Supreme Court of the United States.

Judge Will's contributions to the judiciary do not end with his case law. He pioneered the use of innovative administrative procedures, such as establishing a final pretrial order now used in courts nationwide. His guiding hand helped many budding jurists at the onset of their careers. He served as a mentor for many judges and participated in seminars for newly appointed jurists for over 20 years. Finally, he served as lead plaintiff in a class-action lawsuit, challenging the congressional withholding of cost-of-living adjustments due to judges under Federal law. In 1980, the Supreme Court decided Will versus U.S. in favor of the judges, protecting the Constitutional separation of powers our Founding Fathers intended.

Judge Will was also active in the community, serving on dozens of committees and boards of directors throughout his career, and receiving numerous honors and awards, including the Clarence Darrow Humanitarian Award in 1962. In 1991, he received one of the highest honors available to judges, the Edward J. Devitt Distinguished Service to Justice Award, bestowed by judges across the country to the Nation's outstanding jurists.

Judge Will also showed strength in times of personal adversity. When his beloved daughter died in 1982 at age 39, Judge Will founded the Wendy Will Case Cancer Fund. The fund has distributed over $1.5 million to cancer researchers, in the hope that they may someday put an end to the suffering experienced by cancer victims and their survivors.

Judge Will has served in many ways, he will be sorely missed by all. However, his legacy of service will live on, through his deeds, and most importantly through the people whose lives he has touched.

I will miss him. He reached out to me, when I was just starting a career in the law, and became a mentor to me. Upon my election to the Senate, he sought to help me get established in the best traditions of this body.●

RECOGNITION OF THE SUNNYSIDE SCHOOL DISTRICT VOLUNTEER PROGRAM

● Mr. GORTON. Mr. President, today I would like to recognize the Sunnyside School District's volunteer program for its dedication to the enrichment of the lives of children in Washington State.

I applaud the effort and enthusiasm of the many members of our community working to ensure a bright future for our children, and I believe the innovative and resourceful programs developed by educators and community members deserve more recognition. In January 1994, I began recognizing outstanding school programs through the U.S. Senate Award for Excellence in Education. The 300 volunteers who selflessly dedicate their time to the children of the Sunnyside School District deserve such recognition.

Whether working one-on-one with children in academic subjects, helping on the playground, or sharing their talents and hobbies, the volunteers for the Sunnyside School District can be found assisting in every aspect of school operations. During the 1994–95 school year, these volunteers gave 37,226 hours of service to the district. This kind of partnership between families, community members and schools has made Sunnyside School District a leader in promoting a health learning environment for its students.

I hope their vision of excellence in education serves as an example to others in Washington State and the rest of the country.●

ROBERT DONOVAN

● Mr. DODD. Mr. President, I wanted to take a few moments today to commemorate the life of Robert Donovan, President of ABB Incorporated, who so tragically perished with Commerce Secretary Ron Brown in Croatia.

Over the past few weeks, the Nation has come together in an outpouring of support and remembrance for the life of Commerce Secretary Ron Brown.

And deservedly so. Ron Brown was a great American who faithfully, and with quiet dignity, served his country and his party.

But, we must not forget those in our own community who were taken away from us on that wind-swept mountain in Croatia.

Robert Donovan, as well as all the others who were killed, deserve our special praise and commemoration because they died while on a humanitarian mission of mercy.

Robert Donovan didn't have to travel to the Balkans. He certainly could have stayed in Connecticut. But, Robert Donovan believed, as did everyone else on that plane, that in the global economy of the 21st century, Americans have a need and a responsibility to reach beyond their borders.

And, what's more, he believed the business community had a solemn obligation to do all it could to help those nations that are in the midst of the difficult process of rebuilding and reconciliation.

Some may cynically suggest that Robert Donovan and the other business leaders who traveled to Croatia were interested only in a financial bottom line. But one doesn't journey to Bosnia to make money.

Robert Donovan went to the Balkans because he believed that the dynamism of American business could help bring lasting peace to regions that for years knew only violence and hatred.

And he believed that his efforts could make a real difference in healing the lingering anguish of ethnic violence.

This spirit of altruism was evident in everything that Robert Donovan did.

At a time when pundits and politicians alike have made corporate CEO's Public Enemy No. 1, Robert Donovan proved the stereotype wrong. He was a man who remained strongly committed and loyal to his workers and his company.

He was as comfortable dealing with ABB employees, either in the workplace or running in the neighborhoods around this plant as he was dealing with international wheelers and dealers.

And his generosity spread beyond the workplace. He took an active, personal interest in helping out at the 1995 Special Olympics World Games in New Haven.

But, Robert Donovan was a man who didn't hesitate from taking on difficult tasks and that was never more obvious than on his last mission to the Balkans.

And, while I know this is a difficult time for Robert Donovan's friends, family and colleagues, it is important to remember that last mission and all the tireless work that he did on behalf of ABB, his family, and his country. It's that enduring legacy that we must all remember in this time of tragedy.

My thoughts and prayers remain with his wife Margaret, and his children Kevin and Kara.

CLAUDIO ELIA

Mr. President, I also wanted to take a few moments to remember another Connecticut resident who tragically perished with Commerce Secretary Brown in Croatia—Claudio Elia, of Greenwich, CT, who was chairman and CEO of Air & Water Technologies Corp.

Like Ron Brown and all the others who died in Croatia, Claudio Elia was on a solemn mission of mercy and he deserves particular recognition from this body.

