

**Calendar No. 950**

106TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
{ 106-502

TO AMEND TITLE 31, UNITED STATES CODE,  
TO PROVIDE FOR EXECUTIVE AGENCIES TO  
CONDUCT ANNUAL RECOVERY AUDITS AND  
RECOVERY ACTIVITIES, AND FOR OTHER  
PURPOSES

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R E P O R T

OF THE  
COMMITTEE ON GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

together with  
ADDITIONAL VIEWS

TO ACCOMPANY

S. 3030

TO AMEND TITLE 31, UNITED STATES CODE, TO PROVIDE FOR  
EXECUTIVE AGENCIES TO CONDUCT ANNUAL RECOVERY AU-  
DITS AND RECOVERY ACTIVITIES, AND FOR OTHER PURPOSES



OCTOBER 12 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

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Mr. THOMPSON, from the Committee on Governmental Affairs, submitted the following

## REPORT

[To accompany S. 3030]

The Committee on Governmental Affairs, to which was referred the bill (S. 3030) amending title 31, United States Code, to provide for executive agencies to conduct annual recovery audits and recovery activities, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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### I. PURPOSE AND SUMMARY

S. 3030 amends chapter 35 of title 31, United States Code, to require Federal agencies to perform recovery audits if their direct purchases for goods and services total \$500 million or more per fiscal year. Agencies that must undertake recovery auditing also would be required to institute a management improvement program to address underlying problems of their payment systems.

## II. BACKGROUND AND NEED FOR LEGISLATION

### *Improper payments in the Federal Government*

Each year, the Federal government spends hundreds of billions of dollars for a variety of grants, transfer payments, and the procurement of goods and services. The Federal government must be accountable for how it spends these funds and for safeguarding against improper payments. Unfortunately, the problem of improper payments by Federal agencies and departments is immense. The General Accounting Office recently identified \$20.7 billion in improper payments in just 20 major programs administered by 12 Federal agencies in Fiscal Year 1999 alone (Financial Management: Improper Payments Reported in Fiscal Year 1999 Financial Statements (GAO/AIMD-00-261R)). This represents an increase of more than \$1.5 billion from the previous year's estimate. In its report, GAO wrote that its "audits and those of agency inspectors general continue to demonstrate that improper payments are much more widespread than agency financial statement reports have disclosed thus far."

Legislative efforts have focused on improving the Federal government's financial control processes. Recently-enacted laws, such as the Chief Financial Officers Act, the Government Management Reform Act, and the Government Performance and Results Act, have provided an impetus for agencies to systematically measure and reduce the extent of improper payments.

However, the risk of improper payments and the government's inability to prevent them continue to be significant problems. While the Committee continues to work to improve the government's widespread financial management weaknesses, it is important to begin to address the recovery of the tens of billions of dollars in improper payments.

### *Recovery auditing in the private sector*

Recovery auditing is used extensively by private sector businesses, including a majority of Fortune 500 companies. These businesses typically contract with specialized recovery auditing firms that are paid a contingent fee based on the amounts recovered from payment errors they identify. Recovery auditing is not "auditing" in the usual sense. Recovery auditing firms do not examine the records of vendors doing business with their client companies or assess the vendors' performance. Instead, these firms develop and use computer software programs that are capable of analyzing their clients' own contract and payment records in order to identify discrepancies in those records between what was owed and what was paid. They focus on obvious but inadvertent errors, such as duplicate payments or failure to get credit for applicable discounts and allowances.

Payment errors identified by private sector recovery auditors average only 0.1 percent of all payments reviewed. Nevertheless, recoveries are substantial when applied to large volumes of transactions. The 0.1 percent average error rate produces \$1 million in recoveries for each \$1 billion of payments reviewed.

### III. LEGISLATIVE HISTORY

#### HOUSE ACTIVITY

The House companion to S. 3030—H.R. 1827—was introduced on May 17, 1999 by Rep. Dan Burton (R-IN), Chairman of the Committee on Government Reform. Original co-sponsors were Majority Leader Dick Armey (R-TX), Rep. Pete Sessions (R-TX), and Rep. Doug Ose (R-CA). H.R. 1827 was referred to the Committee on Government Reform, then referred to the Subcommittee on Government Management, Information, and Technology on May 25, 1999.

The Subcommittee held a legislative hearing on June 29, 1999. Witnesses at the hearing were: David Walker, Comptroller General of the United States, General Accounting Office; Deidre Lee, Acting Deputy Director of Management and Administrator of the Office of Federal Procurement Policy, Office of Management and Budget; George H. Allen, Deputy Commander, Defense Supply Center Philadelphia; Gerald R. Peterson, Chief, Accounts Payable Division, Army and Air Force Exchange Service; Michelle Snyder, Director, Financial Management Office, and Chief Financial Officer, Health Care Financing Administration; Paul Dinkins, Executive Vice President, The Profit Recovery Group International, Inc.; Douglas R. Wilwerding, Chief Executive Officer and President, Omnium Worldwide, Inc.; Terrance Lyons, Director of Accounting, the Walgreen Company; Stephen R. Booma, private consultant; Robert Koehler, American Logistics Association.

