Tuesday, October 20
4:30 pm–6:00 pm

1108 Developments for Federal Contractors and Subcontractors (Including Commercial Vendors)

Arleigh Closser
Director of Legal Affairs, Assistant General Counsel
Juniper Networks

Douglas Cole
Vice President and General Counsel
ECS, Ltd.

Lydia Tallent
In-house Counsel
SC Solutions

Faculty Biographies

Arleigh Closser

Arleigh Closser currently is a director of legal affairs and assistant general counsel for Juniper Networks, Inc., where he assists internal clients regarding government contracts, state and local contracting, and commercial law matters.

Prior to joining Juniper, Mr. Closser served as the vice president, general counsel and Secretary at Multimax, Inc., which was acquired by Harris Corporation in mid-2007. Previously, Mr. Closser served as an assistant general counsel at Anteon International Corporation, which was acquired by General Dynamics Information Technology (GDIT) in June 2006. At Anteon and GDIT, Mr. Closser handled government contracts, employment law, litigation, environmental law, mergers and acquisitions, and patent and trademark law matters. Prior to joining Anteon, Mr. Closser served as an associate attorney in the government contracts department at McKenna & Cuneo, LLP (now called McKenna, Long & Aldridge, LLP). Mr. Closser also served on the staff of the Honorable Christine O. C. Miller at the United States Court of Federal Claims.

Mr. Closser is a co-chair of the Government Contracts Forum of ACC's WMACCA chapter. He also is a member of the District of Columbia Bar and the ABA.

Mr. Closser holds a BA from Princeton University and a JD from the George Washington University National Law Center.

Douglas Cole

Doug Cole is the vice president and general counsel for Engineering Consulting Services (ECS), Ltd. headquartered in Chantilly, Virginia. ECS is a privately held group of professional services companies providing geotechnical, specialty, and facilities engineering, construction materials testing, and environmental consulting services to the construction industry. As head of a small law department, his responsibilities focus on risk management and insurance law, commercial and public contracting, litigation and dispute resolution, intellectual property rights, corporate compliance, and labor and employment matters.

Prior to joining ECS, Mr. Cole was a partner in a Northern Virginia firm as well as working in-house for a large computer services provider and the Department of Defense. Mr. Cole has provided training for the Army, Air Force, and various legal and insurance organizations.

Professionally, he is active in ACC's Small Law and Labor & Employment Committees and is a member of the ABA and the National Contract Management Association. In his free time, he is a soccer referee.

Mr. Cole received his BS with honors from Middle Tennessee State University and is a graduate of the American University, Washington College of Law.

Lydia Tallent
In-house Counsel
SC Solutions

An Alphabet Soup of Changes for Government Contractors

1. PLAs
2. Notices Regarding Employee Rights to Organize
3. SCA Employee Succession
4. E-Verify
5. Revolving Door Restrictions

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More Soup

6. DoL ARRA Letter
7. COIs
8. Mandatory Disclosure/Ethics Compliance Programs
9. FERA and the FCA
10. ARRA in Government Contracting
11. FOIA Policy Changes
12. Export Controls
13. Buy American Changes
14. BAA COTS Waivers
15. In-Sourcing
16. Disallowance of Certain Costs

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Project Labor Agreements

- Executive Order 13502 - 74 Fed. Reg. 6985 (February 11, 2009)
- Revocation of Executive Order 13202, 74 Fed. Reg. 74 FR 34206 (July 14, 2009)
- Proposed Rulemaking – 74 Fed. Reg. 33953 (July 14, 2009)

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PLA Proposed Rulemaking

- The Comment Period Closes after ACC's Publication Cut-off – so stay tuned for updates to cover:
  - New FAR subpart 22.5
  - 52.222-XX, Notice of Requirement for Project Labor Agreement
  - 52.222-YY, Project Labor Agreement

Notice to Employees

- Executive Order 13496 - 74 Fed. Reg. 6107 (February 4, 2009)
- Notice of Proposed Rulemaking – 74 Fed. Reg. 38488 (August 3, 2009)
- Initial comment period schedules to close September 2, 2009

Employees Permitted to:

- Act with "one or more co-workers" to improve working conditions
- Discuss terms and conditions of employment with co-workers
- File a Complaint with the Department of Labor

Employers Prohibited From:

- Question employee about union activities
- Take adverse action for engaging in protected activities
- Prohibit wearing union paraphernalia
- Videotape peaceful union activity and "gatherings"

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Service Contract Act Employee Succession

- E.O. 13495 requires first right of refusal for incumbent employees with successive service contractor
- Clinton Administration version applied only to recurring services relating to public buildings
- Sanction: Debarment
- Prime Contractor vs. Subcontractor
- Impact on pricing proposals and transition

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E-Verify

- Start Date – September 8, 2009
- FAQs (see materials)
- Application:
  - Applies to all Federal contractors & subcontractors with a contract with FAR E-Verify clause
- Update ??

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Related Documents and Links:

- E-Verify Final Rule
- Delay Notice – USCIS Letter 6/3/09
- FAQs
- USCIS E-Verify: http://www.uscis.gov/
- Registration for E-Verify:
  - https://e-verify.uscis.gov/enroll

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Revolving Door Restrictions EO 13495

- Within 2 years of leaving DoD, former DoD officials must now get ethics opinions before taking compensation from a defense contractor
- Sanctions for contractor violation -- termination, suspension or debarment
- How to document and comply?
- Contract Clause

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DOL - American Recovery & Relief Act (ARRA)

- www.recovery.org
- COBRA Premium Subsidy
  - - DOL Release Letter 3/19/09
- Prevailing Wage Determinations
  - - 600 investigations in 2010
- EEO – higher priority on evaluations
- OSHA – targeting investigations and those receiving ARRA funding

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Related Documents and Links:

- ARRA Act
- "ARRA Risks" article www.governmentcontractslawblog.com
- DOL News Release and FAQs – COBRA subsidy
  - - Notice to employees (English, Spanish)

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Organizational and Personal Conflicts of Interest

- FAR Subpart 9.5
  - Part of the Mandatory Disclosure changes of FAR 52.203-13
- Application: Formal ethics and compliance training program
- Affecting state programs - especially on contracts receiving ARRA funds

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Related Documents and Links:

- FAR Subpart 9.5
- Washington State Department of Transportation Administrative Manual, "Organizational Conflicts of Interest Manual" M 3043, July 10, 2009 www.wsdot.wa.gov/publications/manuals

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Ethics and Compliance Programs - 2007

- December 2007 FAR changes: required contractors and subcontractors receiving awards of contracts expected to exceed $5 million (including options) and with a performance period of 120 days or more to:
  - have a code of business ethics and conduct within 30 days of award
  - implement a formal awareness or training program on the code within 90 days of award
  - develop internal controls to support the code, also within 90 days of award
  - display a hotline poster

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Ethics and Compliance Programs - 2008

- New FAR rule, effective 12/12/08 -- enhances existing compliance program provisions (Subpart 3.10) and clauses (52.203-13 and 52.203-14).
  - Covered: contracts and subcontracts > $5 million (including options), with terms > 120 days:
  - Required:
    - written code, with proof of dissemination;
    - Must proactively prevent and detect improper conduct;
    - Program must promote culture of compliance

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Requirements Under the New Ethics Rules

- Timely disclose "credible evidence" of a violation of federal criminal law (See GSA OIG reporting website)
- Fully cooperate in government audits, investigations, or corrective actions relating to contract fraud and corruption.
- Retroactive impact of disclosure rule.
- Covers "commercial item" vendors and contractors operating outside of US

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New Ethics Rules (cont.)

- Recommendations:
  - Perform a Risk Assessment or Gap Analysis.
  - Comply With The Look-Back Requirement:
    - Best case – contractor has had robust Ethics and Compliance Program in place since then
    - Worst case – no such program in case. Due diligence must be performed. Documentation.

FERA Amendments to FCA

- Applies to a Broader Set of Transactions
- Response to *Allison Engine* and *Ex Rel Totten*
- Reduces the Standard for "Intent"
- Broadens the Scope of "Conspiracy"
- Changes Character of Government Involvement
- Enhances Whistleblower Protection

FCA Applies to a Broader Set of Transactions

- Any person who has possession or control of property or money used, or to be used, by the government and knowingly delivers less than all of that money or property;
- Any person who falsely certifies receipt of property used, or to be used, by the government;
- Any person who knowingly buys or receives an illegal pledge of property from a government employee.

Changes Overturn *Allison Engine* and *Ex Rel Totten*

- Eliminates the requirement that claims be presented to a representative of the United States government. Allows presentation to a
  - Contractor
  - Grantee, or
  - Other recipient
- if the money or property is to be spent or used on the government's behalf or to advance a government program or interest.

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FCA Contains a Reduced Standard for "Intent"

- Loosens connection between a false record/ statement and the fraudulent claim
- Requires only that the false record be "material to" a fraudulent claim.
- Defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"

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FCA Includes Conspiracy

- Contractors, grantees and fund recipients are now liable for "conspiracy to commit a violation" of any substantive section of the FCA.
- There is no longer a need for the false claim to be paid or approved in order to assess liability.

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FCA Changes the Character of Government Involvement

- Authority to issue Civil Investigation Demand (CID) can be delegated to "designees"
- Information sharing can now be "Official Use" with
  - A qui tam relator,
  - Contractor,
  - State agency

  If such sharing is in connection with a DoJ Investigation.

FCA Contains Enhanced Whistleblower Protection

- Applies to any employee, contractor, or agent
- Entitles a claimant to "all relief necessary"
- For adverse actions taken against a claimant in response to "lawful acts" in furtherance of "efforts to stop 1 or more violations"

ARRA in Government Contracting

- Reporting (FAR Parts 4 and 52)
- GAO and IG Access (FAR Parts 12, 13, 14, 15, and 52)
- Whistleblower Protections (FAR Parts 3 and 52)

FOIA Policy Shift

- Presidential Memorandum, January 21, 2009
- AG FOIA Memorandum of March 19, 2009
- Rescinds AG's FOIA Memorandum of October 12, 2001

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Deemed Export Control

- Two regulatory schemes:
  - Department of States' International Traffic in Arms Regulation (ITAR)
  - Department of Commerce's Export Administration Regulations
- In 2009 economy of reduced work-forces, filling Federal contracts with current employees may be difficult.
  - Using current international employees on work visas may create EAR Export Control issues.
- Review all contracts and contract staff to assess Export Control status

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Related Documents and Links:

- US Bureau of Industry and Security – Deemed Export FAQs

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Buy American – a Common Theme

- It all started in 1933 – BAA – required US Government to buy products made in the US. Since then – it has morphed into a myriad of requirements to address high tech products, etc.
- ARRA of 2009: FAR Subpart 25.6 -- avoids defining what is required for manufactured construction material to be considered "produced" or "manufactured" in the United States.
- Compliance – complicated.
- Contractual hook – certifications.
- Example for discussion: DOE Grant
- Recent agency actions: EPA easing BAA rules for ARRA funds

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COTS Waiver of BAA

- The new FAR Rule adds the following definition of "COTS" item, based on the definition found in 41 U.S.C. § 431(c):
- (1) . . . any item of supply (including construction material) that is--
  - (i) A commercial item . . . ;
  - (ii) Sold in substantial quantities in the commercial marketplace; and
  - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo . . . such as agricultural products and petroleum products.
- Still must be manufactured in the US
- TAA still in effect.

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More on COTS Waiver

- Eliminates "cost of component" test of BAA for COTS Items
- Item still must be manufactured in the US
- Trade Agreement Act requirements still kick in above certain thresholds as complete waiver of BAA

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Government In-Sourcing

- Included in Recovery Act budget
- Hiring away contractor employees
- Highlighted in CLEAN-UP Act S.924
  - - sponsored by Senator Barbara Mikulski (D-MD).
- Privatization – comments to President Obama by various organizations
- Right of Action ??

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Related Documents and Links:

- www.recovery.org
- Articles (see materials)

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Disallowance of Costs Related to Opposing Labor Activity

- Executive Order 13494 - 74 Fed. Reg. 6101 (February 4, 2009)
- No action by the FAR Council as of the prepublication date

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Executive Order [13502]: Use of Project Labor Agreements for Federal Construction Projects

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release
February 6, 2009

EXECUTIVE ORDER

- - - - - - -

USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION PROJECTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq*., and in order to promote the efficient administration and completion of Federal construction projects, it is hereby ordered that:

Section 1. Policy. (a) Large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government. Construction employers typically do not have a permanent workforce, which makes it difficult for them to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise due to the fact that construction projects typically involve multiple employers at a single location. A labor dispute involving one employer can delay the entire project. A lack of coordination among various employers, or uncertainty about the terms and conditions of employment of various groups of workers, can create frictions and disputes in the absence of an agreed-upon resolution mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On larger projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.

(b) The use of a project labor agreement may prevent these problems from developing by providing structure and stability to large-scale construction projects, thereby promoting the efficient and expeditious completion of Federal construction contracts. Accordingly, it is the policy of the Federal Government to encourage executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement.

Sec. 2. Definitions.

(a) The term "labor organization" as used in this order means a labor organization as defined in 29 U.S.C. 152(5).

(b) The term "construction" as used in this order means construction, rehabilitation, alteration, conversion, extension, repair, or improvement of buildings, highways, or other real property.

(c) The term "large-scale construction project" as used in this order means a construction project where the total cost to the Federal Government is $25 million or more.

(d) The term "executive agency" as used in this order has the same meaning as in 5 U.S.C. 105, but excludes the Government Accountability Office.

(e) The term "project labor agreement" as used in this order means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

Sec. 3. (a) In awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, executive agencies may, on a project-by-project basis, require the use of a project labor agreement by a contractor where use of such an agreement will (i) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (ii) be consistent with law.

(b) If an executive agency determines under subsection (a) that the use of a project labor agreement will satisfy the criteria in clauses (i) and (ii) of that subsection, the agency may, if appropriate, require that every contractor or subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations.

Sec. 4. Any project labor agreement reached pursuant to this order shall:

(a) bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

(b) allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(c) contain guarantees against strikes, lockouts, and similar job disruptions;

(d) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(e) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health;

and

(f) fully conform to all statutes, regulations, and Executive Orders.

Sec. 5. This order does not require an executive agency to use a project labor agreement on any construction project, nor does it preclude the use of a project labor agreement in circumstances not covered by this order, including leasehold arrangements and projects receiving Federal financial

assistance. This order also does not require contractors or subcontractors to enter into a project labor agreement with any particular labor organization.

Sec. 6. Within 120 days of the date of this order, the Federal Acquisition Regulatory Council (FAR Council), to the extent permitted by law, shall take whatever action is required to amend the Federal Acquisition Regulation to implement the provisions of this order.

Sec. 7. The Director of OMB, in consultation with the Secretary of Labor and with other officials as appropriate, shall provide the President within 180 days of this order, recommendations about whether broader use of project labor agreements, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects.

Sec. 8. Revocation of Prior Orders, Rules, and Regulations. Executive Order 13202 of February 17, 2001, and Executive Order 13208 of April 6, 2001, are revoked. The heads of executive agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, or regulations implementing Executive Orders 13202 and 13208.

Sec. 9. Severability. If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

Sec. 10. General. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 11. Effective Date. This order shall be effective immediately and shall apply to all solicitations for contracts issued on or after the effective date of the action taken by the FAR Council under section 6 of this order.

BARACK OBAMA

THE WHITE HOUSE,

February 6, 2009.

required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.'' This proposed rule does not have Tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed rule from Tribal officials.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it approves a State rule implementing a Federal standard.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 30, 2009.

Jane Diamond,

Acting Regional Administrator, Region IX.

[FR Doc. E9–16642 Filed 7–13–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 17, 22, 36, and 52

[FAR Case 2009–005; Docket 2009–0024; Sequence 1]

RIN 9000–AL31

Federal Acquisition Regulation; FAR Case 2009–005, Use of Project Labor Agreements for Federal Construction Projects

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13502, Use of Project Labor Agreements for Federal Construction Projects. The new E.O. encourages Federal departments and agencies to consider requiring the use of project labor agreements for Federal construction projects where the total cost to the Government is more than $25 million in order to promote economy and efficiency in Federal procurement.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before August 13, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2009–005 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–005'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–005. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–005'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2009–005 in all

correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAR case 2009–005.

SUPPLEMENTARY INFORMATION:

A. Background

On February 6, 2009, the President issued E.O. 13502 which encourages executive agencies to consider requiring the use of project labor agreements in connection with large scale construction projects in order to promote economy and efficiency in Federal procurement. The E.O. encourages executive departments and agencies to consider the use of project labor agreements for construction projects where the total cost to the Government is valued at $25 million or more and permits agencies on a project-by-project basis to require the use of a project labor agreement where certain criteria would be met.

The term ''project labor agreement'' means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

The E.O. describes how project labor agreements may help agencies manage workforce challenges that arise in connection with large-scale construction projects. For example, large-scale construction projects typically involve multiple employers at a single location.

The E.O. explains that a ''lack of coordination among various employers, or uncertainties about the terms and conditions of employment of various groups of workers, can create friction and disputes in the absence of an agreed-upon resolution and mechanism''. The use of project labor agreements may ''prevent these problems from developing by providing structure and stability to large-scale construction projects thereby promoting the efficient and expeditious completion of Federal construction contracts.'' A project labor agreement may help an agency manage these problems by providing an agreed-upon resolution mechanism that promotes the efficient and expeditious completion of Federal construction projects.

In accordance with E.O. 13502, this proposed rule amends the FAR to—

- Provide a new FAR Subpart 22.5, Use of Project Labor Agreements for Federal Construction Projects.
- Add a new provision at 52.222–XX, Notice of Requirement for Project Labor Agreement, to be included in solicitations where the agency has exercised its discretion to require a project labor agreement as prescribed at FAR 22.505(a).
- Add a new clause 52.222–YY, Project Labor Agreement, to be included in contracts in accordance with FAR 22.505(b).

The Councils invite comment on the process, in which the solicitation incorporates the provision providing for submission of the project labor agreement prior to the contract award (*i.e.*, should agencies require this from each offeror as part of its bid or only from an apparent successful offeror).

The Councils are also considering factors for the contracting officer to consider, on a project-by-project basis, in determining whether use of a project labor agreement will be in the best interest of the Government. The Councils welcome public comment on the factors that should be considered, such as the difficulty of coordinating multiple contracts in the absence of a project labor agreement, the importance of timely project completion, etc.

The Director of the Office of Management and Budget (OMB) is working with the Secretary of Labor and other officials, to provide recommendations to the President on whether to broaden the application of project labor agreements on both construction projects awarded under Federal contracts and construction projects receiving Federal financial assistance, to promote the economical, efficient, and timely completion of such projects.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rationale for this determination is based on the discretionary nature of the regulation being promulgated and the fact that the application of the rule is only in connection with large scale construction projects over $25 million (those that would likely impact large businesses). Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 17, 22, 36, and 52, in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*; (FAR case 2009–005), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) addresses the collection of information by the Federal government from individuals, small businesses and state and local governments and seeks to minimize the burdens such information collection requirements might impose. A collection of information includes providing answers to identical questions posed to, or identical reporting or record-keeping requirements imposed on ten or more persons, other than agencies, instrumentalities, or employees of the United States. In accordance with the requirements of the Paperwork Reduction Act, agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number or the number appears in the Code of Federal Regulations (see FAR 1.106).