Claudio Elia came to this country from Italy and took advantage of the vast economic opportunities available to all Americans. He started his business career in 1968 at the Boston Consulting Group and from there he quickly worked his way up the corporate ladder.

In fact, Elia's value at Air & Water Technologies was so significant that it took three top executives to replace him.

But, as Claudio Elia reveled in the economic opportunities that he received in his country, he traveled to Bosnia so that others would realize the same opportunities.

Claudio Elia didn't have to travel to the Balkans. There are excellent business opportunities elsewhere. But, Claudio Elia recognized that in the global economy of the 21st century, Americans must often look beyond its borders for new possibilities.

One of Claudio Elia's former classmates said at his funeral that: ''His presence on that flight was vintage Claudio. He was constantly pushing the envelope, looking for new opportunities and business relationships.''

And those words were most true on the final mission of his life to the former Yugoslavia. He believed that American businessmen have an obligation to play a role in helping nations that are on the difficult journey toward peace.

There are those who have cynically insinuated that Claudio Elia and the other business leaders who traveled to Croatia were interested more in their financial bottom line then the well-being of the Bosnian people. Well, as I said before, one doesn't journey to Bosnia to make money.

I believe that Claudio Elia and everyone else on that flight ventured to the Balkans because they shared the vision of Ron Brown.

They believed that through the machinations of the free market they could make a real difference in the lives of the Bosnian, Serb, and Croatian people. They understood that even though peace had been achieved, the chance for a real and lasting peace would depend on all peoples having the same opportunity for a brighter future.

Claudio Elia took with him to the Balkers who unquenchable spirit of American optimism and idealism that has infused our Nation for 220 years.

That spirit was as evident when he was in the boardroom or on an overseas mission, as it was when he was sailing his yacht in the Long Island Sound or dealing with his employees in the same manner he dealt with everyone else.

Claudio Elia was a man who didn't hesitate from taking on difficult tasks and that was never more obvious than on his last mission to the Balkans.

And, while I know this is a difficult time for Claudio Elia's friends, family and colleagues, it is important to remember that last mission and all the tireless work that he did on behalf of his family, and his country.

My thoughts and prayers remain with his wife Susan and his children Christine and Marc.●

CONGRATULATING THE NAACP ON THE OCCASION OF ITS 41ST ANNUAL FREEDOM FUND DINNER

● Mr. ABRAHAM. Mr. President, I rise today to congratulate and extend warm greetings to the Detroit chapter of the National Association for the Advancement of Colored People [NAACP] on the occasion of its 41st Annual Freedom Fund Dinner, to be held on April 28.

The struggles of the NAACP have had an immeasurable impact on local, national, and world events, advancing educational, housing and employment opportunities for America's voiceless. The Detroit chapter of this organization in particular has shown a commitment to both local and national action in the interests of its neighbors and community. The rewards of these efforts are shared by all throughout Michigan and our entire Nation.

Of course, Mr. President, we must continue to pursue every means by which to improve the quality of life for all Michigan residents. Ensuring that all of our citizens share in the resurgence of Michigan as a national and world leader is an important priority to me, as it is to the Detroit NAACP. My voice echoes with the many members and supporters of the Detroit NAACP in their calls for more jobs, better schools, and safer communities.

It is clear to me that the NAACP stands, as it always has stood, for self-determination, hard work, and leadership. I think Frederick Douglass best captured this philosophy when he said: ''The whole history of the progress of human liberty shows that all concessions yet made to her August claims have been born of earnest struggle. . . If there is no struggle there is no progress.''

I am sure that all concerned citizens who hope and pray for a unified America where we can celebrate opportunity and justice join me in extending our sincere best wishes to the Detroit chapter of the NAACP.●

ORDERS FOR WEDNESDAY, APRIL 24, 1996

Mr. DOLE. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until the hour of 9:30 a.m., Wednesday, April 24; further, that immediately following the prayer, the Journal of the proceedings be deemed approved to date, no resolutions come over under the rule, the call of the calendar be dispensed with, the morning hour be deemed to have expired, and there be a period for the transaction of morning business until the hour of 10 a.m., with Senators permitted to speak therein for 5 minutes each, with Senator HATCH to speak for up to 15 minutes; further, that the Senate then immediately resume consideration of S. 1664, the immigration bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. DOLE. Mr. President, for the information of all Senators, the Senate will resume consideration of the immigration bill tomorrow at 10 a.m. Rollcall votes are expected in relation to the immigration bill during Wednesday's session. It is also expected that the House will complete action on a short-term continuing resolution tomorrow. Therefore, I would expect the Senate to consider that appropriations matter when it is received from the House. Additional rollcall votes can therefore be expected during Wednesday's session of the Senate. The Senate may also be asked to turn to any other legislative items that can be cleared for action.

I hope to complete action on the immigration bill this week. So we will see what we can accomplish tomorrow. Senator SIMPSON is prepared to proceed, and we will try to complete action sometime late on Thursday. But on Friday I think my colleagues on the other side of the aisle have a conference outside Washington. We are going to try to accommodate them.

ADJOURNMENT UNTIL 9:30 A.M. TOMORROW

Mr. DOLE. Mr. President, if there be no further business to come before the Senate, I now ask that the Senate stand in adjournment under the previous order.

There being no objection, the Senate, at 6:27 p.m., adjourned until Wednesday, April 24, 1996, at 9:30 a.m.