A business meeting was held by the Subcommittee on July 21, 1999, at which time the Subcommittee chairman, Rep. Steve Horn (R-CA), offered an amendment in the nature of a substitute to H.R. 1827. It was ordered favorably reported to the full Committee on Government Reform by voice vote. On November 10, 1999, the full Committee on Government Reform met to consider H.R. 1827. Chairman Dan Burton offered an amendment in the nature of a substitute. Two additional amendments were offered and accepted. The Committee on Government Reform approved the amendment in the nature of a substitute, as amended, by voice vote. The Committee on Government Reform then ordered the bill reported favorably, as amended, to the House by voice vote. On November 17, 1999, the bill was reported by the Committee on Government Reform and placed on the House Calendar. On March 8, 2000, H.R. 1827 was passed by the House 375-0.

#### SENATE ACTIVITY

S. 3030 was introduced by Committee on Governmental Affairs Chairman Fred Thompson on September 12, 2000, and referred to the Committee. On September 27, 2000, the Committee held a business meeting and discussed S. 3030. Chairman Thompson recognized that some issues still remained open and committed to working with the Committee to resolve them prior to bringing S. 3030 up for consideration by the full Senate.

The Committee ordered S. 3030 reported without amendment favorably to the full Senate by voice vote (en bloc). Senators present were: Thompson, Roth, Stevens, Collins, Voinovich, Domenici, Cochran, Levin, Akaka, Durbin, Torricelli, Cleland, and Edwards.

## IV. SECTION-BY-SECTION ANALYSIS

*Section 1. Recovery audits*

Section 1(a)(1) would add a new subchapter to chapter 35 of title 31, United States Code, entitled “Recovery Audits” containing sections 3561 through 3566.

*Section 3561. Definitions*

This section would contain definitions of terms applicable under this legislation. For example, the term “Director” would mean the Director of the Office of Management and Budget (OMB). The definition of “facial discrepancy payment error” is meant to convey Congressional intent with respect to the conduct and meaning of “recovery audit” in this legislation. Under this legislation, the subject of the recovery audit is the contract, invoice, and payment documents held by the agency. A recovery audit contractor would not be authorized to access or audit the vendor’s records. The Committee intends for the recovery audit to be performed strictly to identify payment errors found from a review of the facts and figures on the “face” of contract, invoice, and payment documents held by the agency and would not entail assessments, evaluations, or judgement calls regarding the quality of goods or services provided to the agency. Further, the language is not meant to restrict a recovery audit contractor from substantiating agency payment errors such as missed discounts or rebates. The term “payment activity” would mean an agency activity that entails making payments to vendors or other nongovernmental entities that provide goods or services to support the performance of the agency’s mission. The term “recovery audit” would mean a financial management technique used by an agency to perform internal audits of its records to identify payment errors in connection with agency payment activities. The term “recovery activity” would mean the process, otherwise authorized by law, to try and collect payment errors.

*Section 3562. Recovery audit requirement*

Subsection (a) would require each executive agency to conduct recovery audits for every fiscal year if combined payment activities total at least \$500 million annually on goods or services for the use or direct benefit of the agency. Agencies may conduct recovery audits for payment activities under this threshold if they so choose.

Subsection (b) would provide agency heads the authority to seek from the Director of OMB exemptions to the requirement in (a).

Subsection (c) would provide that agency heads prescribe procedures for recovery audits and recovery activities which will ensure the greatest financial benefit to the United States. It also would provide that agency heads consult and coordinate recovery audits with the agency Chief Information Officer and the Inspector General. Agencies would be authorized to conduct recovery audits in-house, contract with private recovery audit specialists, or use any combination thereof. It would be necessary for recovery audits to comply with a recovery audit standard to be set forth by the Director of OMB.

Subsection (d) would prescribe authorities and functions of recovery audit contractors and terms and conditions required in recovery audit contracts. Under (d)(1), the agency head would have the ex-

licit authority to use contingency contracts, whereby contractors would be allowed to retain a percentage of collections from payment errors they identify during the audit.

Under (d)(2), it is made explicit that a contract for recovery auditing would not affect an agency's authorities under the Contract Disputes Act, the Debt Collection Act, or other applicable laws to resolve disputes and take collection action. It also is made clear that nothing in this subchapter would require the production of documents by anyone other than the executive agency or that nothing in this subchapter would create the authority for a physical presence on the property of a vendor by the executive agency.

Under (d)(3), recovery audit contractors would be required to protect any financial information they come across in the course of their recovery audit work or any other information which has not been released for general public use. They would be required to report periodically to the agency on the causes of payment errors they identify and offer any recommendations they have on how to mitigate them. They also would be required to notify the agency of any payment errors they happen to identify that are beyond the scope of their contracts. They would have to promptly notify the agency head of suspected fraudulent or criminal activity.

Agencies, under (d)(4), would be required to take prompt and appropriate action in response to contractor recommendations and notifications.

Under (d)(5), agencies would have to conduct a public-private cost comparison to determine whether to conduct recovery auditing in-house or by contract.

Subsection (e) would indicate that the legislation would not affect current authorities of Inspectors General, including such authorities under the Inspector General Act of 1978.

Subsection (f) would specify that the legislation would not affect current payment authorities and claim procedures for certain types of transportation provided to the government.

Subsection (g) would limit the disclosure by recovery audit contractors of any individually identifiable information obtained during the course of the audit and places liability for damages on any violators of this restriction. The subsection also would require the return of individually identifiable information at the conclusion of the audit.

#### *Section 3563. Disposition of amounts collected*

Subsection (a) would provide that this section applies to annual amounts recouped by the United States.

Subsection (b) would provide authority for amounts recovered to be available to pay recovery audit contractors and to reimburse applicable appropriations for recovery audit costs incurred by the agency.