The Paperwork Reduction Act (Pub. L. 104–13) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat will submit a request for approval of a new information collection requirement concerning FAR Case 2009–005 to the OMB under 44 U.S.C. Chapter 35, *et seq.*

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Councils solicit comments concerning: whether these information collection requirements are necessary for the Government to properly perform its functions, including whether the information has practical utility; the accuracy of the estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collecting information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

The rule will apply to large-scale construction projects where the cost to the Government is $25 million or more and where agencies have determined that use of a project labor agreement, in accordance with requirements prescribed by this rule, will advance the Government's interest in achieving economy and efficiency in the resulting procurement. Most prime contractors for such projects are large business concerns. We estimate the annual total burden hours as follows:

Based on Fiscal Year 2008 data regarding the types of contracts to which this information collection applies, it is estimated that there are approximately 300 large-scale construction contracts (including Architectural and Engineering contracts) exceeding $25 million that could be subject to an agency determination for use of project labor agreements. Based on advice of labor advisors, approximately 10 percent of these types of projects may be deemed appropriate for a project labor agreement. Therefore, it is estimated the information collection requirement would apply to approximately 30 large-scale construction contracts per year. Each contract would require one project labor agreement submission prior to or after award; therefore, the estimated number of annual respondents is 30. Project labor agreements are often negotiated in advance of the solicitation phase for a procurement, as the large-scale projects are defined. The estimated time for reporting of this information is 1 hour to cover copying and submitting the agreement to the Government.

We estimate the total annual public cost burden for these elements to be $900, based on the following:

Respondents	30
Responses/respondent	× 1
Responses	30
Hours per response	× 1
Total hours	30
Cost per hour	× $30
Total annual cost to public	$900

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than August 13, 2009 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, Washington, DC 20405.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 9000–00XX, Use of Project Labor Agreements for Federal Construction Projects, in all correspondence.

List of Subjects in 48 CFR Parts 2, 17, 22, 36, and 52

Government procurement.

Dated: July 9, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, the Councils propose amending 48 CFR parts 2, 17, 22, 36, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 17, 22, 36, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

2. Amend section 2.101(b)(2) in the third sentence in the definition ''Construction'' by removing the words ''personal property'' and adding ''personal property (except that for use in Subpart 22.5, see the definition at 22.502).''

PART 17—SPECIAL CONTRACTING METHODS

3. In section 17.603 revise paragraph (c) to read as follows:

17.603 Limitations.

* * * * *

(c) For use of project labor agreements, see Subpart 22.5.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

4. In section 22.101–1 revise paragraph (b)(2) to read as follows:

* * * * *

(b)(1) * * * *

(2) For use of project labor agreements, see Subpart 22.5.

5. Add Subpart 22.5 to Part 22 to read as follows:

Subpart 22.5 Use of Project Labor Agreements for Federal Construction Projects.

Sec.

This subpart prescribes policies and procedures to implement Executive Order 13502, February 6, 2009.

22.502 Definitions.

As used in this subpart—

Construction means construction, rehabilitation, alteration, conversion, extension, repair, or improvement of buildings, highways, or other real property.

Labor organization means a labor organization as defined in 29 U.S.C. 152(5).

Large-scale construction project means a construction project, including all contracts associated with the project, where the total cost to the Federal Government is $25 million or more.

Project labor agreement means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

22.503 Policy.

Project labor agreements are a tool that agencies may use to promote economy and efficiency in Federal procurement. Pursuant to Executive Order 13502, agencies are encouraged to consider requiring the use of project labor agreements in connection with large-scale construction projects.

22.504 General requirements for project labor agreements.

(a)(1) Agencies may require the use of project labor agreements where use of such agreements will—

(i) Advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters; and,

(ii) Be consistent with law.

(2) If an agency determines that use of a project labor agreement will meet the standards set forth in paragraphs (a)(1)(i) and (ii) of this section, the agency has complete discretion—

(i) To require that every contractor and subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations; or

(ii) To decide not to require the use of a project labor agreement.

(b) Project labor agreements established under this subpart shall—

(1) Bind all contractors and subcontractors on the construction project to comply with the project labor agreement;

(2) Allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, and Executive orders.

22.505 Solicitation provision and contract clause.

(a)(1) For acquisition of large-scale construction projects, if the agency makes a determination pursuant to this subpart that a project labor agreement will be required, the contracting officer shall insert the provision at 52.222–XX, Notice of Requirement for Project Labor Agreement, in all solicitations associated with the project.

(2) If an agency allows submission of the project labor agreement after contract award, the contracting officer shall use the provision with its Alternate I in accordance with agency procedures.

(b)(1) For acquisition of large-scale construction projects, if the agency makes a determination pursuant to this subpart that a project labor agreement will be required, the contracting officer shall insert the clause at 52.222–YY, Project Labor Agreement in all contracts associated with the project.

(2) If an agency allows submission of the project labor agreement after contract award, the contracting officer shall use the clause with its Alternate I in accordance with agency procedures.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

6. In section 36.202 revise paragraph (d) to read as follows:

36.202 Specifications.

* * * * *

(d) For requirements on the use of project labor agreements for Federal construction projects, see part 22, Subpart 22.5 of this chapter.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Add section 52.222–XX to read as follows:

52.222–XX Notice of Requirement for Project Labor Agreement.

As prescribed in 22.505(a)(1), insert the following provision:

NOTICE OF REQUIREMENT FOR PROJECT LABOR AGREEMENT (DATE)

(a) *Definitions. Labor organization and project labor agreement*, as used in this provision, are defined in the clause of this solicitation entitled Project Labor Agreement.

(b) Consistent with applicable law, the apparent successful offeror will be required to execute a project labor agreement with one or more appropriate labor organizations for the term of the resulting construction contract.

(c) Any project labor agreement reached pursuant to this provision shall—

(1) Bind the offeror and all subcontractors on the construction project to comply with the project labor agreement;

(2) Allow the offeror and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, and Executive orders.

(d) Any project labor agreement reached pursuant to this provision does not change the terms of this contract or provide for any price adjustment by the Government.

(e) The Government will not participate in the negotiations of any project labor agreement.

(f) The apparent successful offeror shall submit to the Contracting Officer a copy of the project labor agreement—reached pursuant to this provision prior to contract award.

(End of Provision)

Alternate I (DATE) As prescribed in 22.505(a)(2), substitute the following paragraph (b) in lieu of paragraphs (b) through (f) of the basic clause:

(b) Consistent with applicable law, the contractor agrees to bargain in good faith to a project labor agreement with one or more appropriate labor organizations for the term of the resulting construction contract.

8. Add section 52.222–YY to read as follows:

52.222–YY Project Labor Agreement.

As prescribed in 22.505(b)(1), insert the following clause:

PROJECT LABOR AGREEMENT (DATE)

(a) *Definitions.* As used in this clause—

Labor organization means a labor organization as defined in 29 U.S.C. 152(5).

Project labor agreement means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

(b) The Contractor shall maintain in a current status throughout the life of the contract the project labor agreement entered into prior to the award of this contract in accordance with solicitation provision 52.222–XX, Notice of Requirement for Project Labor Agreement.

(c) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts.

(End of Clause)

Alternate I (Date). As prescribed in 22.505(b)(2), substitute the following paragraphs (b) through (g) for paragraphs (b) and (c) of the basic clause:

(b) Consistent with applicable law, the contractor agrees to bargain in good faith to a project labor agreement with one or more appropriate labor organizations for the term of this construction contract. The contractor shall submit an executed copy of the project labor agreement to the Contracting Officer.

(c) Any project labor agreement reached pursuant to this clause shall—

(1) Bind the Contractor and all subcontractors on the construction project to comply with the project labor agreement;

(2) Allow the Contractor and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, and Executive orders.

(d) Any project labor agreement reached pursuant to this provision does not change the terms of this contract or provide for any price adjustment by the Government.

(e) The Government will not participate in the negotiations of any project labor agreement.

(f) The Contractor shall maintain in a current status throughout the life of the contract the project labor agreement entered into pursuant to this clause.

(g) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (g), in all subcontracts.

(End of Provision)

[FR Doc. E9–16619 Filed 7–10–09; 11:15 am]
BILLING CODE 6820–EP–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R9-IA-2009-0016; 96100-1671-9FLS-B6]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List 14 Parrot Species as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90–day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90–day finding on a petition to list as threatened or endangered under the Endangered Species Act of 1973, as amended (Act), the following 14 parrot species: Blue-throated macaw (*Ara glaucogularis*), blue-headed macaw (*Primolius couloni*), crimson shining parrot (*Prosopeia splendens*), great green macaw (*Ara ambiguus*), grey-cheeked parakeet (*Brotogeris pyrrhoptera*), hyacinth macaw (*Anodorhynchus hyacinthinus*), military macaw (*Ara militaris*), Philippine cockatoo (*Cacatua haematuropygia*), red-crowned parrot (*Amazona viridigenalis*), scarlet macaw (*Ara macao*), thick-billed parrot *(Rhynchopsitta pachyrhyncha*), white cockatoo (*Cacatua alba*), yellow-billed parrot (*Amazona collaria*), and yellow-crested cockatoo (*Cacatua sulphurea*). The thick-billed parrot is listed as an endangered species under the Act throughout its range. As such, we will not be addressing it further as part of this petition. We have also previously determined that the blue-throated macaw warrants listing in response to a 1991 petition and has been a candidate species since. Because we have recently re-evaluated the status of this species as part of our 2008 Annual Notice of Review, we will not address it further as part of this petition. We find that the petition presents substantial scientific or commercial information indicating that listing the remaining 12 species of parrots may be warranted. Therefore, with the publication of this notice, we are initiating a status review of these 12 species of parrots to determine if listing is warranted. To ensure that the status reviews are comprehensive, we are soliciting scientific and commercial data regarding these 12 species. Additionally, we are seeking any recent information concerning the blue-throated macaw so that it can be taken into consideration in our evaluation of its status when we do our re-evaluation as part of the 2009 Annual Notice of Review.

DATES: We made the finding announced in this document on July 14, 2009. To allow us adequate time to conduct the 12–month status review, we request that we receive information on or before September 14, 2009.

ADDRESSES: You may submit information by one of the following methods:

- Federal rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R9-IA-2009-0016; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more information).

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, Chief, Branch of Listing, Endangered Species, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, Virginia 22203; telephone 703-358-2105. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that substantial information is presented to indicate that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information on the following 12 parrot species: Blue-headed macaw (*Primolius couloni*), crimson shining parrot (*Prosopeia splendens*), great green macaw (*Ara ambiguus*), grey-cheeked parakeet (*Brotogeris pyrrhoptera*), hyacinth macaw (*Anodorhynchus hyacinthinus*), military macaw (*Ara militaris*), Philippine cockatoo (*Cacatua haematuropygia*), red-crowned parrot (*Amazona viridigenalis*), scarlet macaw (*Ara macao*), white cockatoo (*Cacatua alba*), yellow-billed parrot (*Amazona collaria*), and yellow-crested cockatoo (*Cacatua sulphurea*). We request scientific and commercial information from the public, concerned governmental agencies, the scientific community, industry, or any other interested parties on the status of the 12 parrot species that will be addressed as part of this petition, as well as the blue-throated macaw (*Ara glaucogularis*), throughout their range, including but not limited to:

(1) Information on taxonomy, distribution, habitat selection and trends (especially breeding and foraging habitats), diet, and population abundance and trends (especially current recruitment data) of these species.

(2) Information on the effects of habitat loss and changing land uses on the distribution and abundance of these species and their principal prey species over the short and long term.

(3) Information on the effects of other potential threat factors, including live capture and hunting, domestic and international trade, predation by other animals, and diseases of these species or their principal prey over the short and long term.

(4) Information on management programs for parrot conservation, including mitigation measures related to conservation programs, and any other private, tribal, or governmental conservation programs that benefit these species.

(5) Information relevant to whether any populations of these species may qualify as distinct population segments.

(6) Information on captive populations and captive breeding and domestic trade of these species in the United States.

We will base our 12–month finding on a review of the best scientific and commercial information available, including all information received during the public comment period. Please note that comments merely stating support or opposition to the actions under consideration without providing supporting information, although noted, will not be part of the basis of this determination, as section 4(b)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) directs that determinations as to whether any species is a threatened or endangered species shall be made ''solely on the basis of the best scientific

Executive Order [13496] -- Notification of Employee Rights Under Federal Labor Laws

For Immediate Release January 30, 2009

EXECUTIVE ORDER

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NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to ensure the economical and efficient administration and completion of Government contracts, it is hereby ordered that:

Section 1. Policy. This order is designed to promote economy and efficiency in Government procurement. When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 et seq. As the Act recognizes, "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" will "eliminate the causes of certain substantial obstructions to the free flow of commerce" and "mitigate and eliminate these obstructions when they have occurred." 29 U.S.C. 151. Relying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts.

Sec. 2. Contract Clause. Except in contracts exempted in accordance with section 3 of this order, all Government contracting departments and agencies shall, to the extent consistent with law, include the following provisions in every Government contract, other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases under the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403.

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The notice shall include the information contained in the notice published by the Secretary of Labor in the Federal Register (Secretary's Notice).

"2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order [number as provided by the Federal Register] of [insert new date]. Such other sanctions or remedies may be imposed as are provided in Executive Order [number as provided by the Federal Register] of [insert new date], or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (3) above in every subcontract entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order [number as provided by the Federal Register] of [insert new date]) so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non compliance: Provided, however, that if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 3. Administration.

(a) The Secretary of Labor (Secretary) shall be responsible for the administration and enforcement of this order. The Secretary shall adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.

(b) Within 120 days of the effective date of this order, the Secretary shall initiate a rulemaking to prescribe the size, form, and content of the notice to be posted by a contractor under paragraph 1 of the contract clause described in section 2 of this order. Such notice shall describe the rights of employees under Federal labor laws, consistent with the policy set forth in section 1 of this order.

(c) Whenever the Secretary finds that an act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions set out in subsection (a) of this section necessary to achieve the purposes of this order, the Secretary promptly shall issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

Sec. 4. Exemptions. (a) If the Secretary finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Government to procure goods or services on an economical and efficient basis, the Secretary may exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of this order with respect to a particular contract or subcontract or any class of contracts or subcontracts.

(b) The Secretary may, if the Secretary finds that special circumstances require an exemption in order to serve the national interest, exempt a contracting department or agency from the requirements of any or all of the provisions of section 2 of this order with respect to a particular contract or subcontract or class of contracts or subcontracts.

Sec. 5. Investigation.

(a) The Secretary may investigate any Government contractor, subcontractor, or vendor to determine whether the contractual provisions required by section 2 of this order have been violated. Such investigations shall be conducted in accordance with procedures established by the Secretary.

(b) The Secretary shall receive and investigate complaints by employees of a Government contractor or subcontractor, where such complaints allege a failure to perform or a violation of the contractual provisions required by section 2 of this order.

Sec. 6. Compliance.

(a) The Secretary, or any agency or officer in the executive branch lawfully designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, regarding compliance with this order as the Secretary may deem advisable.

(b) The Secretary may hold hearings, or cause hearings to be held, in accordance with subsection (a) of this section, prior to imposing, ordering, or recommending the imposition of sanctions under this order. Neither an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under section 7(b) of this order nor the inclusion of a contractor on a published list of noncomplying contractors under section 7(c) of this order shall be carried out without affording the contractor an opportunity for a hearing.

Sec. 7. Remedies. In accordance with such rules, regulations, or orders as the Secretary may issue or adopt, the Secretary may:

(a) after consulting with the contracting department or agency, direct that department or agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor to comply with the contractual provisions required by section 2 of this order; contracts may be cancelled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon future compliance: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of the contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that completion of the contract is essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of the contracting department or agency, or his or her designee, continues to object to the issuance of such directive;

(b) after consulting with each affected contracting department or agency, provide that one or more contracting departments or agencies shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of this order: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of each contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that further contracts or extensions or other modifications of existing contracts with the noncomplying contractor are essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of a contracting department or agency, or his or her designee, continues to object to the issuance of such directive; and

(c) publish, or cause to be published, the names of contractors that have, in the judgment of the Secretary, failed to comply with the provisions of this order or of related rules, regulations, and orders of the Secretary.

Sec. 8. Reports. Whenever the Secretary invokes section 7(a) or 7(b) of this order, the contracting department or agency shall report to the Secretary the results of the action it has taken within such time as the Secretary shall specify.

Sec. 9. Cooperation. Each contracting department and agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

Sec. 10. Sufficiency of Remedies. If the Secretary finds that the authority vested in the Secretary by sections 5 through 9 of this order is not sufficient to effectuate the purposes of this order, the Secretary shall develop recommendations on how better to effectuate those purposes.

Sec. 11. Delegation. The Secretary may, in accordance with law, delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Sec. 12. Implementation. To the extent permitted by law, the Federal Acquisition Regulatory Council (FAR Council) shall take whatever action is required to implement in the Federal Acquisition Regulation (FAR) the provisions of this order and any related rules, regulations, or orders issued by the Secretary under this order and shall amend the FAR to require each solicitation of offers for a contract to include a provision that implements section 2 of this order.

Sec. 13. Revocation of Prior Order and Actions. Executive Order 13201 of February 17, 2001, is revoked. The heads of executive departments and agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 13201.

Sec. 14. Severability. If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

Sec. 15. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary,

administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 16. Effective Date. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the rule promulgated by the Secretary pursuant to section 3(b) of this order.

BARACK OBAMA

THE WHITE HOUSE,
January 30, 2009.

Federal Register

Monday,
August 3, 2009

Part II

Department of Labor

Office of Labor-Management Standards

29 CFR Part 471
Notification of Employee Rights Under Federal Labor Laws; Proposed Rule

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Part 471

RIN 1215–AB70

Notification of Employee Rights Under Federal Labor Laws

AGENCY: Office of Labor-Management Standards, Employment Standards Administration, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) proposes a regulation to implement Executive Order 13496, which was signed by President Barack Obama on January 30, 2009. Executive Order 13496 (''the Executive Order,'' ''the Order,'' or ''EO 13496'') requires nonexempt Federal departments and agencies to include within their Government contracts specific provisions requiring that contractors and subcontractors with whom they do business post notices informing their employees of their rights as employees under Federal labor laws. The Executive Order requires the Secretary (''Secretary'') of the Department of Labor (''Department'') to initiate a rulemaking to prescribe the size, form, and content of the notice that must be posted by a contractor under paragraph 1 of the contract clause described in section 2 of the Order. Under the Executive Order, Federal Government contracting departments and agencies must include the required contract provisions in every Government contract, except for collective bargaining agreements and contracts for purchases under the Simplified Acquisition Threshold, and except in those cases in which the Secretary exempts a contracting department or agency with respect to particular contracts or subcontracts or class of contracts or subcontracts pursuant to section 4 of the Order. As required by the Executive Order, this proposed rule establishes the content of the notice required by the Executive Order's contract clause, and implements other provisions of the Executive Order, including provisions regarding sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under the Order and the implementing regulations.

DATES: Comments regarding this proposed rule must be received by the Department of Labor on or before September 2, 2009.