Subsection (c) would provide authority for up to 25 percent of collections to be used to fund agency management improvement programs under section 3564.

Subsection (d) would require that at least 50 percent and any additional amounts not used for recovery audit costs or the management improvement program would revert to the Treasury.

Subsection (e)(1) would exempt from this section amounts collected if the application would be inconsistent with other provisions

of law governing the crediting of collections. Examples include non-appropriated fund instrumentalities, revolving funds, working capital funds, and trust funds.

Subsection (e)(2) would provide that, except for use for the recovery audit contract, the disposition authorities and requirements for collected amounts under this section would not apply to funds that remain available for obligation at the time the amounts are collected.

*Section 3564. Management improvement program*

Subsection (a) would require the agencies that are mandated to conduct recovery audits to implement management improvement programs consistent with guidance prescribed by the Director of OMB. Other agencies that conduct recovery auditing in compliance with OMB guidance would be authorized to implement management improvement programs.

Subsection (b) would require the agency to address the problems that contributed to the payment errors as the first priority of the management improvement program. The agency head also would be able to use the management improvement program for other initiatives to reduce error and waste in agency programs.

Subsection (c) would authorize the agency head to integrate the management improvement program with other management improvement programs within the agency or with other agencies. Agency heads would have flexibility, within the guidance established by OMB, over how to conduct their management improvement programs; however, they must be able to account for the use of amounts made available from recovery audit proceeds.

*Section 3565. Responsibilities of the Office of Management and Budget*

Subsection (a) would assign the Director of OMB general responsibility for coordinating and overseeing the implementation of the legislation.

Subsection (b) would require the Director of OMB in consultation with the Chief Financial Officers Council (CFOC) and the President's Council on Integrity and Efficiency (PCIE), to issue implementation guidance and support to the agencies. The guidance must include recovery audit standards to be developed in consultation with GAO and private recovery audit specialists. This subsection also would require the guidance to include specific standards and procedures for the identification and disposition of payment errors which cause underpayments to vendors.

Subsection (c) would authorize the Director of OMB to place limitations on percentage amounts paid to recovery audit contractors under contingency fee arrangements.

*Section 3566. Exemptions*

Subsection (a) would authorize the Director of OMB to make exemptions from the recovery audit mandate if compliance with such a mandate would impede the agency's mission or would not be cost effective. Under subsection (b), the Director of OMB would have to promptly report any such determination and exemption to Congress.

Subsection (c) would provide exemptions for certain contracts which, under current law, already are subject to extensive audit scrutiny and oversight.

Section (1)(a)(2) would add the new table of sections to chapter 35.

Section (1)(b) would clarify that its provisions apply to all Executive Branch agencies.

Section (1)(c) would require the Director of OMB to issue initial guidance on implementation of this legislation not later than 180 days after enactment, and such initial guidance shall include the standards required by paragraph (2) of section 3565(b).

Section (1)(d) would require each executive agency to begin the first recovery audit required under section 3562(a)(1) not later than 18 months after date of enactment and that such recovery audit will cover 2001, the preceding fiscal year, and any additional fiscal years that the head of the executive agency determines are practical and cost-effective.

Section (1)(e) would prohibit information obtained from a recovery audit to be used by plaintiffs in certain actions.

Section (1)(f) would authorize the Director of OMB to establish a recovery audit pilot program at one or more agencies to test the feasibility and effectiveness of recovery audits with respect to payment activities other than those related to Federal contracts for the procurement of goods and services.

Section (1)(g)(1) would require the Director of OMB to submit to the President and Congress, not later than 30 months after the date of enactment and then annually for each of the two years thereafter, detailed reports on implementation of this legislation. The reports would include: a description and evaluation of agency efforts to conduct recovery audits; an assessment of the benefits of the Act, including amounts identified and recovered; an identification of best practices; a list of any significant problems or barriers to more effective performance of recovery audits and activities; a report on agency expenditures related to recovery auditing; a description of the management improvement programs; recommendations for changes in agency practices or law that would improve agency efforts under this Act; and a description and evaluation of each pilot program conducted.

Section (1)(g)(2) would require the GAO, not later than 60 days after the submittal of each report under paragraph (1), to report to Congress and the Director of OMB on implementation of this legislation.

Section (1)(h) would require the Director of OMB to conduct a study on the effects of recovery audits including any problems relating to improper or inadequate notice of recovery audits. The study would be reported to Congress and would contain the Director's findings, conclusions, and recommendations.

## V. REGULATORY IMPACT STATEMENT

Paragraph 11(b)(1) of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the regulatory impact which would be incurred in carrying out this bill."

The enactment of this legislation will not have significant regulatory impact. S. 3030 contains no intergovernmental or private-

sector mandates as defined in the Unfunded Mandates Reform Act and would have no impact on state, local or tribal governments.

#### VI. CBO COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, October 11, 2000.*

Hon. FRED THOMPSON,  
*Chairman, Committee on Governmental Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3030, a bill to amend title 31, United States Code, to provide for executive agencies to conduct annual recovery audits and recovery activities, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John R. Righter.

Sincerely,

BARRY B. ANDERSON  
(For Dan L. Crippen, Director).

Enclosure.

*S. 3030—A bill to amend title 31, United States Code, to provide for executive agencies to conduct annual recovery audits and recovery activities, and for other purposes*

Summary: S. 3030 would require federal agencies to conduct specialized audits of accounts that purchase at least \$500 million of goods and services in a given year from the private sector. By increasing the federal government's recovery of erroneous payments made to the private sector, CBO estimates that enacting S. 3030 would decrease direct spending by \$60 million over the 2001–2010 period. Consequently, pay-as-you-go procedures would apply to the bill. Implementing the bill also could yield similar savings for amounts made available in future years, but such savings would depend on the amounts appropriated for the relevant accounts. In addition, CBO estimates that the Office of Management and Budget (OMB) would spend less than \$500,000 a year to oversee and report on the bill's implementation and that the General Accounting Office (GAO) would spend less than \$500,000 in each of fiscal years 2001 through 2003 to report on the bill's effectiveness.

S. 3030 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on the budgets of state, local, or tribal governments.

Major provisions: S. 3030 would require federal agencies to conduct specialized audits of accounts that purchase at least \$500 million of goods and services in a given year from the private sector. The audits, referred to as recovery auditing, are conducted using software that identifies such anomalies as pricing errors on invoices, duplicate payments, miscalculated freight charges, and any failure to provide applicable rebates, allowances, and discounts.

For certain accounts, S. 3030 would allow agencies to retain and spend, without further appropriation action, one-half of any amounts collected from conducting recovery audits. Agencies could

use the amounts they retain to improve management functions and to pay for the costs of performing the audits. The bill would require agencies to deposit the remaining amounts recovered in the Treasury as miscellaneous receipts.

S. 3030 would require both OMB and GAO to report to the Congress on the bill's implementation in each of fiscal years 2001 through 2003. As part of its role in overseeing such implementation, OMB could exempt agencies or programs from the bill's requirements.

Estimated cost to the Federal Government: CBO estimates that implementing S. 3030 would increase offsetting receipts from the recovery of overpayments by about \$120 million over fiscal years 2002 through 2005. That estimate represents recovery of overpayments made with funds appropriated during fiscal years 2000 and 2001. Because the bill would allow agencies to retain and spend one-half of such amounts without further appropriation, CBO estimates that agencies would spend about \$60 million of those recoveries over fiscal years 2002 through 2006. Implementing the bill could yield similar savings in net spending for amounts made available in years after fiscal year 2001, but such savings would depend on the amounts appropriated.

The estimated budgetary impact of S. 3030 is shown in the following table. The costs of this legislation fall within multiple budget functions.

	By fiscal year, in millions of dollars—				
	2001	2002	2003	2004	2005
<b>Recovery of Overpayments:</b>					
Estimated Budget Authority .....	0	(?)	-20	-90	-10
Estimated Outlays .....	0	(?)	-20	-90	-10
<b>Spending by Agencies:</b>					
Estimated Budget Authority .....	0	(?)	10	45	5
Estimated Outlays .....	0	(?)	5	25	25
<b>Net Changes:</b>					
Estimated Budget Authority .....	0	(?)	-10	-45	-5
Estimated Outlays .....	0	(?)	-15	-65	15

<sup>1</sup> Implementing the bill would also affect spending subject to appropriation.

<sup>2</sup> Less than \$500,000.

**Basis of estimate:** This estimate assumes that the bill will be enacted early in fiscal year 2001 and that it would apply to appropriations provided for 2001 and 2000.

#### *Direct spending*

**Audits of Appropriated Accounts.** Within 18 months of enactment, S. 3030 would require agencies to begin conducting recovery audits of payments made from certain accounts during fiscal years 2000 and 2001. Based on an analysis of 1998 and 1999 data from the Federal Procurement Report, which is compiled by the General Services Administration, CBO estimates that recovery audits could apply to about \$125 billion in annual payments made in each of fiscal years 2000 and 2001, net of those payments (including payments from revolving and working capital funds) that we expect will be audited under current law. However, CBO expects that OMB would exempt certain accounts from the bill's requirements, including accounts that involve the research, testing, and procurement of military weapons, finance federal law enforcement activi-

ties, and involve medical records. Thus, we estimate that the bill’s requirement to audit payments would apply to about \$60 billion in annual payments.

In the private sector, companies using the recovery audit process have identified and collected approximately \$1 for every \$1,000 in audited payments, or a rate of 0.1 percent. Recovery audits of some payments made by the Department of Defense (DoD) have identified a payment error rate of 0.4 percent; however, DoD’s experience in recovering the identified overpayments is mixed. On average, CBO assumes the federal government would recover about 0.1 percent of the \$60 billion audited, or \$60 million a year. That rate takes into account the increased difficulty in collecting overpayments that are more than one year old and the likelihood that federal agencies will settle for less than full payment on some of these debts. We expect that agencies would not begin collecting overpayments from contractors until the end of fiscal year 2002.

Audits of Revolving and Working Capital Funds. S. 3030 also could affect spending from accounts that receive no annual appropriations, such as revolving and working capital funds. Some agencies, particularly the DoD, are currently auditing tens of billions of dollars of payments from such accounts already, and CBO expects that they will continue to expand their use of recovery auditing to recapture overpayments made from these accounts. Under the bill, none of the funds recovered by revolving and working capital funds would be deposited in the Treasury. Therefore, the legislation would have no net budgetary effect for such accounts.

*Spending subject to appropriation*

If recovery audits are used to collect overpayments made with funds appropriated after 2001, then implementing the bill could yield savings similar to the net recoveries estimated for audits of 2000 and 2001, but such savings would depend on the amounts appropriated for the relevant accounts. If appropriations were to continue at about the same level as in fiscal year 2001, the net savings would average about \$30 million a year in 2004 and subsequent years (allowing time for agencies to complete their audits of 2000 and 2001 funds and begin recovering 2002 overpayments).