ADDRESSES: You may submit comments, identified by 1215–AB70, only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov*. To locate the proposed rule, use key words such as ''Department of Labor'' or ''Notification of Employee Rights Under Federal Labor Laws'' to search documents accepting comments. Follow the instructions for submitting comments.

Delivery: Comments should be sent to: Denise M. Boucher, Director of the Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210. Because of security precautions the Department continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments.

The Office of Labor-Management Standards (OLMS) recommends that you confirm receipt of your delivered comments by contacting (202) 693–0123 (this is not a toll-free number). Individuals with hearing impairments may call (800) 877–8339 (TTY/TDD). Only those comments submitted through *http://www.regulations.gov,* hand-delivered, or mailed will be accepted. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours at the above address.

The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Denise M. Boucher, Director, Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, (202) 693–1185 (this is not a toll-free number), (800) 877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION: *The Proposed Rule is organized as follows*:

I. Background

On January 30, 2009, President Barack Obama signed Executive Order 13496, entitled ''Notification of Employee Rights Under Federal Labor Laws.'' 74 FR 6107 (February 4, 2009). The purpose of the Order is ''to promote economy and efficiency in Government procurement'' by ensuring that employees of certain Government contractors are informed of their rights under Federal labor laws. *Id.,* Sec. 1. As the Order states, ''When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.*'' The Order reiterates the declaration of national labor policy contained in the National Labor Relations Act (''NLRA''), 29 U.S.C. 151, that ''encouraging the practice and procedure of collective bargaining and * * * protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection'' will ''eliminate the causes of certain substantial obstructions to the free flow of commerce'' and ''mitigate and eliminate these obstructions when they have occurred.'' *Id.,* Section 1, quoting 29 U.S.C. 151. As the Order concludes, ''[r]elying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts.'' *Id.*

The Order achieves the goal of notification to employees of federal contractors of their legal rights through two related mechanisms. First, Section 2 of the Order provides the complete text of a contract clause that Government contracting departments and agencies must include in all covered Government contracts and subcontracts. 74 FR at 6107–6108, Sec. 2. Second, through incorporation of the specified clause in its contracts with the Federal government, contractors thereby agree to post a notice in conspicuous places in their plants and offices informing employees of their rights under Federal labor laws. *Id.,* Sec. 2, Para. 1.

The Order states that the Secretary of Labor (''Secretary'') ''shall be responsible for [its] administration and enforcement.'' 74 FR at 6108, Sec. 3. To that end, the Order delegates to the Secretary the authority to ''adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.'' *Id.,* Sec. 3(a). In particular, the Order requires the Secretary to prescribe the content, size, and form of the employee notice. *Id.,* Sec. 3(b). In addition, the Order permits the Secretary, among other things, to make modifications to the contractual provisions required to be included in Government contracts (Sec. 3(c)); to provide exemptions for contracting departments or agencies with respect to particular contracts or subcontracts or class of contracts or subcontracts for certain specified reasons (Sec. 4); to establish procedures for investigations of Government contractors and subcontractors to determine whether the required contract provisions have been violated (Sec. 5); to conduct hearings regarding compliance (Sec. 6); and to provide for certain remedies in the event that violations are found (Sec. 7). *Id.,* 74 FR at 6108–6109. Accordingly, the Secretary proposes the following regulations to implement the policies and procedures set forth in the Executive Order. The specific standards and procedures proposed to implement the Executive Order will be discussed in detail in Section III., Overview of the Rule, below.

II. Authority

A. Legal Authority

The President issued Executive Order 13496 pursuant to his authority under ''the Constitution and laws of the United States,'' expressly including the Federal Property and Administrative Services Act ''Procurement Act,'' 40 U.S.C. 101 *et seq.* The Procurement Act authorizes the President to ''prescribe policies and directives that [he] considers necessary to carry out'' the statutory purposes of ensuring ''economical and efficient'' government procurement and supply. 40 U.S.C. 101, 121(a). Executive Order 13496 delegates to the Secretary of Labor the authority to ''adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.'' 74 FR at 6108, Sec. 3. The Secretary has delegated her authority to promulgate these regulations to the Assistant Secretary for Employment Standards. Secretary's Order 01–2008 (May 30, 2008), 73 FR 32424 (published June 6, 2008).

B. Interagency Coordination

Section 12 of the Executive Order requires the Federal Acquisition Regulatory Council (FAR Council) to take action to implement provisions of the Order in the Federal Acquisition Regulation (FAR). 74 FR at 6110. Accordingly, the Department has coordinated with the FAR Council in inserting language implementing the Executive Order into the FAR.

III. Overview of the Rule

The Department's proposed rule, which establishes standards and procedures for implementing and enforcing Executive Order 13496, is set forth in subchapter D, Part 471 of Volume 29 of the Code of Federal Regulations (CFR). Subpart A of the proposed rule sets out definitions, the prescribed requirements for the size, form and content of the employee notice, exceptions for certain types of contracts, and exemptions that may be applicable to contracting departments and agencies with respect to a particular contract or subcontract or class of contracts or subcontracts. Subpart B of the proposed rule sets out standards and procedures related to complaint procedures, compliance evaluations, and enforcement of the rule. Subpart C sets out other standards and procedures related to certain ancillary matters. The discussion below is organized in the same manner, and explains the Department's adoption of the standards and procedures set out in the regulatory text, which follows. The Department invites comments on any issues addressed by the proposals in this rulemaking.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Subpart A contains definitions of terms used in the rule, requirements for the content, size and form of the notice that a contractor must post to its employees, the types of contracts that are excepted from the rule and applicable exemptions available to a contracting department or agency with respect to a particular contract or subcontract or class of contracts or subcontracts.

Definitions

The definitions proposed in this rule are derived largely from the definitions of the same terms in the Department's Office of Federal Contract Compliance Programs (OFCCP) regulations at 41 CFR part 60–1.3 and the former regulations implementing Executive Order 13201, 29 CFR Part 470 (2008), rescinded under authority of E.O. 13496, 74 FR 14045 (March 30, 2009). Slight variations between the definitions proposed here and those upon which they were modeled were made in order to accommodate the terms to Executive Order 13946. The Department invites comments regarding the definitions proposed in Section 471.1 below.

Requirements for Employee Notice

As noted above, Executive Order 13496 requires the Secretary to ''prescribe the size, form and content of the notice'' that contractors must post to notify employees of their rights. Sec. 3(b), E.O. 13496, 74 FR at 6108. The proposed rule fulfills the Secretary's obligation to establish standards and procedures regarding each of these issues, which are discussed in turn below.

Section 471.2(a) of the proposed rule sets out in full the four paragraphs that the Executive Order requires to be included in all non-excepted Government contracts. The first paragraph of the proposed contract clause specifies the content of the notice that must be provided to employees of Federal contractors. The proposed notice contains those employee rights established under the National Labor Relations Act (''NLRA''), 29 U.S.C. 151, *et seq.* The Secretary believes providing notice of the rights under the NLRA bests effectuates the purpose of the Executive Order. Section 1 of the Executive Order clearly states that the Order's policy is to attain industrial peace and enhance worker productivity through the notification of workers of ''their rights under Federal labor laws, including the National Labor Relations Act.'' 74 FR at 6107, Sec. 1. The policy of the Executive Order goes on to emphasize the foundation underlying the NLRA, which is to encourage collective bargaining and to protect workers' rights to freedom of association and self-organization, and notes that

efficiency and economy in government contracting is promoted when contractors inform their employees of ''such rights.'' Further, the contract clause prescribed by the Order requires Federal contractors to post the notice ''in conspicuous places in and about plants and offices *where employees covered by the National Labor Relations Act* engage in activities related to performance of the contract * * *.'' 74 FR at 6107, Sec. 2, Para. 1 (emphasis added). As a result, the Executive Order's terms provide that the employee notice it requires must be posted only by employers in the private sector, with some statutory exceptions, and need not be posted by employers in the public sector.[1]

In establishing a description of rights under the NLRA in the proposed notice, the Department believes that such rights are best presented to employees following a concise preamble that provides context to such rights. Therefore, section 471.2 of the proposed rule sets out the following text for inclusion in the notice to employees prior to the description of employee rights under the NLRA:

> It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

The content of the above notice derives from section 1 of the NLRA, 29 U.S.C. 151, and E.O. 13496, Section 1. The Department seeks comments on this description of policy in the proposed section 471.2.

In proposing to include the statutory rights under the NLRA in the required notice, the Secretary considered the level of detail the notice should contain regarding those statutory rights. A broad statement of employee rights under the NLRA appears in section 7 of the Act, which states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

29 U.S.C. 157. The Department considered requiring a verbatim replication of the statute's enumeration of employee rights in Section 7 of the NLRA. Alternatively, the Department considered including a simplified list of rights based upon the statutory provision, which would include the right of employees to: Organize; form, join, or assist any union; bargain collectively through representatives of their own choice; act together for other mutual aid or protection; or choose not to engage in any of these protected concerted activities.

However, the Department does not believe that posting the statutory language itself or a simplified list of rights in a notice will be likely to convey the information necessary to best inform employees of their rights under the Act. Instead, the Department proposes that the statement of employee rights contained in Appendix A to Subpart A of Part 471 be required for inclusion in the notice. This statement contains greater detail of NLRA rights, derived from Board or court decisions implementing such rights—which will more effectively convey such rights to employees. A more complete and readable text will also better enable employees to apply the rights to actual workplace situations. Additionally, employees will be better apprised of their rights under the NLRA if the notice also contains examples of general circumstances, also derived from Board or court decisions further implementing section 7 and other provisions of the NLRA, that constitute violations of their rights under the Act. With the above principles in mind, the Department devised a notice that provides employees with a more than rudimentary overview of their rights under the NLRA, in a user-friendly format, while simultaneously not overwhelming employees with information that is unnecessary and distracting in the limited format of a notice.

The Department invites comment on this statement of employee rights proposed for inclusion on the required notice to employees. In particular, the Department requests comment on whether the notice contains sufficient information of employee rights under the Act; whether the notice effectively conveys the information necessary to best inform employees of their rights under the Act; and whether the notice achieves the desired balance between providing an overview of employee rights under the Act and limiting unnecessary and distracting information.

Moreover, proposed § 471.2 also requires that the notice of employee rights contain NLRB contact information and basic enforcement procedures to enable employees to find out more about their rights under the Act and to proceed with enforcement if necessary. Accordingly, the required notice confirms that illegal conduct will not be permitted, provides information regarding the NLRB and filing a charge with that agency, and indicates that the Board will prosecute violators of the Act. Furthermore, the notice indicates that there is a 6-month statute of limitations applicable to making allegations of violations and provides NLRB contact information for use by employees. The Department invites suggested additions or deletions to these procedural provisions that would improve the content of the notice of employee rights.

Paragraph 4 of the contract clause in the Executive Order requires the contractor to incorporate only paragraphs 1 through 3 of the clause in its subcontracts. *See* 74 FR at 6108, Sec. 2, para. 4. A narrow reading of the operation of this provision outside the full context of the Executive Order might suggest that the obligation to include the contract clause is limited to contracts between the government agency and the prime contractor. Under this reading, subcontractors would be required only to post the notice of employee rights, and their subcontractors (sometimes called second tier contractors) would have no responsibilities under the Executive Order. However, the provisions of the Executive Order establishing exemptions and exceptions for the application of the Executive Order's obligations do not expressly specify that its obligations do not flow past the first tier subcontractor, a significant limitation that one would expect to be made explicitly in the text of the Executive Order rather than by operation of the contract clause's incorporation provision. In addition, in the Department's past regulatory treatment of a similar issue, it has adapted through regulation the application of an Executive Order's contract inclusion provisions so that the obligation to abide by the mandates of the orders flows to subcontractors below the first tier. *See, e.g.*, 69 FR 16376, 16378 (Mar. 29, 2004) (final rule implementing E.O. 13201) (based on identical contract incorporation provision, ''the intent of the Order was clearly that the clause be passed to subcontractors below the first tier''); 57 FR 49588, 49591 (Nov. 2, 1992) (final rule implementing E.O. 12800) (''It is clear, however, that the intent of Executive Order 12800 was that the clause flow down below the first tier level''). The Department's experience with regulatory implementation of all these Executive Orders is that requiring the obligations of the Executive Order to flow past the first tier subcontractor best achieves the purposes of the Executive Orders. For these reasons, the Department has concluded that in order to fully implement the intent of E.O. 13496, Sec. 471.2(a) has been adapted to require the inclusion of paragraphs 1 through 4 of the contract clause. The Department seeks comments on this proposal.

Proposed § 471.2(b) provides that the employee notice clause is to be set out verbatim in a contract, subcontract or purchase order, rather than being incorporated by reference in those documents. Proposed § 471.2(c) implements Section 3(c) of the Executive Order, 74 FR 6108, permitting the Secretary to modify the contract clause under certain specified circumstances as needed from time to time. The Department requests comment regarding the utility of setting out the employee notice clause verbatim, as opposed to incorporation by reference, to ensure that contractors will be aware of their contractual obligation to post the required notice.

The contract clause in the Executive Order requires a contractor to post the employee notice conspicuously ''in and about its plants and offices * * * including in all places where notices to employees are customarily posted both physically and electronically.'' 74 FR 6107, Sec. 2, para. 2. As a result, a contractor is required to post the notice physically at its place of operation where employees are likely to see it. Proposed § 471.2(d) provides that the Department will print the required employee notice poster and supply it to Federal contractors through the Federal contracting agency. In addition, the poster may be obtained from OLMS, whose contact information is provided in this subsection of the proposed rule, or can be downloaded from OLMS's Web site, *http://www.olms.dol.gov*. The Secretary has concluded that the Department's printing of the poster and provision of it to Federal contractors will reduce the burden on those contractors to comply with the Executive Order and this regulation, and will ensure conformity and consistency with the Secretary's specifications for the notice. Proposed § 471.2(d) also permits contractors to reproduce in exact duplicate the poster supplied by the Department to satisfy their obligations under the Executive Order and this rule. The Department invites comment on its proposal to make available print and electronic format posters containing the employee notice.

Those contractors that customarily post notices to employees electronically must also post the required notice electronically. In § 471.2(e), the Department proposes that such contractors may satisfy the electronic posting requirement on any web site that is maintained by the contractor or subcontractor and customarily used for employee notices, whether external or internal. A contractor must display prominently on its Web page or electronic site where other employee notices are customarily placed a link to the DOL's web page that contains the full text of the employee notice. The contractor must also place the link in the prescribed text contained in § 471.2(e). The prescribed text is the introductory language of the notice. The Department seeks comments on this proposal for electronic compliance. In addition, the Department seeks comment on whether it should prescribe standards regarding the size, clarity, location, and brightness with regard to the link, including how to prescribe electronic postings that are at least as large, clear and conspicuous as the contractor's other posters.

Exceptions for Specific Types of Contracts and Exemptions Available to Contracting Departments or Agencies With Respect to Particular Contractors or Subcontracts

The Executive Order expressly excepts from its application two types of Government contracts: Collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and contracts involving purchases below the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403; 74 FR at 6107, Sec. 2. The simplified acquisition threshold is currently set at $100,000. 41 U.S.C. 403. Section 471.3(a)(1) and (2) of the proposed rule implement these exceptions. In addition, the Executive Order's provision regarding its effective date excepts contracts resulting from solicitations issued prior to the effective date of the final rule promulgated pursuant to this rulemaking. 74 FR 6111, Sec. 16. Proposed § 471.3(a)(3) implements this provision of the Executive Order.

As proposed in § 471.2(a), all nonexempt prime contractors and subcontractors are required to include the employee notice contract clause in each of their nonexempt subcontracts so that the obligation to notify employees of their rights flows to subcontractors of a government contract as well. The Executive Order does not except from its coverage subcontracts involving purchases below the simplified acquisition threshold. The Department has defined ''subcontract'' in the definitional section of the rule to include only those subcontracts that are necessary to the performance of the government contract. *See* § 471.1(r); *see also OFCCP* v. *Monongahela R.R.*, 85–OFC–2, 1986 WL 802025 (Recommended Decision and Order, April 2, 1986), aff'd, (Deputy Under Secretary's Final Decision and Order, Mar. 11, 1987) (railroad transporting coal to power generation plant of energy company contracting with GSA was subcontractor because delivery of coal is necessary to for the power company to perform under its contract with GSA). Although this rule may result in coverage of subcontracts with relatively *de minimis* value in the overall scheme of government contracts, covered subcontractors include only those who are performing subcontracts that are necessary to the performance of the prime contract. The Department invites comment on whether a further limitation on the application of the rule to subcontracts is necessary, and if it is, whether such a limitation is best accomplished through the application of this or another standard, for instance, a threshold related to the monetary value of the subcontract.

In addition to the exceptions for certain contracts, the Executive Order establishes two exemptions that the Secretary, in her discretion, may provide to contracting departments or agencies that the Secretary finds appropriate for exemption. 74 FR 6108, Sec. 4. These provisions permit the Secretary to exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of the Order with respect to a particular contract or subcontract or any class of contracts or subcontracts if she finds either that the application of any of the requirements of the Order would not serve its purposes or would impair the ability of the government to procure goods or services on an economical and efficient basis, or that special circumstances require an exemption in order to serve the national interest. *Id*. Proposed § 471.3(b) implements these exemptions. Proposed § 471.3(b) provides for the submission of written requests for exemptions to the

[1] Under the NLRA, the term ''employer'' excludes the United States government, any wholly owned government corporation, or any State or political subdivision. 29 U.S.C. 152(2). As a result, employees of these public-sector employers are not ''employees'' covered by the NLRA. The NLRA's definition of ''employee'' also excludes those employed as agricultural laborers, in the domestic service of any person or family in a home, by a parent or spouse, as an independent contractor, as a supervisor, or by an employer subject to the Railway Labor Act, such as railroads and airlines. 29 U.S.C. 152(3).

Deputy Assistant Secretary for Labor-Management Programs, and further provides that the Deputy Assistant Secretary may withdraw an exemption if a determination is made that such action is necessary or appropriate to achieve the purposes of the rule. The Department invites comments on the standards and procedures for requesting an exemption and the Department's withdrawal of a granted exemption.

Finally, proposed § 471.4 implements the policy noted above that the Executive Order requires notice-posting in those workplaces in which employees covered by the NLRA perform their work under the Federal contract. Thus, this rule does not apply to employers excluded from the definition of ''employer'' in the NLRA, 29 U.S.C. 152(2), and employers of employees excluded from the definition of ''employee'' under the NLRA, 29 U.S.C. 152(3). As a result, Federal, State and local public-sector employers are not covered by this rule. 29 U.S.C. 152(2). Also excluded are employers of workers employed: as agricultural laborers; in the domestic service of any person or family in a home; by a parent or spouse; as an independent contractor; as a supervisor; or by an employer subject to the Railway Labor Act, such as railroads and airlines. 29 U.S.C. 152(3).

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

Subpart B of the proposed rule establishes standards and procedures the Department will use to determine compliance with obligations of the rule, take complaints regarding noncompliance, address findings of violations, provide hearings for certain matters, impose sanctions, including debarment, and provide for reinstatement in the case of debarment. The standards and procedures proposed in this subpart are taken largely from the Department's prior rule administering and enforcing Executive Order 13201, 66 FR 11221 (February 22, 2001). *See* 29 CFR Part 470 (2008), rescinded under authority of E.O. 13496, 74 FR 14045 (March 30, 2009). The Department invites comment on the administrative and enforcement procedures proposed in Subpart B.