In addition, CBO estimates that OMB would spend less than \$500,000 a year to oversee and report on the bill’s implementation and that GAO would spend less than \$500,000 in each of fiscal years 2001 through 2003 to report on the bill’s effectiveness.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays that are subject to pay-as-you-go procedures are shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects in the budget year and the succeeding four years are counted.

	By fiscal year, in millions of dollars—									
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Changes in outlays .....	0	0	-15	-65	15	5	0	0	0	0
Changes in receipts .....	Not applicable									

Intergovernmental and private-sector impact: S. 3030 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on the budgets of state, local, or tribal governments.

Previous CBO estimate: On November 17, 1999, CBO prepared a cost estimate for H.R. 1827, the Government Waste Corrections Act of 1999, as ordered reported by the House Committee on Government Reform. CBO estimated that H.R. 1827 would decrease direct spending by \$100 million over the 2000–2004 period and by \$90 million over the 2000–2009 period. The estimate of net savings under H.R. 1827 is higher because that bill would require that federal agencies conduct specialized audits of payments made in the year in which the bill is enacted and the two preceding fiscal years. In contrast, S. 3030 would require that agencies only audit payments made in the year in which the bill is enacted and the preceding fiscal year. As a result, our estimate of total recoveries—and, therefore, net savings—is greater under H.R. 1827.

Estimate prepared by: John R. Righter.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

## VII. ADDITIONAL VIEWS

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### ADDITIONAL VIEWS OF SENATOR LEVIN

I fully support the objective of S. 3030 to encourage federal agencies to conduct recovery audits to identify and recover erroneous payments. Reviews by the General Accounting Office and others indicate that federal agencies make erroneous payments far too often, and rely far too much on contractors and other recipients of federal funds to identify the errors and volunteer repayment.

However, I have a number of concerns about the details of S. 3030. First and foremost, it appears that this bill would exclude from its coverage most of the federal payments with which the General Accounting Office and others have identified problems. The bill would address only contract payments, excluding payments to States, entitlement payments, and federal grants and loans. The vast majority of contract payments would be excluded from coverage as well, because the bill contains an exclusion for all contracts that are covered by the Truth In Negotiations Act, the Cost Accounting Standards, or statutory audit requirements. Such contracts account for most contract dollars, including the major weapons systems contracts on which GAO has identified significant problems.

The result is that the bill would establish detailed and prescriptive requirements for a small number of contracts (where there has been no identifiable problem) while excluding the bulk of federal payments. While it would make sense to give agencies the authority to structure their own recovery audit programs, and to exclude categories of contracts for which the costs of conducting recovery audits would exceed the benefits, broad statutory exclusions like those in S. 3030 could send the message that Congress does not expect federal agencies to address payments that account for the vast majority of federal dollars.

Secretary of Defense William Cohen expressed additional concerns about the bill in a February 10, 2000 letter to the House of Representatives. These concerns included the following:

- The bill would permit agencies to take a significant percentage of funds recovered by recovery audits and put them into “management improvement programs.” All of the funds recovered were authorized and appropriated for specific programs identified by Congress—not for “management improvement programs” selected by the executive branch. For this reason, Congress should carefully consider Secretary Cohen’s request that the bill be modified to “[r]ecognize that funds collected from recovery audit activities should not be used for management improvement programs or returned to the Treasury if those funds are needed for liquidation of obligations or obligational adjustment.”

- The bill would require a public-private competition before any recovery audit could be conducted by a private sector company. This requirement appears to go beyond the requirements of OMB Circular A-76, because it would apply even in the case of audit work which is not currently being performed by government employees. For this reason, Congress should carefully consider Secretary Cohen's request that the bill be revised to "eliminate the requirement to conduct public-private cost comparisons before any agency may contract for recovery audit services," where those audits are not now being conducted in the public sector.

It is my hope that we will be able to address these issues before S. 3030 is brought to the Senate floor.

CARL LEVIN.

#### ADDITIONAL VIEWS OF SENATOR AKAKA

During the markup of S. 3030, I pointed out that H.R. 1827, a similar bill to S. 3030, was approved on a roll call vote of 375–0. I noted that the reason the House bill enjoyed such wide bipartisan support was because the measure included a provision requiring that whenever an agency is planning to do a recovery audit, that government employees must be given an opportunity to compete against any outside contractors for that work.

This public-private competition, as it is called, would determine whether the audit would be performed in-house or by a private recovery audit contractor. Although a similar provision is included in S. 3030, it has been altered slightly. The two largest federal employee unions—the National Treasury Employees Union and the American Federation of Government Employees—expressed concern that section 3562(c)(2)(B) of S. 3030 would prevent the use of interagency service agreements and would limit in-house performance of the recovery audit to payment office personnel. The unions argue that such limitations micro-manage agencies in a way that could limit public-private competition. For example, if an agency develops a proficiency for recovery audits, that agency should be allowed to compete with other agencies' in-house staff, as well as outside firms. Similarly, agencies should be allowed to determine if they want to reallocate their contract administration personnel to meet the mandate to perform recovery audits, and, therefore, should not be limited to using only payment office personnel. I suggest that the language found in H.R. 1827 be considered in lieu of that in S. 3030.

I also note that federal Inspector Generals and the Office of Management and Budget have some lingering concerns about S. 3030, as drafted. I understand that the Majority is working on those issues. I am pleased that Chairman Thompson recognized that there are those who expressed concern with the bill and that he would attempt to address those concerns.