The Department's Office of Federal Contract Compliance Programs (''OFCCP'') administers and enforces several laws that ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment. Therefore, OFCCP already has responsibility for monitoring, evaluating and ensuring that contractors doing business with the Federal government conduct themselves in a manner that complies with certain Federal laws. Proposed § 471.10 builds on this practice and expertise, and establishes authority in the Deputy Assistant Secretary for Federal Contract Compliance to conduct evaluations to determine whether a contractor is in compliance with the requirements of this rule. Under proposed § 471.10(a), such evaluations may be done solely for the purpose of assessing compliance with this rule, or may be undertaken in conjunction with an assessment of a Federal contractors' compliance with other laws under OFCCP's jurisdiction. This proposed section also establishes standards regarding location of the posted notice that will be used by OFCCP to assess compliance and indicates that an evaluation record will reflect efforts made toward conciliation, corrective action and/or recommendations regarding enforcement actions.

Proposed § 471.11 provides for the Department's acceptance of written complaints alleging that a contractor doing business with the Federal government has failed to post the notice required by this rule. The proposed section establishes that no special complaint form is required, but that complaints must be in writing. In addition, as proposed in § 471.11, written complaints must contain certain information, including the name, address and telephone number of the person submitting the complaint, and the name and address of the Federal contractor alleged to have violated this rule. This proposed section establishes that written complaints may be submitted either to OFCCP or OLMS, and the contact information for each agency is contained in this subsection. Finally, proposed § 471.11 establishes that OFCCP will conduct investigations of complaints submitted under this section, make compliance findings based on such investigations, and include in the investigation record any efforts made toward conciliation, corrective action, and recommended enforcement action,

Proposed § 471.12 sets out the initial steps that the Department will take in the event that a contractor is found to be in violation of this rule, including making reasonable efforts to secure compliance through conciliation. Under this proposed section, a noncompliant contractor must take action to correct the violation and commit in writing to maintain compliance in the future. If the contractor fails to come into compliance, OLMS may proceed with enforcement efforts proposed in § 471.13.

Proposed § 471.13 implements Section 6 of the Executive Order, 74 FR 6108–6109, and establishes steps that the Department will take in the event that conciliation efforts fail to bring a contractor into compliance with this rule. Under this proposed section, enforcement proceedings may be initiated if violations are found as a result of either a compliance evaluation or a complaint investigation, or in those cases in which a contractor refuses to allow a compliance evaluation or complaint investigation or refuses to cooperate with the compliance evaluation or complaint investigation, including failing to provide information sought during those procedures. The enforcement procedures proposed in § 471.13 rely primarily on the Department's regulations at 29 CFR part 18, which govern administrative hearings before Administrative Law Judges (ALJ), and, in particular, on the provisions for expedited hearings at 29 CFR 18.42. The procedures in this proposed section establish that an ALJ will make recommended findings and conclusions regarding any alleged violation to the Assistant Secretary for Employment Standards (''Assistant Secretary''), who will issue a final administrative order. The final administrative order may include a cease-and-desist order or other appropriate remedies in the event that a violation is found. The procedures in this proposed section also establish timetables for submitting exceptions to the ALJ's recommended order to the Assistant Secretary, and also provide for the use of expedited proceedings.

Proposed § 471.14 addresses the imposition of sanctions and penalties in cases in which violations are found, and establishes post-hearing procedures related to such sanctions or penalties. Section 7 of the Executive Order provides the framework for the scope and nature of remedies the Department may order in the event of a violation. 74 FR 6109. Section 7(a) of the Executive Order provides that the Secretary may issue a directive that the contracting department or agency cancel, terminate, suspend, or cause to be cancelled, terminated or suspended any contract or portion of a contract for noncompliance. *Id.* In addition, the Executive Order indicates that contracts may be cancelled, terminated or suspended absolutely, or their continuance may be conditioned on a requirement for future compliance. *Id.* Prior to issuing such a directive, the Secretary must offer the head of the contracting department or agency an opportunity to object in writing to the remedy contemplated, and the objections must contain reasons why the contract is essential to the agency's mission. *Id.* Finally, Section 7 of the Executive Order prevents the imposition of such a remedy if the head of the contracting department or agency, or his or her designee, continues to object to the issuance of the directive. *Id.* Proposed § 471.14(a), (b), (c), and (d)(1) fully implement the standards and procedures established in Section 7(a) of the Executive Order.

Section 7(b) of the Executive Order provides that the Secretary may issue an order debarring noncompliant contractors ''until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of the order.'' 74 FR 6109. As with the remedies discussed above, prior to the imposition of debarment, the Secretary must offer the head of the contracting department or agency an opportunity to object in writing to debarment, and the objections must contain reasons why the contract is essential to the agency's mission. *Id.* Finally, Section 7(b) of the Executive Order prevents the imposition of debarment if the head of the contracting department or agency, or his or her designee, continues to object to it. *Id.* Proposed § 471.14(d)(3) of the rule establishes the availability of the debarment remedy. Section 471.14(f) of the proposed rule indicates that the Assistant Secretary will periodically publish and distribute the names of contractors or subcontractors that have been debarred for noncompliance.

Proposed § 471.15 permits a contractor or subcontractor to seek a hearing before the Assistant Secretary before the imposition of any of the remedies outlined above. Finally, proposed § 471.16 provides contractors or subcontractors that have been debarred under this rule an opportunity to seek reinstatement by requesting such in a letter to the Assistant Secretary. Under this proposed provision, the Assistant Secretary may reinstate the debarred contractor or subcontractor if he or she finds that the contractor or subcontractor has come into compliance with this rule and has shown that it will fully comply in the future.

As noted above, § 471.2(a) requires all nonexempt prime contractors and subcontractors to include the employee notice contract clause in each of its nonexempt subcontracts so that the obligation to notify employees of their rights is binding upon each successive subcontractor. Regarding enforcement of the requirements of the rule as to subcontractors, the Executive Order requires the contractor to ''take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance.'' 74 FR 6108, Sec. 2, para. 4. Accordingly, in the event that the Department determines that a subcontractor is out of compliance with the requirements of this rule regarding employee notice or inclusion of the contract clause in the subcontractor's own subcontracts, the Secretary may direct the contractor to require the noncompliant subcontractor to come into compliance. As indicated in the Executive Order, if such a directive causes the contractor to become involved in litigation with the subcontractor, the contractor may request the United States to enter the litigation in order to protect the interests of the United States. 74 FR 6108, Sec. 2, para. 4. If the contractor is unable to compel subcontractor compliance on its own accord, the compliance review, complaint, investigation, conciliation, hearing and decision procedures established in Sections 471.10 through 471.16 to assess and resolve contractor compliance with the requirements of this rule are also applicable to subcontractors. In those instances in which a contractor fails to take the action directed by the Secretary regarding a subcontractor's noncompliance, the contractor may be subject to the same enforcement and remedial procedures that apply when it is determined to be out of compliance regarding the requirements to provide employee notice or include the contract clause in its contracts. *See* § 471.13(a)(1).

Subpart C—Ancillary Matters

A number of discrete issues unconnected to the issues addressed in the two previous subparts merit attention in this proposed rule, and they are set out in this subpart. Consequently, this Subpart addresses delegations of authority within and outside the Department to administer and enforce this proposed rule, rulings under or interpretations of the Executive Order, standards prohibiting intimidation, threats, coercion or other interference with rights protected under this rule, and other provisions of the Executive Order that are included in this proposed rule. The Department invites comment on any issues addressed in this subpart.

Proposed § 471.20 implements Section 11 of the Executive Order, 74 FR 6110, which permits the delegation of the Secretary's authority under the Order to Federal agencies within or outside the Department. Section 471.21 of the proposed rule indicates that the Assistant Secretary has authority to make rulings under or interpretations of this rule. Proposed § 471.22 seeks to prevent intimidation or interference with rights protected under this rule, so it proposes that the sanctions and penalties available for noncompliance set out in § 471.14 be available should a contractor or subcontractor fail to take all steps necessary to prevent such intimidation or interference. Activities protected by this proposed section include filing a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, a complaint investigation, hearing or any other activity related to the administration and enforcement of this rule. Finally, proposed § 471.23 implements Section 9 of the Executive Order, 74 FR 6109, which requires that contracting departments and agencies cooperate with the Secretary in carrying out her functions under the Order, and implements Section 15 of the Executive Order, 74 FR 6110, which establishes general guidelines for the Order's implementation.

IV. Regulatory Procedures

Executive Order 12866

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. 58 FR 51735, 51735–51736. The Department has determined that this rule is not an ''economically significant'' regulatory action under section 3(f)(1) of Executive Order 12866. 58 FR 51738. Based on the Department's analysis, including a cost impact analysis set forth more fully below with regard to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, this rule is not likely to: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or (4) raise novel legal or policy issues. 58 FR 51738. As a result, the Department has concluded that a full economic impact and cost/benefit analysis is not required for the rule under section 6(a)(3)(B) of the Executive Order. 58 FR 51741. However, because of its importance to the public,

the rule was reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' Executive Order 13272, Sec. 1, 67 FR 53461 (''Proper Consideration of Small Entities in Agency Rulemaking''). However, an agency is relieved of the obligation to prepare an initial regulatory flexibility for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C 605. Based on the analysis below, in which the Department has estimated the financial burdens to covered small contractors and subcontractors associated with complying with the requirements contained in this proposed rule, the Department has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule will not have a significant economic impact on a substantial number of small entities.

The primary goal of the Executive Order and these implementing regulations is the notification to employees of their rights with respect to collective bargaining and other protected, concerted activity. This goal is achieved through the incorporation of a contract clause in all covered Government contracts. The Executive Order and this rule impose the obligation to ensure that the contract clause is included in all Government contracts not on private contractors, but on Government contracting departments and agencies, which are not ''small entities'' that come within the focus of the RFA. Therefore, the costs attendant to learning of the obligation to include the contract clause in Government contracts and modifying those contracts in order to comply with that obligation is a cost borne by the Federal government, and is not incorporated into this analysis.

Once the required contract clause is included in the Government contract, contractors then begin to assume the burdens associated with compliance. Those obligations include posting the required notice and incorporating the contract clause into all covered subcontracts, thus making the same obligations binding on covered subcontractors. For the purposes of this analysis, the Department estimates that, on average, each prime contractor will subcontract some portion of its prime contract three times, and the prime contractor therefore will expend time ensuring that the contract clause is included in its subcontracts and notifying those subcontractors of their attendant obligations. To the extent that subcontractors subcontract any part of their contract with the prime contractor, they, in turn, will be required to expend time ensuring that the contract clause is included in the next tier of subcontracts and notifying the next-tier subcontractors of their attendant obligations. Therefore, for the purpose of determining time spent on compliance, the Department will not differentiate between the obligations of prime contractors and subsequent tiers of subcontractors in assessing time spent on compliance; the Department assumes that all contractors, whether prime contractor or subcontractor, will spend equivalent amounts of time engaging in compliance activity.

The Department estimates that each contractor will spend a total of 3.5 hours per year in order to comply with this rule, which includes 90 minutes for the contractor to learn about the contract and notice requirements, train staff, and maintain records; 30 minutes for contractors to incorporate the contract clause into each subcontract and explain its contents to subcontractors; 30 minutes acquiring the notice from a government agency or Web site; and 60 minutes posting them physically and electronically, depending on where and how the contractor customarily posts notices to employees. The Department assumes that these activities will be performed by a professional or business worker, who, according to Bureau of Labor statistics data, earned a total hourly wage of $31.02 in January, 2009, including accounting for fringe benefits. The Department then multiplied this figure by 3.5 hours to estimate the average annual costs for contractors and subcontractors to comply with this rule. Accordingly, this proposed rule is estimated to impose average annual costs of $108.57 per contractor (3.5 hours × $31.02). These costs will decrease in subsequent years based on a contractor's increasing familiarity with the rule's requirements and having already satisfied its posting requirements in earlier years.

Based upon figures obtained from USASpending.gov, which compiles information on federal spending and contractors across government agencies, the Department concludes that there were 186,536 unique Federal contractors holding Federal contracts in FY 2008.[2] Although this rule does not apply to Federal contracts below the simplified acquisition threshold, the Department does not have a means by which to calculate what portion of all Federal contractors hold *only* contracts with the government below the simplified acquisition threshold to which the rule would not apply in any respect. Therefore, in order to determine the number of entities affected by this rule, the Department used all Federal contractors as a basis, regardless of the size of the government contract held. Based on data analyzed in the Federal Procurement Data System (fpds.gov), which compiles data about types of contractors, of all 186,536 unique Federal prime contractors, approximately 35% are ''small entities'' as defined by the Small Business Administration (SBA) size standards.[3]

[2] The Federal Funding Accountability and Transparency Act of 2006, Pub.L. 109–282, (Sept. 26, 2006), requires that the Office of Management and Budget establish a single searchable Web site, accessible by the public for free, that includes for each Federal award, among other things: (1) The name of the entity receiving the award; (2) the amount of the award; (3) information on the award including transaction type, funding agency, etc.; (4) the location of the entity receiving the award; and (5) a unique identifier of the entity receiving the award. *See* 31 U.S.C.A. § 6101 note. In compliance with this requirement, USASpending.gov was established.

[3] The Federal Procurement Data System compiles data regarding small business ''actions'' and small business ''dollars'' using the criteria employed by SBA to define ''small entities.'' In FY 2008, small business actions accounted for 50% of all Federal procurement action. However, deriving a percentage of contractors that are small using the ''action'' data would overstate the number of small contractors because contract actions reflect more than just contracts; they include modifications, blanket purchase agreement calls, task orders, and federal supply schedule orders. As a result, there are many more contract actions than there are contracts or contractors. Accordingly, a single small contractor might have hundreds of actions, *e.g.*, delivery or task orders, placed against its contract. These contract actions would be counted individually in the FPDS, but represent only one small business.

Also reflected in FPDS, in FY 2008, small business ''dollars'' accounted for 19% of all Federal dollars spent. However, deriving a percentage of contractors that are small using the ''dollars'' data would understate the number of small contractors. Major acquisitions account for a disproportionate share of the dollar amounts and are almost exclusively awarded to large businesses. For instance, Lockheed Martin was awarded $34 billion in contracts in FY 2008, which accounted for 6% of all Federal spending in that year. The top five federal contractors, all large businesses, accounted for over 20% of contract dollars in FY 2008. As a result, because the largest Federal contractors disproportionately represent ''dollars'' spent by the Federal government, the FPDB's data on small ''dollars'' spent understates the number of small entities with which the Federal government does business.

The Department concludes that the percentage of all Federal contractors that are ''small'' is probably somewhere between 19% and 50%, the two percentages derived from the FPDS figures on small ''actions'' and small ''dollars.'' The mean of these two percentages is approximately 35%, and the Department will use this figure above to estimate how many of all Federal contractors are ''small entities'' in SBA's terms.

Therefore, for the purposes of the RFA analysis, the Department estimates that this rule will affect 65,288 small Federal prime contractors.

As noted above, for the purposes of this analysis, the Department estimates that each prime contractor subcontracts a portion of the prime contract three times, on average. However, the community of prime contractors does not utilize a unique subcontractor for each subcontract; the Department assumes that subcontractors may be working under several prime contracts for either a single prime contractor or multiple prime contractors, or both. In addition, some subcontractors may also be holding prime contracts with the government, so they may already be counted as affected entities. Therefore, in order to determine the unique number of subcontractors affected by this rule, the Department estimates there are the same number of unique subcontractors as prime contractors, resulting in the estimate that 186,536 subcontractors are affected by this rule. Further, for the purposes of this analysis, the Department assumes that all subcontractors are ''small entities'' as defined by SBA size standards. Therefore, in order to estimate the total number of ''small'' contractors affected by this rule, the Department has added together the estimates for the number of small prime contractors calculated above (65,288) with the estimate of all subcontractors (186,536), all of which we assume are small. Accordingly, the Department estimates that 251,824 small prime and subcontractors are affected by this rule.

Based on this analysis, the Department concludes that this proposed rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act does not define either ''significant economic impact'' or ''substantial'' as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, ''what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact.'' *See A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,* Office of Advocacy, U.S. Small Business Administration at 17, available at *http://www.sba.gov.* As to economic impact, one important indicator is the cost of compliance in relation to revenue of the entity or the percentage of profits affected. *Id.* In this case, the Department has determined that the average cost of compliance with this rule in the first year for all Federal contractors and subcontractors will be $108.57. The Department concludes that this economic impact is not significant. Furthermore, the Department has determined that of the entire regulated community of all 186,536 prime contractors and all 186,536 subcontractors, 67% percent of that regulated community constitute small entities (251,824 small contractors divided by all 373,072 contractors). Although this figure represents a substantial number of federal contractors and subcontractors, because Federal contractors are derived from virtually all segments of the economy and across industries, this figure is a small portion of the national economy overall. *Id.* at 20 (''the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall''). Accordingly, the Department concludes that the rule does not impact a substantial number of small entities in a particular industry or segment of the economy. Therefore, under 5 U.S.C. 605, the Department concludes that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform

For purposes of the Unfunded Mandates Reform Act of 1995, this proposed rule would not include any Federal mandate that might result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100 million in any one year.

Paperwork Reduction Act

Certain sections of this proposed rule, including § 471.11(a) and (b), contain information collection requirements for purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA). As required by the PRA, the Department has submitted a copy of these sections to OMB for its review.

The proposed rule requires contractors to post notices and cooperate with any investigation into a failure to comply with the requirements of part 471 as the result of a complaint or a compliance evaluation. It also permits employees to file complaints with the Department alleging that a contractor has failed to comply with those requirements. The application of the PRA to those requirements is discussed below.

The proposed rule imposes certain minimal burdens associated with the posting of the employee notice poster required by the Executive Order and § 471.2(a). As noted in § 471.2(e), the Department will supply the notice, and contractors will be permitted to post exact duplicate copies of the notice. Under the regulations implementing the PRA, ''[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public'' is not considered a ''collection of information'' under the Act. *See* 5 CFR 1320.3(c)(2). Therefore, the posting requirement is not subject to the PRA.

The proposed rule would also impose certain burdens on the contractor associated with cooperating with an investigation into failure to comply with the requirements of part 471 as the result of a complaint or in connection with a compliance evaluation. The regulations implementing the PRA exempt any information collection requirements imposed by an administrative agency during the conduct of an administrative action against specific individuals or entities. *See* 5 CFR 1320.4. Once the agency opens a case file or equivalent about a particular party, this exception applies during the entire course of the investigation, before or after formal charges or complaints are filed or formal administrative action is initiated. *Id.* Therefore, this exemption would apply to the Department's investigation of complaints alleging violations of the Order or this proposed rule as well as compliance evaluations.

As for the burden hour estimate for employees filing complaints, we estimate, based on the experience of the Office of Federal Contract Compliance Programs (OFCCP) administering other laws applicable to Federal contractors, that it will take an average of 1.28 hours for such a complainant to compose a complaint containing the necessary information and to send that complaint to the Department. This number is also consistent with the burden estimate for filing a complaint under E.O. 13201 and the now-revoked part 470 regulations.