DANIEL K. AKAKA.

VIII. CHANGES TO EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows, (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman).

CHAPTER 35 OF TITLE 31, UNITED STATES CODE  
CHAPTER 35—ACCOUNTING AND COLLECTION

Subchapter I—General

Sec.  
3501. Definition.

\* \* \* \* \*

Subchapter VI—Recovery Audits

3561. Definitions.  
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Subchapter VI—Recovery Audits

§ 3561. Definitions

*In this subchapter:*

“(1) AMOUNTS COLLECTED.—The term ‘amounts collected’ means monies received or credited, by any means, including offset, by the United States Government.

“(2) CHIEF FINANCIAL OFFICER.—The term ‘Chief Financial Officer’ means—

“(A) the official appointed or designated under section 901 of this title; or

“(B) in the case of an executive agency that is not required to have a Chief Financial Officer under that section, an official of the agency whose authority and functions are substantially equivalent to the authority and functions of an agency Chief Financial Officer under section 902 of this title.

“(3) DIRECTOR.—The term ‘Director’ means the Director of the Office of Management and Budget.

“(4) DISCLOSE.—The term ‘disclose’, with respect to individually identifiable information on any person, means release, publish, transfer, provide access to, or otherwise divulge the individually identifiable information to any other person.

“(5) *FACIAL-DISCREPANCY PAYMENT ERROR.*—The term ‘facial-discrepancy payment error’—

“(A) means, except as provided in subparagraph (B), any error in a payment made by an executive agency for goods or services that is apparent from a review of the face of an invoice or other payment document that is presented to the executive agency by the supplier of the goods or services in the usual and customary conduct of business or pursuant to a requirement in law or a contract to substantiate the claim for the payment, including any such document that is presented electronically; and

“(B) does not include a payment error identified, resulting, or supported from a document that is—

“(i) a record of a proprietary nature that is maintained solely by the supplier of the goods or services;

“(ii) not specifically required to be presented to the executive agency by contract, law, or regulation, or not necessary for the substantiation of the claim for the payment; or

“(iii) submitted to the executive agency for evaluative purposes before the award of the contract under which the payment was made.

“(6) *INDIVIDUALLY IDENTIFIABLE INFORMATION.*—The term ‘individually identifiable information’, with respect to a person, means any information, whether oral or recorded in any form or medium, that identifies the person or with respect to which there is a reasonable basis to believe that the information can be used to identify the person.

“(7) *OVERSIGHT.*—The term ‘oversight’, with respect to a payment activity, recovery audit, or recovery activity, means activities by a Federal, State, or local governmental entity to enforce laws relating to, to investigate, or to regulate such audit or activity.

“(8) *PAYMENT ACTIVITY.*—The term ‘payment activity’ means an executive agency activity to pay nongovernmental sources for goods or services acquired from those sources by the agency to support the performance of the agency’s mission.

“(9) *RECOVERY AUDIT.*—The term ‘recovery audit’ means a financial management technique of an executive agency that is used by the executive agency to perform internal audits of its records to identify facial-discrepancy payment errors that are made by the executive agency in connection with a payment activity, including facial-discrepancy payment errors that result from any of the following:

“(A) Duplicate payments.

“(B) Invoice errors.

“(C) Failure to take advantage of applicable discounts, rebates, or other allowances.

“(D) Any other similar facial-discrepancy payment errors resulting in inaccurate payments, including underpayments identified pursuant to guidance issued under section 3565(b)(3) of this title.

“(10) *RECOVERY ACTIVITY.*—The term ‘recovery activity’ means an executive agency activity to attempt to collect, under the au-

thority of chapter 37 of this title or any other provision of law, a payment error identified in a recovery audit.

“(11) *RECOVERY AUDIT CONTRACTOR*.—The term ‘recovery audit contractor’ means any private sector person who is obligated under a contract entered into with an executive agency to perform a recovery audit for the executive agency.

**“§ 3562. Recovery audit requirement**

“(a) *IN GENERAL*.—Except as exempted under section 3566 of this title, the head of each executive agency—

“(1) shall conduct each fiscal year—

“(A) recovery audits of the payment activities of the agency for the preceding fiscal year if the payment activities for the fiscal year total at least \$500,000,000 (adjusted by the Director annually for inflation); and

“(B) the recovery activities determined warranted with respect to those payment activities; and

“(2) may conduct in any fiscal year—

“(A) recovery audits of the payment activities of the agency for the preceding fiscal year if the payment activities for the fiscal year total less than \$500,000,000 (adjusted by the Director annually for inflation); and

“(B) the recovery activities determined warranted with respect to those payment activities.

“(b) *REQUEST FOR EXEMPTION*.—The head of an executive agency required to conduct a recovery audit under subsection (a)(1) may request that the Director exempt a payment activity, in whole or in part, from that requirement if the head of the executive agency determines and can demonstrate that the exemption is justified on any basis described in section 3566(a) of this title.

“(c) *PROCEDURES*.—

“(1) *IN GENERAL*.—The head of each executive agency shall prescribe procedures for the performance of recovery audits and recovery activities in the agency that implement this section in a manner designed to ensure the greatest financial benefit to the United States.