The Department has estimated it would receive a total of 50 employee complaints in any given year, which is significantly larger than the estimate contained its most recent PRA submission for E.O. 13201. In that

submission, the Department estimated it would receive 20 employee complaints. This number itself had been revised downwards because the Department never received any employee complaints pursuant to the now-revoked 29 CFR part 470 regulations. Because the applicability of the proposed rule and E.O. 13496 is greater in scope than the now-revoked part 470 and E.O. 13201 in terms of geography (the now-revoked part 470 regulations only applied to states without right-to-work laws, whereas the proposed rule applies nationwide), the Department has revised upwards its estimate of employee complaints under the proposed rule from 20 to 50. In addition, E.O. 13201 required the posting of a notice containing information of interest to only a few—employees who may have objected to paying union dues or fees for non-representational activities—while the information in the poster required by this regulation should be of interest to all employees.

The Department calculated the estimates of annualized cost to respondents for the hour burdens associated with this collection of information. Specifically, it used the data from the Bureau of Labor Statistics (BLS) National Compensation Survey: Occupation Wages in the United States (NCS), 2007 (Bulletin 2704), to calculate the cost of the burden hours associated with employee complaints. The NCS Bulletin indicates that the average hourly wage for all workers during 2007, the most recent year available, was $19.88 per hour. Therefore, we estimate that the cost to a complainant of filing a complaint under E.O. 13496 will be $25.92, or $25.45 ($19.88 × 1.28) + $0.47 for postage and envelope ($0.44 postage and $0.03 for the envelope). We further estimate, as stated above, that 50 individual complaints will be filed each year. Therefore, we project that this collection of information will impose on employees who file complaints a total annual cost burden of $1,296.00 ($25.92 per complaint × 50 complaints).

Proposed § 471.3(b) permits contracting departments to submit written requests for an exemption from the obligations of the Executive Order (waiver request) as to particular contracts or classes of contracts under specified circumstance. The PRA does not cover the costs to the Federal government for the submission of waiver requests by contracting agencies or departments or for the processing of waiver requests by the Department of Labor. The regulations implementing the PRA define the term ''burden,'' in pertinent part, as ''the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.'' 5 CFR 1320.3(b)(1). The definition of the term ''person'' in the same regulations includes ''an individual, partnership, association, corporation (including operations of government-owned contractor-operated facilities), business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision.'' 5 CFR 1320.3(k). It does not include the Federal government or any branch, political subdivision, or employee thereof. Therefore, the cost to the Federal government for the submission of waiver requests by contracting agencies and departments need not be taken into consideration.

The Department invites the public to comment on whether each of the proposed collections of information: (1) Ensures that the collection of information is necessary to the proper performance of the agency, including whether the information will have practical utility; (2) estimates the projected burden, including the validity of the methodology and assumptions used, accurately; (3) enhances the quality, utility, and clarity of the information to be collected; and (4) minimizes the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses). Comments must be submitted by September 2, 2009 to: Desk Officer for the Department of Labor, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503.

Executive Order 13132 (Federalism)

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that the proposed rule does not have ''federalism implications.'' The employee notice required by the Executive Order and part 471 must be posted only by employers covered under the NLRA. Therefore, the proposed rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

The Department certifies that this Proposed Rule does not impose substantial direct compliance costs on Indian tribal governments.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Request for Comments

This proposed rule would implement Executive Order 13496. The Department invites comments about the NPRM from interested parties, including current and potential Government contractors, subcontractors, and vendors, and current and potential employees of such entities; labor organizations; public interest groups; Federal contracting agencies; and the public.

List of Subjects in 29 CFR Part 471

Administrative practice and procedure, Government contracts, employee rights, Labor unions.

Text of Proposed Rule

Accordingly, a new Subchapter D, consisting of Part 471, is proposed to be added to 29 CFR Chapter IV to read as follows:

Subchapter D. Notification of Employee Rights Under Federal Labor Laws

PART 471—OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS; NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec.

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

Subpart C—Ancillary Matters

Authority: 40 U.S.C. 101 *et seq.*; Executive Order 13496, 74 FR 6107 (February 4, 2009); Secretary's Order 01–2008, 73 FR 32424 (June 6, 2008).

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

§ 471.1 What definitions apply to this part?

Assistant Secretary means the Assistant Secretary for Employment Standards, United States Department of Labor, or his or her designee.

Collective bargaining agreement means an agreement, as defined in the Federal Service Labor-Management Relations Statute, entered into by an agency and the exclusive representative of employees in an appropriate unit to set terms and conditions of employment of those employees.

Construction means the construction, rehabilitation, alteration, conversion, extension, demolition, weatherization, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term construction also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

Construction work site means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair, and any temporary location or facility at which a contractor or subcontractor meets a demand or performs a function relating to the contract or subcontract.

Contract means, unless otherwise indicated, any Government contract or subcontract.

Contracting agency means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, that enters into contracts.

Contractor means, unless otherwise indicated, a prime contractor or subcontractor.

Department means the U.S. Department of Labor.

Employee notice clause means the contract clause that Government contracting departments and agencies must include in all Government contracts and subcontracts pursuant to Executive Order 13496 and this part.

Government means the Government of the United States of America.

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale, or use of personal property or non-personal services. The term ''personal property,'' as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term ''non-personal services'' as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federal financial assistance, as defined in 29 CFR 31.2.

Labor organization means any organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

Modification of a contract means any alteration in the terms and conditions of that contract, including amendments, renegotiations, and renewals.

Order or *Executive Order* means Executive Order 13496 (74 FR 6107, January 30, 2009).

Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

Prime contractor means any person holding a contract with a contracting agency, and, for the purposes of subparts B and C of this part, includes any person who has held a contract subject to the Executive Order and this part.

Related rules, regulations, and orders of the Secretary of Labor, as used in § 471.2 of this part, means rules, regulations, and relevant orders of the Assistant Secretary for Employment Standards, or his or her designee, issued pursuant to the Executive Order or this part.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Simplified acquisition threshold means the dollar amount set by Congress under the Office of Federal Policy Procurement Act. As indicated in this Part, government contracts valued below the dollar amount set in the Simplified Acquisition Threshold are not subject to this Part.

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or non-personal services that, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

Subcontractor means any person holding a subcontract and, for the purposes of subparts B and C of this part, any person who has held a subcontract subject to the Executive Order and this part.

Union means a labor organization as defined in paragraph (k) of this section.

United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

§ 471.2 What employee notice clause must be included in Government contracts?

(a) *Government contracts.* With respect to all contracts covered by this part, Government contracting departments and agencies shall, to the extent consistent with law, include the language set forth in Appendix A to Subpart A of Part 471 in every Government contract, other than collective bargaining agreements as defined in § 471.1 and purchase orders under the simplified acquisition threshold as defined in § 471.1.

(b) *Inclusion by reference not permitted.* The employee notice clause must be quoted verbatim in a contract, subcontract, or purchase order. The clause may not be made part of the contract, subcontract, or purchase order by words of incorporation or inclusion.

(c) *Adaptation of language.* Whenever the Assistant Secretary finds that an Act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions necessary to achieve the purposes of Executive Order 13496 and this part, the Assistant Secretary promptly shall issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

(d) *Obtaining employee notice poster.* The required employee notice poster, printed by the Department, will be provided by the Federal contracting agency or may be obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, or from any field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs. A copy of the poster may also be downloaded from the Office of Labor-Management Standards Web site at *http://www.olms.dol.gov.* Additionally, contractors may reproduce and use exact duplicate copies of the Department's official poster.

(e) *Electronic postings of employee notice poster.* A contractor or subcontractor that customarily posts notices to employees electronically must also post the required notice electronically. Such contractors or subcontractors satisfy the electronic posting requirement by displaying prominently on any Web site that is maintained by the contractor or subcontractor and customarily used for employee notices, whether external or internal, a link to the Department of Labor's Web site that contains the full text of the poster. The language that must constitute the link is contained in Appendix B to Subpart A to Part 471.

§ 471.3 What exceptions apply and what exemptions are available?

(a) *Exceptions for specific types of contracts.* The requirements of this part do not apply to

(1) Collective bargaining agreements as defined in § 471.1.

(2) Government contracts that involve purchases below the simplified acquisition threshold as defined in § 471.1. Therefore, the employee notice clause need not be included in contracts for purchases below that threshold, provided that:

(i) No agency or contractor is permitted to procure supplies or services in a way designed to avoid the applicability of the Order and this part; and

(ii) The employee notice clause must be included in contracts and subcontracts for indefinite quantities, unless the contracting agency or contractor has reason to believe that the amount to be ordered in any year under such a contract or subcontract will be less than the simplified acquisition threshold.

(3) Government contracts resulting from solicitations issued prior to the date of the effective date of this rule.

(b) *Exemptions for certain contracts.* The Deputy Assistant Secretary for Labor-Management Programs may exempt a contracting agency department or agency or groups of departments or agencies from the requirements of this part with respect to a particular contract or subcontract or any class of contracts or subcontracts when the Deputy Assistant Secretary finds that:

(1) The application of any of the requirements of this part would not serve its purposes or would impair the ability of the Government to procure goods or services on an economical and efficient basis; or

(2) Special circumstances require an exemption in order to serve the national interest.

(c) *Procedures for requesting an exemption and withdrawals of exemptions.* Requests for exemptions under this subsection from an agency or department must be in writing, and must be directed to the Deputy Assistant Secretary for Labor-Management Programs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5603, Washington, DC 20210. The Deputy Assistant Secretary for Labor-Management Programs may withdraw an exemption granted under this section when, in the Deputy Assistant Secretary's judgment, such action is necessary or appropriate to achieve the purposes of this part.

§ 471.4 What employers are not covered under this part?

(a) The following employers are excluded from the definition of ''employer'' in the National Labor Relations Act (NLRA), and are not covered by the requirements of this part:

(1) The United States or any wholly owned Government corporation;

(2) Or any Federal Reserve Bank;

(3) Or any State or political subdivision thereof, or any person subject to the Railway Labor Act;

(4) Or any labor organization (other than when acting as an employer);

(5) Or anyone acting in the capacity of officer or agent of such labor organization.

(b) Additionally, employers exclusively employing workers who are excluded from the definition of ''employee'' under the NLRA are not covered by the requirements of this part. Those excluded employees are employed:

(1) As agricultural laborers;

(2) In the domestic service of any family or person at his home;

(3) By his parent or spouse;

(4) As an independent contractor;

(5) As a supervisor as defined under the NLRA; or

(6) By an employer subject to the Railway Labor Act.

Appendix A to Subpart A of Part 471—Text of Employee Notice Clause

''1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The ''Secretary's Notice'' shall include the following information:

''NOTICE TO EMPLOYEES

RIGHTS OF EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT

''It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

''Under federal law, you have the right to:

Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

Form, join or assist a union.

Bargain collectively through a duly selected union for a contract with your employer setting your wages, benefits, hours, and other working conditions.

Discuss your terms and conditions of employment with your co-workers or a union; join other workers in raising work-related complaints with your employer, government agencies, or members of the public; and seek and receive help from a union subject to certain limitations.

Take action with one or more co-workers to improve your working conditions, including attending rallies on non-work time, and leafleting on non-work time in non-work areas.

Strike and picket, unless your union has agreed to a no-strike clause and subject to certain other limitations. In some circumstances, your employer may permanently replace strikers.

Choose not to do any of these activities, including joining or remaining a member of a union.

''It is illegal for your employer to:

Prohibit you from soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas.

Question you about your union support or activities.

Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in other activity for mutual aid and protection, or because you choose not to engage in any such activity.

Threaten to close your workplace if workers choose a union to represent them.

Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances, for example, as where doing so might interfere with patient care.

Spy on or videotape peaceful union activities and gatherings or pretend to do so.

It is illegal for a union or for the union that represents you in bargaining with your employer to: discriminate or take other adverse action against you based on whether you have joined or support the union.

''If your rights are violated:

Illegal conduct will not be permitted. The National Labor Relations Board (NLRB), an agency of the United States government, will protect your right to a free choice concerning union representation and collective bargaining and will prosecute violators of the National Labor Relations Act. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits and may order an employer or union to cease violating the law. The NLRB can only act, however, if it receives information of unlawful behavior within six months.

''If you believe your rights or the rights of others have been violated, you must contact the NLRB within six months of the unlawful treatment. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: *http://www.nlrb.gov.*

''Click on the NLRB's page titled About Us, which contains a link, Locating Our Offices. You can also contact the NLRB by calling toll-free: 1–866–667–NLRB (6572) or (TTY) 1–866–315–NLRB (1–866–315–6572) for hearing impaired.

''This is an official Government Notice and must not be defaced by anyone.

''2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

''3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13496 of January 30, 2009. Such other sanctions or remedies may be imposed as are provided in Executive Order 13496 of January 30, 2009, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

''4. The contractor will include the provisions of paragraphs (1) through (4) herein in every subcontract or purchase order entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: Provided, however, if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.''

Appendix B to Subpart A of Part 471—Electronic Link Language

RIGHTS OF EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT

''It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.''

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

§ 471.10 How will the Department determine whether a contractor is in compliance with Executive Order 13496 and this part?

(a) The Deputy Assistant Secretary for Federal Contract Compliance may conduct a compliance evaluation to determine whether a contractor holding a covered contract is in compliance with the requirements of this part. Such an evaluation may be limited to compliance with this part or may be included in a compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the Department.

(b) During such an evaluation, a determination will be made whether:

(1) The employee notice required by § 471.2(a) is posted in conspicuous places in and about each of the contractor's establishments and/or construction work sites, including all places where notices to employees are customarily posted both physically and electronically; and

(2) The provisions of the employee notice clause are included in government contracts, subcontracts or purchase orders entered into on or after [THE EFFECTIVE DATE OF FINAL RULE], or that the government contracts, subcontracts or purchase orders have been exempted under § 471.3(b).

(c) The results of the evaluation will be documented in the evaluation record, which will include findings regarding the contractor's compliance with the requirements of Executive Order 13496 and this part and, as applicable, conciliation efforts made, corrective action taken and/or enforcement recommended under § 471.13.

§ 471.11 What are the procedures for filing and processing a complaint?

(a) *Filing complaints.* An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice as required by Executive Order 13496 and this part; and/or has failed to include the employee notice clause in subcontracts or purchase orders. Complaints may be filed with the Office of Labor-Management Standards (OLMS) or the Office of Federal Contract Compliance Programs (OFCCP) at 200 Constitution Avenue, NW., Washington, DC 20210, or with any OLMS or OFCCP field office.

(b) *Contents of complaints.* The complaint must be in writing and must include the name, address, and telephone number of the employee who filed the complaint (the complainant), the name and address of the contractor alleged to have violated Executive Order 13496 and this part, an identification of the alleged violation and the establishment or construction work site where it is alleged to have occurred, and any other pertinent information that will assist in the investigation and

resolution of the complaint. The complainant must sign the complaint.

(c) *Complaint investigations.* In investigating complaints filed with the Department under paragraph (a) of this section, the Deputy Assistant Secretary for Federal Contract Compliance will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of Executive Order 13496 and this part, and, as applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended.

§ 471.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?

(a) If any complaint investigation or compliance evaluation indicates a violation of Executive Order 13496 or this part, the Deputy Assistant Secretary for Federal Contract Compliance will make reasonable efforts to secure compliance through conciliation.

(b) The contractor must correct the violation found by the Department (for example, by posting the required employee notice, and/or by amending its subcontracts or purchase orders with subcontractors to include the employee notice clause), and must commit, in writing, not to repeat the violation, before the contractor may be found to be in compliance with Executive Order 13496 or this part.

(c) If a violation cannot be resolved through conciliation efforts, the Deputy Assistant Secretary for Federal Contract Compliance will refer the matter to the Deputy Assistant Secretary for Labor-Management Programs, who may proceed in accordance with § 471.13.

(d) For reasonable cause shown, the Deputy Assistant Secretary for Labor-Management Programs may reconsider, or cause to be reconsidered, any matter on his or her own motion or pursuant to a request.

§ 471.13 Under what circumstances, and how, will enforcement proceedings under Executive Order 13496 be conducted?

(a) *General.* (1) Violations of Executive Order 13496 and this part may result in administrative proceedings to enforce the Order and the part. The bases for a finding of a violation may include, but are not limited to:

(i) The results of a compliance evaluation;

(ii) The results of a complaint investigation;

(iii) A contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted; or

(iv) A contractor's refusal to cooperate with the compliance evaluation or complaint investigation, including failure to provide information sought during those procedures.

(v) A contractor's refusal to take such action with respect to a subcontract as is directed by the Deputy Assistant Secretary for Federal Contract Compliance or the Deputy Assistant Secretary for Labor-Management as a means of enforcing compliance with the provision of this part.

(vi) A subcontractor's refusal to adhere to the requirements of this part regarding employee notice or inclusion of the contract clause in its subcontracts.

(2) If a determination is made by the Deputy Assistant Secretary for Federal Contract Compliance that the Executive Order or the regulations in this part have been violated, and the violation has not been corrected through conciliation, he will refer the matter to the Deputy Assistant Secretary for Labor-Management Programs for enforcement consideration. The Deputy Assistant Secretary for Labor-Management Programs may refer the matter to the Solicitor of Labor for institution of administrative enforcement proceedings.

(b) *Administrative enforcement proceedings.* (1) Administrative enforcement proceedings will be conducted under the control and supervision of the Solicitor of Labor, under the hearing procedures set forth in 29 CFR part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.

(2) The administrative law judge will certify his or her recommended decision issued pursuant to 29 CFR 18.57 to the Assistant Secretary. The decision will be served on all parties and amici.

(3) Within 25 days (10 days in the event that the proceeding is expedited) after receipt of the administrative law judge's recommended decision, either party may file exceptions to the decision. Exceptions may be responded to by the other parties within 25 days (7 days if the proceeding is expedited) after receipt. All exceptions and responses must be filed with the Assistant Secretary.

(4) After the expiration of time for filing exceptions, the Assistant Secretary may issue a final administrative order, or may make such other disposition of the matter as he or she finds appropriate. In an expedited proceeding, unless the Assistant Secretary issues a final administrative order within 30 days after the expiration of time for filing exceptions, the administrative law judge's recommended decision will become the final administrative order. If the Assistant Secretary determines that the contractor has violated Executive Order 13496 or the regulations in this part, the final administrative order will order the contractor to cease and desist from the violations, require the contractor to provide appropriate remedies, or, subject to the procedures in § 471.14, impose appropriate sanctions and penalties, or any combination thereof.

§ 471.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?

(a) After a final decision on the merits has been issued and before imposing the sanctions and penalties described in paragraph (d) of this section, the Assistant Secretary will consult with the affected contracting agencies, and provide the heads of those agencies the opportunity to respond and provide written objections.

(b) If the contracting agency provides written objections, those objections must include a complete statement of reasons for the objections, among which reasons must be a finding that, as applicable, the completion of the contract, or further contracts or extensions or modifications of existing contracts, is essential to the agency's mission.

(c) The sanctions and penalties described in this section, however, will not be imposed if:

(1) The head of the contracting agency, or his or her designee, continues to object to the imposition of such sanctions and penalties, or

(2) The contractor has not been afforded an opportunity for a hearing.

(d) In enforcing Executive Order 13496 and this part, the Assistant Secretary may:

(1) Direct a contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated or suspended, any contract or any portions thereof, for failure of the contractor to comply with its contractual provisions as required by section 7(a) of Executive Order 13496 and the regulations in this part. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance.

(2) Issue an order of debarment under section 7(b) of Executive Order 13496 providing that one or more contracting agencies must refrain from entering into further contracts, or extensions or other modification of existing contracts, with any non-complying contractor.

(3) Issue an order of debarment under section 7(b) of Executive Order 13496 providing that no contracting agency may enter into a contract with any non-complying subcontractor.

(e) Whenever the Assistant Secretary has exercised his or her authority pursuant to paragraph (d) of this section, the contracting agency must report the actions it has taken to the Assistant Secretary within such time as the Assistant Secretary will specify.

(f) Periodically, the Assistant Secretary will publish and distribute, or cause to be published and distributed, to all executive agencies a list of the names of contractors and subcontractors that have, in the judgment of the Assistant Secretary under § 471.13(b)(4) of this part, failed to comply with the provisions of the Executive Order and this part, or of related rules, regulations, and orders of the Secretary of Labor, and as a result have been declared ineligible for future contracts or subcontracts under the Executive Order and the regulations in this part.

§ 471.15 Under what circumstances must a contractor be provided the opportunity for a hearing?

Before the Assistant Secretary takes the following action, a contractor or subcontractor must be given the opportunity for a hearing before the Assistant Secretary:

(a) Issues an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under sections 7(a) or (b) of Executive Order 13496 and § 471.14(d)(1) or (2) of this part; or

(b) Includes the contractor on a published list of non-complying contractors under section 7(c) of Executive Order 13496 and § 471.14(f) of this part.

§ 471.16 Under what circumstances may a contractor be reinstated?

Any contractor or subcontractor debarred from or declared ineligible for further contracts or subcontracts under Executive Order 13496 and this part may request reinstatement in a letter to the Assistant Secretary. If the Assistant Secretary finds that the contractor or subcontractor has come into compliance with Executive Order 13496 and this part and has shown that it will carry out Executive Order 13496 and this part, the contractor or subcontractor may be reinstated.

Subpart C—Ancillary Matters

§ 471.20 What authority under this part or Executive Order 13496 may the Secretary delegate, and under what circumstances?

Section 11 of Executive Order 13496 grants the Secretary the right to delegate any of his/her functions or duties under the Order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

§ 471.21 Who will make rulings and interpretations under Executive Order 13496 and this part?

Rulings under or interpretations of Executive Order 13496 or the regulations contained in this part will be made by the Assistant Secretary or his or her designee.

§ 471.22 What actions may the Assistant Secretary take in the case of intimidation and interference?

The sanctions and penalties contained in § 471.14 of this part may be exercised by the Assistant Secretary against any contractor or subcontractor who fails to take all necessary steps to ensure that no person intimidates, threatens, or coerces any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, complaint investigation, hearing, or any other activity related to the administration or enforcement of Executive Order 13496 or this part.

§ 471.23 What other provisions apply to this part?

(a) The regulations in this part implement Executive Order 13496 only, and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Consistent with section 9 of Executive Order 13496, each contracting department and agency must cooperate with the Assistant Secretary, the Deputy Assistant Secretary for Labor-Management Programs, and/or the Deputy Assistant Secretary for Federal Contract Compliance, and must provide such information and assistance as the Assistant Secretary or Deputy Assistant Secretary may require, in the performance of his or her functions under the Executive Order and the regulations in this part.

(c)(1) Consistent with section 15 of Executive Order 13496, nothing in this subpart shall be construed to impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) Consistent with section 15 of Executive Order 13496, nothing contained in the Executive Order or this part, or promulgated pursuant to Executive Order 13496 or this part, is intended to create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Neither Executive Order 13496 nor this part creates any such right or benefit.

Signed in Washington, DC, July 20, 2009.

Shelby Hallmark,

Acting Assistant Secretary for Employment Standards.

John Lund,

Deputy Assistant Secretary, Office of Labor-Management Standards.

Lorenzo D. Harrison,

Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs.

[FR Doc. E9–17577 Filed 7–31–09; 8:45 am]

BILLING CODE P

EXECUTIVE ORDER
13495
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NONDISPLACEMENT OF QUALIFIED WORKERS
UNDER SERVICE CONTRACTS

When a service contract expires, and a follow-on contract is awarded for the same service, at the same location, the successor contractor or its subcontractors often hires the majority of the predecessor's employees. On some occasions, however, a successor contractor or its subcontractors hires a new work force, thus displacing the predecessor's employees.

The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover work force reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in Federal Government procurement, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the

award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided. Nothing in this order shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law of the United States.

Sec. 2. Definitions.

(a) "Service contract" or "contract" means any contract or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 351 *et seq.*, and its implementing regulations.

(b) "Employee" means a service employee as defined in the Service Contract Act of 1965, 41 U.S.C. 357(b).

Sec. 3. Exclusions. This order shall not apply to:

(a) contracts or subcontracts under the simplified acquisition threshold as defined in 41 U.S.C. 403;

(b) contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48c;

(c) guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts with sheltered workshops employing the severely handicapped as described in section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103-329;

(d) agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act, 20 U.S.C. 107; or

(e) employees who were hired to work under a Federal service contract and one or more nonfederal service contracts

as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

Sec. 4. Authority to Exempt Contracts. If the head of a contracting department or agency finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of such department or agency may exempt its department or agency from the requirements of any or all of the provisions of this order with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders.

Sec. 5. Contract Clause. The following contract clause shall be included in solicitations for and service contracts that succeed contracts for performance of the same or similar work at the same location:

"NONDISPLACEMENT OF QUALIFIED WORKERS

"(a) Consistent with the efficient performance of this contract, the contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in

paragraph (b) there shall be no employment opening under this contract, and the contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

"(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors (1) may employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 357(b), and (3) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

"(c) In accordance with Federal Acquisition Regulation 52.222-41(n), the contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts

either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives.

"(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in Executive Order (No.) _____, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

"(e) In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the subcontractor will provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph 5(c), above. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States."

Sec. 6. Enforcement. (a) The Secretary of Labor (Secretary) is responsible for investigating and obtaining compliance with this order. In such proceedings, the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Secretary also may provide that where a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further Government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity for a hearing.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding the requirement of the contract clause prescribed by section 5 of this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under this order. To the extent practicable, such regulations shall favor the resolution of disputes by efficient and informal alternative dispute resolution methods. The Secretary shall, in consultation with the Federal Acquisition Regulatory Council, issue regulations, within 180 days of the date of this order, to the extent permitted by law, to implement the requirements of this order. The Federal Acquisition Regulatory Council shall issue, within

180 days of the date of this order, to the extent permitted by law, regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal solicitations and contracts subject to this order.

Sec. 7. Revocation. Executive Order 13204 of February 17, 2001, is revoked.

Sec. 8. Severability. If any provision of this order, or the application of such provision or amendment to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

Sec. 9. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. This order is not intended, however, to preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq*.

Sec. 10. Effective Date. This order shall become effective immediately and shall apply to solicitations issued on or after the effective date for the action taken by the Federal Acquisition Regulatory Council under section 6(b) of this order.

THE WHITE HOUSE,

January 30, 2009.

[FR Doc. 2009-02484 Filed 02/03/2009 at 8:45 am; Publication Date: 02/04/2009]

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 22, and 52

[FAC 2005–29; FAR Case 2007–013; Docket 2008–0001; Sequence 1]

RIN 9000–AK91

Federal Acquisition Regulation; FAR Case 2007–013, Employment Eligibility Verification

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require certain contractors and subcontractors to use the E-Verify system administered by the Department of Homeland Security, U.S. Citizenship and Immigration Services, as the means of verifying that certain of their employees are eligible to work in the United States.

DATES: *Effective Date:* January 15, 2009.

Applicability Date: Contracting Officers should modify, on a bilateral basis, existing indefinite-delivery/indefinite-quantity contracts in accordance with FAR 1.108(d)(3) to include the clause for future orders if the remaining period of performance extends at least six months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–29, FAR case 2007–013.

SUPPLEMENTARY INFORMATION:

A. Background and Purpose

Employment Eligibility Verification Requirements

As explained more fully in the proposed rule, the Federal Property and Administrative Services Act of 1949 (FPASA), authorizes the President to ''prescribe policies and directives'' governing procurement policy ''that the President considers necessary to carry out'' that Act and that are ''consistent'' with the Act's purpose of ''provid[ing] the Federal Government with an economical and efficient'' procurement system. 40 U.S.C. 101, 121. On June 6, 2008, the President exercised this authority and the authority vested in him under section 301 of Title 3 of the United States Code in issuing Executive Order 13465 ''Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System.'' 73 FR 33285, Jun. 11, 2008, amending Executive Order 12989 (signed February 13, 1996, published February 15, 1996 at 61 FR 6091), previously amended by Executive Order 13286 (signed February 28, 2003, published March 5, 2003 at 68 FR 10619). As amended, Executive Order 12989 now provides, at Section 5.(a), that ''Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of: (i) All persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.'' The Executive Order also requires, at Section 5.(c), that the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration ''amend the Federal Acquisition Regulation to the extent necessary and appropriate to implement the * * * employment eligibility verification responsibility * * * assigned to heads of departments and agencies under this order.''

On June 9, 2008, the Secretary of Homeland Security designated the ''E-Verify system, modified as necessary and appropriate to accommodate the policy set forth in the Executive Order * * * as the electronic employment eligibility verification system to be used by Federal contractors.'' (See 73 FR 33837, Jun. 13, 2008.)

This final rule responds to these requirements, and the Secretary's designation, by amending the FAR to require certain Federal contractors and subcontractors to use the E-Verify system (E-Verify) administered by the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) as the means of verifying that certain of their employees are authorized to work in the United States.

E-Verify Program

The E-Verify system, formerly known as the Basic Pilot/Employment Eligibility Verification Program, is an Internet-based system operated by DHS USCIS, in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees. E-Verify represents the best means currently available for employers to verify the work authorization of their employees.

Before an employer can use the E-Verify system, the employer must enroll in the program and agree to the E-Verify Memorandum of Understanding (MOU) required for program participants. The terms of the MOU are established by USCIS and are not negotiated with each participant. In consenting to the MOU, employers agree to abide by current legal hiring procedures and to ensure that no employee will be unfairly discriminated against in the use of the E-Verify program. Violation of the terms of the MOU by the employer is grounds for termination of the employer's participation in the E-Verify program.

Current law (8 U.S.C. 1324a(b)) requires all employers in the United States to complete an Employment Eligibility Verification Form (Form I–9) for each newly hired employee to verify each employee's identity and employment eligibility. Under this final rule, Federal contractors will additionally enter the worker's identity and employment eligibility information into the E-Verify system, which checks that information against information contained in SSA, USCIS and other Government databases.

SSA first verifies that the name, social security number (SSN), and date of birth are correct and, if the employee has stated that he or she is a U.S. citizen, confirms U.S. citizen status through its databases. If the system confirms identity and U.S. citizenship, and there are no other indicators that the information is not correct, SSA confirms employment-eligibility. USCIS also verifies through database checks that any non-U.S. citizen employee is in an employment-authorized immigration status.

If the information provided by the worker matches the information in the SSA and USCIS records, no further action will be required. E-Verify procedures require only that the employer record on the Form I–9 the verification identification number and the result obtained from the E-Verify query or print a copy of the transaction record and retain it with the Form I–9.

If SSA is unable to verify information presented by the worker, the employer will receive an ''SSA Tentative Nonconfirmation'' notice. Similarly, if USCIS is unable to verify information presented by the worker, the employer will receive a ''DHS Tentative Nonconfirmation'' notice. Employers can receive a tentative nonconfirmation notice for a variety of reasons, including inaccurate entry of information by the employer into the E-Verify Web site, and changes in the worker's name or immigration status that the worker has not updated in the SSA database searched by the E-Verify system. If the individual's information does not match the SSA or USCIS records, the employer must provide the worker with a written notice generated by the E-Verify system, called a ''Notice to Employee of Tentative Nonconfirmation''. The worker must then indicate on the notice whether he or she contests or does not contest the finding reflected in the tentative nonconfirmation that he or she appears unauthorized to work, and both the worker and the employer must sign the notice.

If the worker chooses to contest the tentative nonconfirmation, the employer must print a second notice generated by the E-Verify system, called a ''Referral Letter,'' which contains information about resolving the tentative nonconfirmation, as well as the contact information for SSA or USCIS, depending on which agency was the source of the tentative nonconfirmation. The worker then has eight Federal Government workdays to visit an SSA office or call USCIS to try to resolve the discrepancy. Under the E-Verify MOU, if the worker contests the tentative nonconfirmation, the employer is prohibited from terminating or otherwise taking adverse action against the worker while he or she awaits a final resolution from the Federal Government agency. If the worker fails to contest the tentative nonconfirmation, or if SSA or USCIS is unable to resolve the discrepancy, the employer will receive a notice of final nonconfirmation and the worker's employment may be terminated.

Participation in E-Verify does not exempt the employer from the responsibility to complete, retain, and make available for inspection Forms I–9 that relate to its employees, or from other requirements of applicable regulations or laws. However, the following modified requirements apply by reason of the employer's participation in E-Verify: (1) Identity documents used for verification purposes must have photos (except as discussed below with respect to accommodations); (2) if an employer obtains confirmation of the identity and employment eligibility of an individual in compliance with the terms and conditions of E-Verify, a rebuttable presumption is established that the employer has not violated section 274A(a)(1)(A) of the Immigration and Nationality Act (INA) with respect to the hiring of the individual; (3) the employer must notify DHS if it continues to employ any employee for whom the employer has received a final nonconfirmation, and the employer is subject to a civil money penalty between $500 and $1,000 for each failure to notify DHS of continued employment following a final nonconfirmation; (4) if an employer continues to employ an employee after receiving a final nonconfirmation and that employee is subsequently found to be an unauthorized alien, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien in violation of Immigration and Nationality Act (INA) section 274A(a); and (5) no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the confirmation system.

Further information on registration for and use of E-Verify can be obtained via the Internet at *http://www.dhs.gov/E-Verify*.

E-Verify Basis and Development

1. Legislative History

Laws pertaining to the control of illegal immigration have received serious attention from Congress and the Executive Branch since at least the early 1950s. Chief among the legislative approaches to these problems has been the proposed establishment of penalties for the employment of undocumented aliens and related laws requiring the verification of employment authorization. See INA Section 274(a), codified at 8 U.S.C. 1324(a). The House of Representatives Report filed with the Immigration Reform and Control Act of 1986 (IRCA), found at 1986 U.S. Code Cong. and Adm. News, p. 5649, clearly describes the basis for that legislation:

> This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions. The bill would prohibit the employment of aliens who are unauthorized to work in the United States because they either entered the country illegally, or are in an immigration status which does not permit employment. U.S. employers who violate this prohibition would be subject to civil and criminal penalties. Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment. The logic of this approach has been recognized and backed by the past four administrations * * *. Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens. While there is no doubt that many who enter illegally do so for the best of motives—to seek a better life for themselves and their families—immigration must proceed in a legal, orderly and regulated fashion. As a sovereign nation, we must secure our borders.

H.R. Rep. No. 99–682(I), 99th Cong., 1st Sess. 46 (1986), 1986 U.S. Code Cong. & Admin. News, p. 5649. INA Section 274A, as established by IRCA, thus prohibits any ''person or other entity'' from knowingly hiring, or knowingly continuing to employ, any unauthorized alien. INA section 274A(b) provides for an ''Employment Verification System,'' which requires that employers attest, after examination of documentation presented by the employee, that the person being hired, recruited or referred for employment is not an unauthorized alien. INA section 274A also provides for the assessment of civil monetary penalties and cease and desist orders against any employer that has knowingly hired or continued to employ an unauthorized alien, or that has failed to comply with the employment verification system mandated by INA section 274A(b). 8 U.S.C. 1324a(e)(4)–(e)(5).

Employers who engage in a ''pattern or practice'' of violating the prohibition against illegal employment of unauthorized workers may face criminal sanctions. INA section 274A(f), 8 U.S.C. 1324a(f). DHS U.S. Immigration and Customs Enforcement (ICE) investigates complaints of potential violations of INA section 274A by inspecting employment eligibility verification forms maintained by employers with respect to their current and former employees, and compelling the production of evidence or the attendance of witnesses by subpoena. 8 U.S.C. 1324a(e)(2); 8 CFR 274a.2(b)(2).

Development of E-Verify

E-Verify provides a modern means of verifying employment authorization information in addition to the traditional I–9 process. When Congress established the paper-based employment verification system in 8 U.S.C. 1324a(b), it directed the President to evaluate that system's security and efficacy and implement necessary changes, subject to congressional oversight. 8 U.S.C. 1324a(d). Congress also authorized the President to establish demonstration projects designed to strengthen the employment verification system. 8 U.S.C. 1324a(d)(4).

The first demonstration project, in 1992, included the Telephone Verification System (TVS) pilot program—a predecessor to the E-Verify system. 69 Interpreter Releases 702 (June 8, 1992); 515 (Apr. 27, 1992). In 1996, Congress established the Basic Pilot program—now called E-Verify—as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Public Law 104–208, Sections 401–405, 110 Stat. 3009–655–3009–666 (1996) (8 U.S.C. 1324a note).

On August 10, 2007, the Acting Director of the Office of Management and Budget instructed agencies to encourage their existing and future contractors to use E-Verify and attached a letter that DHS had sent to its major contractors encouraging their use of E-Verify and emphasizing E-Verify's ability to help contractors comply with immigration law. See ''Memorandum for the Heads of Departments and Agencies M–07–21,'' Stephen S. McMillin, Acting Director, Office of Management and Budget (August 10, 2007) (*http://www.whitehouse.gov/omb/memoranda/fy2007/m07-21.pdf*) attaching ''Letter from Paul A. Schneider, Under Secretary for Management'' (Aug. 10, 2007). The OMB Memorandum also announced that the Federal Acquisition Regulatory Council was developing appropriate Governmentwide regulatory coverage to apply E-Verify to Federal contractors. It also indicated that by October 1, 2007, all Federal departments and agencies should begin verifying their new hires through E-Verify.

Compliance Requirements for Federal Contractors

The Executive branch has long recognized that the instability and lack of dependability that afflicts contractors that employ unauthorized workers undermines overall efficiency and economy in Government contracting. The first formal expression of this policy is found in Executive Order 12989, signed by President Clinton in February 1996. (See 61 FR 6091, Feb. 15, 1996.) That Order, which pre-dated Congress's enactment of IIRIRA authorizing what is now the E-Verify program, found that the presence of unauthorized aliens on a contractor's workforce rendered that contractor's workforce less stable and reliable than the workforces of contractors who do not employ unauthorized aliens:

> Stability and dependability are important elements of economy and efficiency. A contractor whose work force is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose work force is more stable. It remains the policy of this Administration to enforce the immigration laws to the fullest extent, including the detection and deportation of illegal aliens. In these circumstances, contractors cannot rely on the continuing availability and service of illegal aliens, and contractors that choose to employ unauthorized aliens inevitably will have a less stable and less dependable work force than contractors that do not employ such persons. Because of this Administration's vigorous enforcement policy, contractors that employ unauthorized alien workers are necessarily less stable and dependable procurement sources than contractors that do not hire such persons. I find, therefore, that adherence to the general policy of not contracting with providers that knowingly employ unauthorized alien workers will promote economy and efficiency in Federal procurement.