“(2) *SPECIFIC PROCEDURES*.—In conducting recovery audits and recovery activities under this section, the head of an executive agency—

“(A) shall consult and coordinate with the Chief Financial Officer and the Inspector General of the agency to avoid any duplication of effort;

“(B) may conduct recovery audits and recovery activities regarding payments by the executive agency by using personnel of the agency’s payment office without reimbursement or payment for services in accordance with the standards issued by the Director under section 3565(b)(2) of this title, by procuring the performance of recovery audits by contractors, or by any combination of both methods; and

“(C) shall ensure that the recovery audits and recovery activities are carried out consistent with the standards issued by the Director under section 3565(b)(2) of this title.

“(d) *RECOVERY AUDIT CONTRACTS*.—

*“(1) AUTHORITY TO USE CONTINGENCY CONTRACTS.—Notwithstanding section 3302(b) of this title, as consideration for performance of any recovery audit procured by an executive agency, the head of the executive agency may pay the recovery audit contractor an amount equal to a percentage of the total amount collected by the United States as a result of payment errors identified by the recovery audit contractor in the audit.*

*“(2) CONSTRUCTION.—*

*“(A) RELATIONSHIP TO OTHER EXECUTIVE AUTHORITIES.—A contract for the performance of a recovery audit shall not affect—*

*“(i) any authority of the head of an executive agency, or any other person, under the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.) and other applicable laws, including authority to initiate litigation or referrals for litigation; or*

*“(ii) the requirements of sections 3711, 3716, 3718, and 3720 of this title that the head of an executive agency resolve disputes, compromise, or terminate payment of error claims, collect by offset, and otherwise engage in recovery activities with respect to payment errors identified by the recovery audit.*

*“(B) CONTRACTOR AUTHORITIES AND DUTIES.—Nothing in this subchapter shall be construed to authorize a recovery audit contractor with an executive agency—*

*“(i) to require the production of any record or information by any person other than an officer, employee, or agent of the executive agency; or*

*“(ii) to establish, or otherwise have, a physical presence on the property or premises of any private sector entity as part of its contractual obligations to an executive agency.*

*“(3) REQUIRED CONTRACT TERMS AND CONDITIONS.—The head of an executive agency shall include in each contract for the procurement of the performance of a recovery audit the following requirements:*

*“(A) That the recovery audit contractor protect from improper use and from disclosure to any person inside or outside the recovery audit contractor’s firm who is not directly involved in the identification or recovery of payment errors—*

*“(i) any financial information that is viewed or obtained in the course of carrying out a recovery audit for an executive agency; and*

*“(ii) any other information so viewed or obtained that has not been released for general public use by the audited person or an authorized agent of that person.*

*“(B) That the recovery audit contractor submit to the head of the executive agency periodic reports on conditions giving rise to payment errors identified by the recovery audit contractor and any recommendations on how to mitigate such conditions.*

*“(C) That the recovery audit contractor notify the head of the executive agency of any payment errors identified by the*

contractor pertaining to the executive agency or to another executive agency that are beyond the scope of the contract.

“(D) That the recovery audit contractor promptly notify the head of the executive agency of any indication of fraud or other criminal activity discovered in the course of the audit.

“(4) EXECUTIVE AGENCY ACTION FOLLOWING NOTIFICATION.—The head of an executive agency shall take prompt and appropriate action in response to a notification by a recovery audit contractor pursuant to the requirements under paragraph (3), including forwarding to the head of another executive agency any information that applies to that agency.

“(5) CONTRACTING REQUIREMENTS.—Before contracting for any recovery audit, the head of an executive agency shall determine and compare the cost of using employees of the United States to perform the audit and the cost of procuring the performance of the audit from the private sector. The head of the executive agency shall use the outcome of the cost comparison process to determine whether to use the employees of the United States or to procure recovery audit services from the private sector.

“(e) RELATIONSHIP TO AUTHORITY OF INSPECTORS GENERAL.—Nothing in this subchapter shall be construed as impairing the authority of an Inspector General under the Inspector General Act of 1978 or any other provision of law.

“(f) RELATIONSHIP TO REQUIREMENTS FOR PAYMENTS FOR TRANSPORTATION.—Nothing in this subchapter shall be construed to affect the requirements and authorities provided in section 3726 of this title.

“(g) PRIVACY PROTECTIONS.—

“(1) LIMITATION ON DISCLOSURE OF INDIVIDUALLY IDENTIFIABLE INFORMATION.—

“(A) RESTRICTION.—Any recovery audit contractor that obtains individually identifiable information on a person through the performance of a recovery audit or recovery activity under this subchapter may disclose that information only for the purpose of such audit or activity, respectively, and for the oversight of such audit or activity, unless otherwise authorized by that person.

“(B) SANCTIONS.—Any person that violates subparagraph (A) shall be liable for any damages (including nonpecuniary damages, costs, and attorneys’ fees) caused by the violation.

“(2) RETURN OF INFORMATION.—

“(A) REQUIREMENT.—Upon the date determined under subparagraph (B), a recovery audit contractor having possession of individually identifiable information disclosed in the course of a recovery audit or recovery activity that is performed under this subchapter by the recovery audit contractor shall return it to the person from whom it was obtained unless another applicable law requires retention of the information.