Executive Order 12989 (preamble), 61 FR 6091. This finding is as applicable today as it was in 1996. The Government is aware, in particular, of recent instances where Federal Government contracts have been disrupted when the contractor's employees were identified as unauthorized workers. See, *e.g.*, Tami Abdollah, ''2 Sentenced for Hiring Illegal Migrants; Golden State Fence Executives Get Probation and Fines, and the Company is Ordered to Forfeit $4.7 Million in Profits,'' Los Angeles Times, March 29, 2007, (detailing the criminal prosecution of two Federal Contractor company executives for hiring illegal workers that resulted in a guilty plea; judgment of probation and combined $300,000 in fines for the two individuals in addition to the forfeiture of $4.7 million in company profits the company reaped by employing unauthorized immigrant workers); Karen Lee Ziner, ''3 at Bianco Plant Indicted on Immigration Charges,'' Providence Journal Bulletin, August 4, 2007, at A3 (reporting the indictment of company president along with two managers for ''conspiring to harbor and hire illegal immigrants'' to work on Government contracts valued over $200 million); Mark Bowes, ''U.S. Immigration Agents Arrest 33: Workers at Richmond Site of New Federal Courthouse Alleged to be Here Illegally,'' Richmond Times Dispatch, May 8, 2008, at B3 (reporting the arrest of 33 alleged illegal immigrant workers employed by a Federal contractor during a raid by immigration authorities at the construction site of a future Federal courthouse in Richmond, Virginia); Giovanna Dell'Orto, ''Illegal Immigrants Arrested at Military Bases,'' Press-Register, January 20, 2007, at B12 (publishing an article on the arrest of roughly 40 illegal immigrant workers over a three day period that were hired by Federal contractors to work at three different military bases including Fort Benning in Georgia and the Marine Corp Base Quantico in Virginia); Rob Bell, ''Mills Manufacturing Corporation Raided by ICE,'' Western Carolina Business Journal, August 15, 2008 (reporting that immigration officials raided a Federal defense contractor and arrested 57 illegal immigrant workers).

Consistent with the President's authority under FPASA, and to ''ensure the economical and efficient administration and completion of Federal Government contracts,'' Executive Order 12989 instructed the Attorney General of the Department of Justice to investigate to determine whether a contractor or an organizational unit thereof is not in compliance with the INA employment provisions, transmit that determination to the contracting agency and have the head of the contracting agency pursue debarment or other such action as may be appropriate under the FAR. (See Executive Order 12989, Sections 3 and 4.) With the establishment of the DHS, the Attorney General's investigative authority transferred to the Secretary of Homeland Security. See Executive Order 13286, Sec. 19, (Feb. 28, 2003), 68 FR 10623. Thus, as early as 1996, agencies were instructed to use provisions within the FAR to support economical and efficient Federal Government contracting by avoiding doing business with contractors that employ unauthorized workers.

On June 6, 2008, President Bush issued Executive Order 13465, amending Executive Order 12989 by adding an electronic employment eligibility verification requirement to strengthen the long-standing Executive branch policy of furthering economical and efficient contracting through only contracting with Federal contractors who employ persons in the United States who are authorized to work in the United States. Executive Order 13465 echoes the findings and conclusions stated in Executive Order 12989 and builds upon the ''economy and efficiency'' justifications for the 1996 Executive Order in light of the significant advances in the technology for employment eligibility verification that have been made since the issuance of Executive Order 12989. As amended, Executive Order 12989 now states:

> It is the policy of the Executive branch to use an electronic employment verification system because, among other reasons, it provides the best available means to confirm the identity and work eligibility of all employees that join the Federal workforce. * * * I find, therefore, that adherence to the general policy of contracting only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize an electronic employment verification system designated by the Secretary of Homeland Security to confirm employment eligibility of their workforce will promote economy and efficiency in Federal procurement.

Executive Order 12989, as amended by Executive Order 13465, 73 FR 33285. Executive Order 12989, as amended, further specifically directs the agency heads of DoD, GSA and NASA to implement this policy through amendments to the FAR. Executive Order 13465 at Section 3, 73 FR 33286. Accordingly, the Councils amend the FAR in this final rule in accordance with the President's direction, pursuant to his authority under FPASA to ''prescribe policies and directives'' governing Federal procurement that are consistent with the Act's aim of providing the Federal Government with an economical and efficient procurement system. 40 U.S.C. 101, 121.

B. Final Rule

Summary of the Elements of the Proposed Rule That Are Retained in the Final Rule

This final rule inserts a clause into Federal contracts committing Government contractors to use the USCIS E-Verify System to verify that all of the contractors' new hires, and all employees (existing and new) directly performing work under Federal contracts, are authorized to work in the United States. Consistent with the requirements first set forth in the proposed rule, the final rule—

1. Exempts contracts that are for—
   - Commercially available off-the-shelf (COTS) items; and
   - Items that would be COTS items but for minor modifications.
2. Requires inclusion of the clause in subcontracts over $3,000 for services or for construction.
3. Requires contractors and subcontractors to use E-Verify to confirm the employment eligibility of all existing employees who are directly performing work under the covered contract.
4. Applies to solicitations issued and contracts awarded after the effective date of the final rule in accordance with FAR 1.108(d). Under the final rule, Departments and agencies should, in accordance with FAR 1.108(d)(3), amend—on a bilateral basis—existing indefinite-delivery/indefinite-quantity contracts to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule.
5. In exceptional circumstances, allows a head of the contracting activity to waive the requirement to include the clause. This authority is not delegable.

The rule is written to apply the above requirements in a manner that will ensure effective compliance by the contractor community, and is reasonably limited in certain circumstances to minimize the burden on participants in the Federal procurement process.

Changes Adopted in the Final Rule

Below is a summary of changes made to the final rule:

1. Significantly Extended Timelines—The final rule amends the proposed rule to permit Federal contractors participating in the E-Verify program for the first time a longer period—90 calendar days from enrollment instead of 30 days as initially proposed—to begin using the system for new and existing employees. The final rule also provides a longer period after this initial enrollment period—30 calendar days instead of 3 business days—for contractors to initiate verification of existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered Federal contract. Contractors already enrolled and using the program as Federal contractors will have the same extended timeframe to initiate verification of employees assigned to the contract, but the time limits will be measured from contract award date instead of from the contractor's E-Verify enrollment date. With regard to verification of new hires, a contractor that has already been enrolled as a Federal contractor for 90 calendar days or more will have the standard 3 business days from the date of hire to initiate verification of new hires. Those contractors that have been enrolled in the program for less than 90 calendar days will have 90 calendar days from the date of enrollment as a Federal contractor to initiate verification of new hires.
2. Covered Prime Contract Value Threshold—The final rule requires the insertion of the E-Verify clause for prime contracts above the simplified acquisition threshold ($100,000) instead of the micro-purchase threshold ($3,000).
3. Contract Term—The final rule clarifies that the E-Verify clause need not be inserted into prime contracts with performance terms of less than 120 days.
4. Institutions of Higher Education—The final rule modifies the contract clause so that institutions of higher education need only verify employees assigned to a covered Federal contract.
5. State and Local Governments and Federally Recognized Indian Tribes—Similarly, under the final rule, State and local governments and Federally recognized Indian tribes need only verify employees assigned to a covered Federal contract.
6. Sureties—Under the final rule, sureties performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond need only verify employees assigned to the covered Federal contract.
7. Security Clearances and HSPD–12 credentials—The final rule exempts employees who hold an active security clearance of confidential, secret or top secret from verification requirements. The rule also exempts employees for which background investigations have been completed and credentials issued pursuant to the Homeland Security Presidential Directive (HSPD)–12, ''Policy for a Common Identification Standard for Federal Employees and Contractors,'' which the President issued on August 27, 2004.
8. All Existing Employees Option—The final rule provides contractors the option of verifying all employees of the contractor, including any existing employees not currently assigned to a Government contract. A contractor that chooses to exercise this option must notify DHS and must initiate verifications for the contractor's entire workforce within 180 days of such notice to DHS.
9. Expanded COTS-related exemptions for:
   - Bulk cargo—The rule will not apply to prime contracts for agricultural products shipped as bulk cargo that would otherwise have been categorized as COTS; and
   - Certain services associated with the provision of COTS items or items that would be COTS items but for minor modifications.
10. Allows the Head of the Contracting Activity to waive E-Verify requirements after contract award,

either temporarily or for the period of performance.

11. Definitions:

• Employee assigned to the contract—The final rule clarifies that employees who normally perform support work, such as general company administration or indirect or overhead functions, and that do not perform any substantial duties applicable to an individual contract, are not considered to be directly performing work under the contract.

• Subcontract and subcontractor—Adds definitions derived from FAR 44.101.

B. Response to Comments Received on the Notice of Proposed Rulemaking Docket

The Department of Defense (DoD), General Services Administration (GSA) and National Aeronautics and Space Administration (NASA) published a notice of proposed rulemaking (NPRM) in this action on June 12, 2008. (See 73 FR 33374.) The NPRM directed the submission of comments to the Federal eRulemaking portal, *http://www.regulations.gov*, as well as by facsimile and by mail to the FAR Secretariat, with reference to FAR Case 2007–013, Docket 2008–0001; Sequence 1, on or before August 11, 2008. The agencies received more than 1,600 public comments on the proposed rulemaking from individuals, organizations, corporations, trade associations, chambers of commerce and Government entities.

Comments submitted to the docket for this rulemaking were distributed relatively evenly among various issues, with concerns about the Government's authority to promulgate the rule and questions about the DHS's and SSA's collective ability to administer the rule receiving the greatest number of comments. Eleven commenters stated that the 60-day public comment period was inadequate to evaluate, research, and prepare responses to a complex proposed rule. Those commenters asked the Councils to extend the comment period to allow more time to research and respond to the proposed rule.

The Councils declined to extend the public comment period after concluding that the period was adequate. The current web-based E-Verify system, which has been active and available to employers since 2004, has been the subject of significant public scrutiny, including in public hearings before Congress. This has, over time, disseminated considerable information about the program to the public. As a result, most commenters did not request additional time to gather information and submit comments, and those that did request additional time failed to raise novel or difficult issues that could have justified an extension. Moreover, the comments received more than adequately provided substantial information on which the Councils could make a final decision. Accordingly, the Councils do not believe that there is a basis for extending the comment period related to this rule.

Support for the Rule

Comment: More than 600 commenters wrote in support of the proposed rule and strongly urged its adoption. One commenter noted that it has been illegal for more than 20 years, *i.e.*, since 1986, to hire an individual who is not authorized to work in the United States. Another commenter, who identified himself as a 30-year Human Resources professional, stated that this E-Verify system is not too burdensome for employers. A third commenter said that the ''E-Verify program WORKS!'' and that he has found it to work accurately 100 percent of the time.

The majority of these commenters expressed overall support for the Executive Order's instruction for Federal agencies to contract with employers that use E-Verify to check the employment eligibility of all persons performing work on Federal contracts and of all persons hired by the contractor. Some commenters applauded E-Verify because it will establish a level playing field and prevent some employers from obtaining a competitive advantage by exploiting unauthorized workers for lower pay. Many commenters noted that—for 22 years—it has been against the law to hire workers who are not authorized to work in the U.S. This is not a new requirement, they say; it merely puts some teeth into the existing law. Other commenters observed that E-Verify will help stem the problem of identity theft by requiring employers to check photo identification.

Response: The Councils appreciate these supportive comments for use of E-Verify in the Federal Government procurement system, but note that application of the system in this context is not meant to regulate immigration, but to provide the Federal Government with stable and dependable contractors which, ultimately, results in a more economical and efficient procurement system.

Requests for a More Comprehensive Solution

Comment: A number of commenters suggested that merely requiring the use of the E-Verify system by Federal contractors was not a comprehensive solution. They strongly advocate ''fixing'' the ''broken'' immigration system. Some commenters see the solution as giving people a path to legal status, others see it as providing ''tangible solutions for the over 7 million undocumented workers in our economy,'' some see it as enabling swifter and earlier access to work permits, and still other commenters advocate improved ICE auditing teams. One commenter claims that, ''[w]hile employer sanctions and a mandatory employment document verification system may be an appropriate part of an effective immigration reform package, standing alone they only exacerbate the problems they are ostensibly designed to address.''

Response: Comprehensive immigration reform is beyond the scope of this rulemaking and was not the purpose of Executive Order 12989, as amended. The mandate given to the FAR Councils was to implement the President's Executive Order of June 6, 2008, as a means of creating a more economical and efficient Federal Government procurement system. The employment of persons unauthorized to work in the U.S. has been against the law for 22 years. Completion of the Form I–9 is still required of all employers and this rule does not change that requirement. This rule merely provides a more convenient, faster, and more consistent means of determining whether an individual is, or is not, authorized to work in the U.S. to establish greater stability and dependability among the Federal contractor workforce.

Authority

1. Immigration Statutes

a. Voluntary Participation in E-Verify

1. *Comment.* Many commenters challenge the Councils' authority to promulgate the Rule, arguing that the insertion of a clause into Federal contracts that commits Federal contractors to use E-Verify conflicts with the congressional intent expressed in the IIRIRA that participation in E-Verify be ''voluntary.'' Some commenters further argue that the E-Verify program is de facto mandatory because contractors who elect not to enter into Federal contracts on account of E-Verify will go out of business.

Response: The Councils disagree. Section 402(a) of IIRIRA states, in relevant part, that ''the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program.'' 8 U.S.C. 1324a note,

Section 402(a). On its face, this statutory limitation applies only to the Secretary of Homeland Security and does not apply to the President or the Councils. Because the requirement to insert the contract clause set forth in this rule comes from a presidential action, Executive Order 12989, as amended, and from this rulemaking undertaken by the Councils, it is not a requirement imposed by the Secretary of Homeland Security and therefore does not run afoul of section 402(a) of IIRIRA.

Moreover, acceptance of a Federal procurement contract is, by definition, a voluntary act. The rule sets forth a performance requirement to be included as a contract clause in contracts entered into or negotiated anew after the effective date of the rule. In *AFL–CIO* v. *Kahn,* the D.C. Circuit Court of Appeals, sitting en banc, rejected the claim that the Carter Administration's insistence that Federal contractors agree to comply with wage and price controls rendered those controls ''mandatory'' in violation of the Council on Wage and Price Stability Act (COWPSA). 618 F.2d 784 (D.C. Cir. 1979). The Kahn Court analogized the procurement requirement at issue to ''those Federal programs that offer funds to State and local governments on certain conditions. The Supreme Court has upheld such conditional grants, observing on one occasion through Justice Cardozo that 'to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.' '' *AFL–CIO* v. *Kahn,* 618 F.2d at 794 (quoting *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 589–590 (1937)). According to the D.C. Circuit:

> Any alleged mandatory character of the procurement program is belied by the principle that no one has a right to a Government contract. As the Supreme Court ruled in *Perkins* v. *Lukens Steel Co.*, ''[The] Government enjoys the unrestricted power * * * to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.'' Those wishing to do business with the Government must meet the Government's terms; others need not.

AFL–CIO v. *Kahn,* 618 F.2d at 794. If a contractor chooses to do business with the Federal Government, then the Federal Government can, and routinely does, impose contract performance requirements. Where, as with this rule, such requirements are imposed through contract terms included in contracts, a contractor's agreement to abide by those terms of the agreement is not ''involuntary.''

2. *Comment:* Many commenters suggested that IIRIRA and the INA limit the types of employers which can be required to participate in the Basic Pilot Program. These commenters asserted that the proposed rule's promulgation of a contract clause committing Federal contractors to use E-Verify violates the congressional intent behind IIRIRA, because Federal contractors are not one of the classes of employers which can be required to participate in Basic Pilot. Some commenters suggested that Congress consciously chose to exclude Government contractors from the subset of employers for which participation in Basic Pilot would be mandatory. Many commenters also asserted that, because of this alleged violation of congressional intent, the Administration lacks the constitutional authority to promulgate this policy through Executive Order or through this rulemaking.

Response: The Councils disagree. IIRIRA requires participation in E-Verify by certain employers, including Executive departments and the legislative branch, as well as employers found to have violated INA section 274A. There is nothing in the text of IIRIRA that prohibits the President, acting pursuant to separate statutory authority, from requiring additional classes of employers to participate in E-Verify as a condition of contracting with the Federal Government. Nor is there any indication in the legislative history to suggest that Congress ever specifically considered and rejected a proposal to include Federal contractors in the E-Verify program. Here, the President has acted within his authority under FPASA and 3 U.S.C. 301 and issued an Executive Order to improve the dependability and stability of the Federal contractor workforce by requiring Federal agencies to contract with businesses that electronically verify the employment eligibility of their employees. In his Executive Order, the President tasked the Secretary of Homeland Security with designating an appropriate electronic verification tool and charged the FAR Councils with the responsibility to promulgate a rule to implement the requirements of the Executive Order. The Secretary of Homeland Security and the FAR Councils have acted in accordance with the President's directive, issued as an exercise of his authority under FPASA, and in so doing, neither the Secretary nor the Councils have taken any action in conflict with IIRIRA. Congress merely prohibited the Secretary of Homeland Security from requiring participation in E-Verify by other persons or entities, and this rule does not violate that prohibition, as described above.

b. Existing Employees

Comment: Many commenters asserted that because IIRIRA created the Basic Pilot program as a tool to confirm employment eligibility of newly hired employees, the contractual requirement—announced by Executive Order and implemented through this rulemaking—that existing employees assigned to Government contracts be verified (or re-verified) through E-Verify is contrary to law.

Response: The Councils disagree. Executive Order 12989, as amended, instructs executive departments and agencies to require, as a condition of contracting, that the contractor agree to use an electronic employment eligibility verification system ''to verify the employment of * * * all persons assigned by the contractor to perform work within the United States on the Federal contract.'' This Executive Order is based on the President's exercise of his authority under FPASA to prescribe policies that promote economy and efficiency in federal contracting. 40 U.S.C. 101, 121.

The Basic Pilot statute does not prohibit the verification of existing employees' work eligibility called for by this presidential directive. The Basic Pilot statute lays out a set of procedures that employers using the system must follow ''in the case of the hiring (or recruitment or referral) for employment in the United States. * * *'' IIRIRA section 403(a). The statute also sets out the parameters for the ''employment eligibility confirmation system'' that the Secretary of Homeland Security must establish. IIRIRA section 404. Nothing in either of these sections, however—or in any other part of the Basic Pilot statute—prohibits the use of the confirmation system for existing employees or prohibits the President, acting pursuant to separate statutory authority, from requiring federal contractors to use the confirmation system for existing employees as a condition of contracting with the federal government.

c. Congressional Notification

Comment: Commenters noted that IRCA requires the Administration to notify Congress before implementing any changes to the employment verification system ''established under subsection (b) of [INA section 274A].'' INA section 274A(d)(1), (d)(3). These commenters suggest that this rulemaking amounts to such a change, and that it may not be implemented without notice to Congress called for in section 274A(d)(3).