“(B) TIME FOR RETURN OF INFORMATION.—The date referred to in subparagraph (A) is the date of the conclusion

*of the matter or need for which the information was disclosed, except that if, on that date, the recovery audit contractor has actual notice of any oversight of the recovery audit or recovery activity, the date referred to in subparagraph (A) is the date of the conclusion of such oversight.*

**“§ 3563. Disposition of amounts collected**

*“(a) IN GENERAL.—Notwithstanding section 3302(b) of this title, the total amount collected in a fiscal year by the United States as a result of recovery audits by an executive agency under this subchapter shall be disposed of in accordance with this section.*

*“(b) USE FOR RECOVERY AUDIT COSTS.—*

*“(1) CONTRACTOR PAYMENTS.—Amounts referred to in subsection (a) shall be available to the executive agency to pay amounts owed to any recovery audit contractor for performance of the audit.*

*“(2) OTHER COSTS.—Subject to the limitation in subsection (e), amounts referred to in subsection (a) shall be available to the executive agency—*

*“(A) to reimburse any applicable appropriation for other recovery audit costs incurred by the executive agency with respect to the audit; and*

*“(B) to pay any fees authorized under chapter 37 of this title.*

*“(c) USE FOR MANAGEMENT IMPROVEMENT PROGRAM.—Subject to the limitation in subsection (e), up to a total of 25 percent (as determined under the guidance issued under section 3565 of this title) of the amount referred to in subsection (a)—*

*“(1) shall be available to the executive agency to carry out the management improvement program of the agency under section 3564 of this title; and*

*“(2) may be credited for that purpose by the head of the executive agency to any agency appropriation that is available for obligation at the time of the collection and shall be merged with other amounts in, and shall remain available for the same period as, the appropriation to which credited.*

*“(d) REMAINDER TO TREASURY.—Subject to the limitation in subsection (e), there shall be deposited into the Treasury as miscellaneous receipts a sum equal to—*

*“(1) 50 percent of the amount referred to in subsection (a); plus*

*“(2) any of that amount that remains unallocated after the application of subsections (b) and (c).*

*“(e) LIMITATION ON APPLICATION.—*

*“(1) IN GENERAL.—This section does not apply to amounts collected through recovery audits and recovery activities to the extent that such application would be inconsistent with another provision of law that authorizes the crediting of the amounts to a nonappropriated fund instrumentality, revolving fund, working-capital fund, trust fund, or other fund or account.*

*“(2) AMOUNTS PAID OUT OF CURRENTLY AVAILABLE FUNDS.—Subsections (b)(2), (c), and (d) shall not apply to amounts collected through recovery audits and recovery activities that were*

*paid out of an appropriation or fund that remains available for obligation at the time the amounts are collected.*

**“§ 3564. Management improvement program**

*“(a) IN GENERAL.—*

*“(1) REQUIRED PROGRAM.—The head of each executive agency that is required to conduct recovery audits under section 3562 of this title shall conduct a management improvement program under this section, consistent with guidelines prescribed by the Director.*

*“(2) DISCRETIONARY PROGRAM.—The head of any other executive agency that conducts recovery audits under section 3562 of this title that meet the standards issued by the Director under section 3565(b)(2) may conduct a management improvement program under this section.*

*“(b) PROGRAM FEATURES.—In conducting a management improvement program under this section, the head of an executive agency—*

*“(1) shall, as the first priority of the program, address problems that contribute directly to payment errors of the executive agency; and*

*“(2) may seek to reduce errors and waste in other programs and operations of that executive agency by improving the executive agency’s staff capabilities, information technology, and financial management.*

*“(c) INTEGRATION WITH OTHER ACTIVITIES.—The head of an executive agency—*

*“(1) subject to paragraph (2), may integrate the program under this section, in whole or in part, with other management improvement programs and activities of that agency or other executive agencies; and*

*“(2) shall retain the ability to account specifically for the use of amounts available to the executive agency under section 3563 of this title.*

**“§ 3565. Responsibilities of the Director of the Office of Management and Budget**

*“(a) IN GENERAL.—The Director shall coordinate and oversee the implementation of this subchapter.*

*“(b) GUIDANCE.—*

*“(1) IN GENERAL.—The Director, in consultation with the Chief Financial Officers Council and the President’s Council on Integrity and Efficiency, shall issue guidance and provide support to the executive agencies for the implementation of this subchapter.*

*“(2) RECOVERY AUDIT STANDARDS.—The Director shall include in the guidance standards for the performance of recovery audits under this subchapter. The Director shall develop the guidance in consultation with the Comptroller General and private sector experts on recovery audits, including such experts who use recovery auditing as part of their financial management procedures.*

*“(3) TREATMENT OF UNDERPAYMENTS.—The guidance developed under this subsection shall include specific standards and procedures for the identification and disposition of facial-dis-*

*crepancy payment errors that result in underpayments to vendors.*

*“(c) FEE LIMITATIONS.—The Director may limit the percentage amounts that may be paid to recovery audit contractors under section 3562(d)(1) of this title.*

**“§ 3566. Exemptions**

*“(a) IN GENERAL.—The Director may exempt an executive agency, in whole or in part, from the requirement to conduct recovery audits under section 3562(a)(1) of this title if the Director determines that compliance with the requirement—*

*“(1) would impair the performance of the agency’s mission; or*

*“(2) would not, or would no longer, be cost-effective.*

*“(b) REPORT TO CONGRESS.—The Director shall promptly report the basis of any determination made and exemption granted under subsection (a)(1) to Congress.*

*“(c) EXEMPTION OF CERTAIN CONTRACTS.—The requirements of section 3562(a) of this title shall not apply to any of the following contracts:*

*“(1) A contract that provides for periodic audit of invoices pursuant to section 2313 of title 10 or section 304C of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254d).*

*“(2) A contract for which cost or pricing data were required to be provided pursuant to section 2306a of title 10 or section 304A of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b).*

*“(3) A contract that is subject to cost accounting standards issued by the Cost Accounting Standards Board under section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 422).”.*