Response: The Councils disagree. This rule instructs Federal contracting officers to insert the specified clause into future Federal contracts, thereby committing Federal contractors to use the E-Verify system as specified in the rule. It does not, however, constitute a change to ''the requirements of subsection (b)'' of INA section 274A, which established the paper-based Form I–9 employment verification process. The I–9 process that all employers must follow at the time of hire continues to apply to Federal contractors without any change. This rule, and the Executive Order on which it is based, promotes economy and efficiency in Federal contracting by assisting employers to avoid employment of unauthorized workers and by limiting the risk that Federal contracts performed in the United States will be staffed by persons unauthorized to work in the United States.

2. Executive Order Authority

Comment: As noted above, many commenters challenged the President's authority to issue the Executive Order under FPASA. These commenters suggested that Executive Order 12989 does not promote ''economy'' and ''efficiency'' in Government contracting, and that the Executive Order is therefore not supported by FPASA's statement that the President may enact procurement regulations which further those two ends. Commenters also contended that the main purpose of the Executive Order is to advance a social policy—a strengthening of the immigration enforcement relating to employment in the United States—in a way that is contrary to congressional intent, and that the President's power recognized by FPASA cannot be employed by the Executive Branch to advance policies that conflict with the statutes passed by Congress.

Response: These challenges to the legal authority for Executive Order 12989 are outside the scope of this rulemaking. The Councils note, however, that Executive Order 12989 falls well within the established legal bounds of presidential directives regarding procurement policy. FPASA authorizes the President to craft and implement procurement policies that further the Act's statutory goals of promoting ''economy'' and ''efficiency'' in Federal procurement. See, *e.g., UAW-Labor Employment & Training Corp.* v. *Chao,* 325 F.3d 360, 366 (D.C. Cir. 2003) (affirming authority of the President under FPASA to require federal contractors, as a condition of contracting, to post notices informing workers of certain labor law rights); *Kahn,* 618 F.2d at 792–793 (upholding an Executive Order implementing procurement wage and price controls, noting need for a ''nexus'' between those wage and price controls and procurement economy and efficiency). The fundamental ''economy and efficiency'' principles underlying the Executive Order were first articulated in the original Executive Order 12989, issued in February 1996, which concluded that contracting with employers who hire unauthorized workers in violation of the INA undermines the economy and efficiency of the Federal procurement system. The 1996 Executive Order imposed debarment penalties on contractors found to have violated the immigration laws, and was never found by a court to be inconsistent with FPASA, the INA, or IRCA. Executive Order 13465 amends Executive Order 12989 to use new employment verification technology in order to advance the same goal of ensuring a stable and dependable Federal contractor workforce and more economical and efficient Federal Government contracting. See 73 FR 33285 (''This order is designed to promote economy and efficiency in Federal Government procurement. * * * I find * * * that adherence to the general policy of contracting only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize an electronic employment verification system designated by the Secretary of Homeland Security to confirm the employment eligibility of their workforce will promote economy and efficiency in Federal procurement.'') The President has determined that this rule will produce net economy and efficiency gains in Federal procurement.

The Councils also disagree with assertions that the proposed rule is a veiled attempt to modify immigration policy under the guise of procurement regulation. This rule implicates immigration, but does so in a permissible manner. The President may, under FPASA, promulgate procurement policies and directives touching upon policy matters beyond Government contracting, so long as there is a sufficiently close ''nexus'' between the policy or directive and the promotion of economy and efficiency in Federal procurement. See *Chao,* 325 F.3d at 366–67; *Kahn,* 618 F.2d at 792; *Chamber of Commerce* v. *Reich,* 74 F.3d 1322, 1337 (D.C. Cir. 1996) (''[T]he President, in implementing the Procurement Act, may * * * draw upon * * * secondary policy views * * * that are directed beyond the immediate quality and price of goods and services purchased.''). In this case, the ''nexus'' is explained at some length in the text of Executive Order 13465. (See 73 FR 33285.)

3. The MOU Requirement

Comment: One commenter specified that ''[t]he inclusion of an MOU in addition to, or as a supplement to, the contract performance requirements, is contrary to contract formation law in that it might create a separately enforceable (and potentially conflicting) obligation between the parties beyond the scope of the contract and could create confusion and result in problems with contract administration and/or lead to the submission of contract claims.''

Response: The Councils do not concur with these comments. The requirement in this clause for the contractor to comply with the requirements of a secondary agreement is no different than any other contract term that requires adherence to a standard or a specification. The clause merely requires adherence to the conditions of the MOU as part of the contractor's performance duties. The terms of the E-Verify MOU are readily available to the public, and were included in the docket of this rulemaking on the *www.regulations.gov* Web site so that commenters on this rule would have the opportunity to review and take into consideration the proposed terms of that agreement in providing comments on this rulemaking. Potential contractors have adequate advance notice of the ancillary agreement with which they must comply.

4. Consistency With Other Federal Regulations

a. FAR Guiding Principles

Comment: Several commenters claim that the proposed rule contradicts many of the guiding principles used in the creation of the FAR, including (1) minimizing administrative operating costs, (2) conducting business with integrity, fairness, and openness, and (3) promoting competition.

Response: Commenters claim that administrative operating costs can include start-up, implementation, training, and maintenance costs; and the Councils agree. All of these costs were included, and evaluated, in the Regulatory Impact Analysis (RIA) released with the proposed rule. Some adjustments have been made to the RIA as a result of comments received in response to the proposed rule, and they are addressed in the Regulatory Flexibility Analysis section of this rule. Commenters claim that there are also

other direct and indirect costs to employers who use E-Verify—employers may perceive foreign-born workers as more expensive to employ than native-born workers due to the database inaccuracies. Commenters claim that resolving tentative nonconfirmations and correcting employee records costs time and money and affects other resources. In claiming that the costs associated with the proposed rule do not minimize administrative costs, however, the commenters overlook the costs already incurred by contractors as a result of the I–9 process mandated by the INA, and they overlook the gains in stability and reliability of the Federal contractor workforce that contractors' use of E-Verify will produce.

The Councils also disagree with the claim by some commenters that the proposed rule fails to advance integrity, fairness, and openness in the way business is conducted. While Government-commissioned reports have found some employer abuse of the program, discriminatory behavior and other such prohibited employment practices is not encouraged by the E-Verify system. Use of E-Verify cannot prevent all such illegal action, but the record created by use of the system does make it more difficult for an employer engaged in discrimination to conceal its unlawful behavior. If any employer engages in discriminatory practices, such abuses should be reported to the appropriate Federal and State agencies responsible for enforcement of the anti-discrimination laws.

Commenters claim that the proposed rule does not encourage competition because the harmful impact on small businesses (many of which are minority-, immigrant-, or family-owned) is disproportionate and makes the playing field for small businesses more uneven. The claim of a disproportionate impact on small businesses is addressed elsewhere in this rule (see the Regulatory Flexibility Analysis section of this rule). However, the Councils believe that there is an impact on competition, and it believes that the impact is positive rather than negative. Use of the E-Verify system will make it more difficult for firms to gain a competitive edge by hiring unauthorized workers at lower pay.

b. DHS Regulations

Comment: One commenter asserted that the proposed rule's requirement to re-verify certain employees violates existing DHS regulations.

Response: As the commenter did not identify the specific DHS regulations allegedly violated, this comment is not susceptible to a response. Other commenters have made similar assertions that E-Verify is contrary to law and the Councils have addressed these specific concerns. The Councils are not aware of any DHS regulation violated by this final rule.

c. Verification of Federal Employees

Comment: Several commenters noted that OMB has directed all Federal departments and agencies to use E-Verify on their newly-hired employees, but not on their existing employees. These commenters asserted that the proposed rule is inconsistent with that OMB decision, because the rule requires Federal contractors to use E-Verify on not only new hires but also on existing employees working on Federal contracts, and argue that Federal contractors should not be held to a higher verification standard than is applied to the Executive branch.

Response: The Councils disagree. The rule is consistent with the policy announced in Executive Order 12989 requiring the Executive branch to contract with employers that agree to use E-Verify for their employees who are working on a covered Federal contract. The aim of the Executive Order is to promote economy and efficiency in Federal procurement by ensuring stable and dependable Federal contractors.

Furthermore, Federal employees are required to undergo background checks pursuant to HSPD–12, which mandates that a person must be suitable (minimum of a national agency check with inquiries (NACI)) in order to be issued an HSPD–12 card. HSPD–12 requires certain credentialing standards prior to issuing personal identity verification cards. These standards include verification of name, date of birth, and social security number (among other data points) against Federal and private data sources. The Councils agree that the degree of scrutiny applied to individuals granted HSPD–12 credentials provides sufficient confidence that any such person is likely truthful about his or her authorization to work in the United States that additional investigation through E-Verify is not necessary.

d. Appropriate Scope of Regulations

Comment: One commenter suggested that the proposed rule's goal was to ''protect U.S. workers''—one that is beyond the scope of that which can rightfully be pursued under procurement authorities.

Response: The Councils do not agree with the premise of this comment. The goal of the proposed rule is not to ''protect U.S. workers.'' Rather, the goal of the rule is to implement Executive Order 12989, which aims to promote economy and efficiency in the Federal procurement system by ensuring that the Federal Government does not do business with contractors that hire or employ unauthorized aliens, thereby promoting the stability and dependability of contractor workforces and minimizing the potential for disruption to federal contracts. The President is well within his authority under FPASA to require the agencies to promulgate this rule, which has a clear nexus to promotion of economy and efficiency in Federal contracting, even if it might also have other impacts. Chao, 325 F.3d at 366 (affirming authority of the President under FPASA to require federal contractors, as a condition of contracting, to post notices informing workers of certain labor law rights.)

Relationship With States

1. States Prohibiting Mandatory Use

Comment: Several commenters requested that the Administration clarify the effects of the proposed rule on employers conducting Federal Government contracting business in locations where State and/or local law prohibits the use of E-Verify. One of these commenters specifically asked if the requirements of the proposed rule would function as an affirmative defense in actions brought against employers which use E-Verify in contravention of State/local law. Two other commenters suggested that the proposed rule be modified to provide E-Verify participation waivers to employers located in States prohibiting E-Verify enrollment, to allow such employers to participate in Government contracting without violating State law.

Response: The Councils decline to provide an exemption to the E-Verify term in contracts covered by this rule for employers located in States that prohibit E-Verify enrollment, because such state and local laws would be preempted by Executive Order 12989, as amended, and by these rules implementing the Order. The Councils note that an Illinois state statute prohibiting use of E-Verify by employers within that state is currently in litigation, as a result of a lawsuit filed by DHS arguing that the state statute is preempted by Federal law. The state has agreed not to enforce its statute pending the final resolution of the litigation.

2. Other States

Comment: Two commenters noted that they are concerned that the proposed rule's requirement that certain existing employees undergo E-Verify

verification could ''embolden'' States and localities to require the same type of verification for employees working under State/local contracts. These commenters fear that such an expansion would complicate employment verification legal requirements, to the detriment of both employers and employees.

Response: The commenters concerns are speculative and, in any case, State and local government action is outside the scope of this case.

E-Verify System

1. E-Verify Procedural Issues

a. Burdensome

Comment: One commenter stated that the E-Verify enrollment process is cumbersome and difficult and that USCIS support for employers trying to enroll has been inconsistent and ineffective. Three commenters felt that tentative nonconfirmations and the subsequent efforts to resolve them place additional burdens on employers and employees alike. Two other commenters state that costs associated with E-Verify are burdensome to employers. One commenter considered that the vast scope of coverage in the proposed rule is contrary to the ''economy and efficiency'' argument that justified issuance of the rule, as compared to other labor requirements attached to procurement.

Response: The Councils have narrowed the coverage to the extent possible yet still meeting the purpose of the Executive Order. The Councils are not charged with administration of the E-Verify program and this process is not within its rulemaking authority or the scope of this final rule. The Councils have considered the burdens and costs associated with E-Verify in the RIA and Regulatory Flexibility Analysis.

The E-Verify registration process is an automated process that uses a registration wizard to assist employers in determining which access method will best suit their company needs. Once that is decided, the individual registering the company is required to enter the company contact information, including the number of company locations for which E-Verify will be used and the address of these locations. Within 24 hours, that individual will receive an email from E-Verify that includes their username and password which they will use to log on to the system. In mid-FY08, the E-Verify program launched a registration reengineering effort aimed to streamline the E-Verify registration process and shift to a profile based registration system. The program has been working with various stakeholders to determine and address the biggest concerns with the process, and hopes to conduct focus groups on ideas for improvement. The program has also undertaken a Plain Language Initiative, designed to simplify the language associated with the program and to update the materials associated with the program once the new verbiage has been finalized. Within this effort, the program also intends to conduct focus groups to determine the best response to various word choices.

With regard to the burdens or costs to employers to register and participate in E-Verify, DHS has informed the Councils of a report entitled the ''Findings of the Web Basic Pilot Evaluation'' that was prepared by Westat in September 2007. The report may be found at *http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.* The report found that 96 percent of long-term users indicated that E-Verify was not burdensome. The Westat report also stated that approximately 97 percent of long-term users reported that the indirect set-up and system maintenance costs were either no burden or only a slight burden and that the majority of employers reported that they spent $100 or less in initial set-up costs. The Councils recognize that costs to employers will vary depending on employer characteristics and practices.

b. Data Accuracy

Comment: Numerous commenters focused their concerns primarily on the reliance of the E-Verify system on DHS and SSA databases that contain high percentages of errors. Many commenters, in particular, specifically call out the reported 4.1 percent error rate of the Social Security Administration's database as a large source of inaccurate data. Several commenters stated concern that DHS databases are not updated in real-time.

Many commenters also believe the inaccurate data in the database leads to the misidentification of workers and to denial of employment for work-authorized individuals, especially naturalized citizens and foreign-born authorized workers. Many commenters stated concerns that naturalized citizens or foreign-born authorized workers are considerably more likely to receive erroneous tentative nonconfirmations than native-born U.S. citizens. One commenter questions the 0.5 percent ''error rate'' claimed by E-Verify when the system is based on SSA databases with a 4 to 5 percent error rate.

One commenter feels data entry or ''human'' errors on the part of employers are of concern as well since they cannot be completely eliminated. Many commenters feel this issue especially affects employees with nontraditional or complex names.

Response: The improvements made to E-Verify over the last few years have decreased the incidence of data mismatches, which is referred to as a ''tentative nonconfirmation'' in the E-Verify program, and often referred to as the ''error rate'' by the public. DHS and SSA continue to analyze and implement improvements to reduce data mismatches as part of ongoing management of the E-Verify program. The majority of mismatches are with SSA data, since the SSA database is the only source for citizen data, against which the large majority of E-Verify queries are run. Instances of data inaccuracies include name changes due to marriage or divorce not reported to SSA, or, in the case of naturalized U.S. citizens, unreported changes in citizenship status. Most citizenship status mismatches that resolve as ''work authorized'' do involve naturalized citizens who have failed to notify SSA of their change in citizenship status. To reduce the number of SSA mismatches due to this situation, USCIS developed an automated check against the USCIS naturalization database for U.S. citizen new hires and provided employees who receive an SSA citizenship status mismatch notice the option of calling DHS directly to resolve it rather than resolving the mismatch with an in-person visit to an SSA field office. This has significantly reduced the burden of resolving tentative nonconfirmations for naturalized citizens. The changes went into effect in May 2008, and preliminary data show a 30 percent decrease in the number of SSA tentative nonconfirmation for naturalized citizens.

It is important to clarify that if the E-Verify program issues an initial mismatch to an employee, the employer cannot fire, prevent from working, or withhold or delay training or wages for that employee during the mismatch process. All employees receiving an initial mismatch are given the opportunity to contest to ensure that every employee who has a work authorized status is not prevented from working. All employees must be given the opportunity to contest and correct their records.

The Government recognizes the concerns over the SSA Office of the Inspector General Congressional Response Report (2006) estimates that 4.1 percent of their NUMIDENT database may contain discrepancies that could potentially affect 12.7 million individuals. The E-Verify program,

however, provides due process for correcting any errors with SSA, which will help to reduce the NUMIDENT discrepancies over time and provides an opportunity for an individual to correct an error they may not have been aware of otherwise. The E-Verify MOU makes clear that employers are prohibited from discharging, refusing to hire, or assigning or refusing to assign to federal contracts employees because they appear or sound ''foreign'' or have received tentative nonconfirmations. If an employee elects to challenge a tentative nonconfirmation, the employee may not be terminated or suffer any adverse employment consequences based upon the employee's perceived employment eligibility status (including denying, reducing, or extending work hours, delaying or preventing training, requiring an employee to work in poorer conditions, refusing to assign the employee to a Federal contract or other assignment, or otherwise subjecting an employee to any assumption that he or she is unauthorized to work) until and unless secondary verification by SSA or DHS has been completed and a final nonconfirmation has been issued. Employers are further notified that any violation of the unfair immigration-related employment practices provisions in section 274B of the INA could subject the Employer to civil penalties, back pay awards, and other sanctions, and violations of Title VII could subject the Employer to back pay awards, compensatory and punitive damages. Moreover, the MOU states that violations of either section 274B of the INA or Title VII may also lead to the termination of its participation in E-Verify. If the Employer has any questions relating to the anti-discrimination provision, it may contact the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) at 1–800–255–8155 or 1–800–237–2515 (TDD).

The ability to identify and fix any errors will help them maintain accurate records with SSA, which is beneficial to them in the future, particularly when applying for SSA benefits. The report also indicates that the majority of the discrepancies (64 percent) in the Numident are in the ''Death Indication'' field, which would not affect new hires. However, the E-Verify program can detect instances in which an individual is fraudulently using the SSN of a deceased person to gain unauthorized employment.

In response to data entry error, the independent report by Westat does state that employee and employer data entry errors cannot be completely eliminated but the E-Verify program has worked to minimize and catch those errors before verification query results are returned. In September 2008 E-Verify instituted a pre-mismatch typographical error check that asks the employers to double-check the information they entered into the system with the employee's documents in the case of a mismatch. Preliminary data show that this enhancement has reduced SSA mismatches by 30 percent. In response to the issue of employees with nontraditional or complex names, the system provides guidance to employers on the system page where the name is entered into the field. There is a box that appears when an employer scrolls over the name field and there is also a help button next to the field that opens up a document that provides detailed guidance on how to enter complex surnames such as multiple last names or hyphenated names.

c. Technology Issues

Comment: Many commenters stated that the E-Verify system remains a paper-based system which still requires a contractor to complete the paper Form I–9 after analyzing up to 25 different documents that an employee could present and is not an entirely electronic system. One commenter stated that the system should provide an electronic export or reporting functionality for Case Verification Numbers. They state that the transfer of the verification case number to paper or on-line I–9 forms is now a manual, case-by-case ''pen and paper process'' that would fail under high volume. Another commenter stated concern over the degree of knowledge the personnel managing the toll free E-Verify phone number has on the myriad of complex immigration documentation and state that the USCIS National Customer Service (NCS) lines have been unable to provide accurate and timely information which can lead to confusion, multiple calls, and case resolution delay.

Response: Completion of the Form I–9 is required regardless of whether an employer is a participant in E-Verify. DHS rules permit the completion and storage of the I–9 electronically rather than on paper. See *e.g.*, 8 CFR 274a.2(a)(2). E-Verify provides Form I–9 support materials for employers on the system's website including the Form I–9, in English and Spanish, and the Handbook for Employers, Instructions for Completing the Form I–9 (M–274), as well as many immigration-related materials such as a Guide to Selected Travel Documents. The Councils and DHS recognize the preference some employers have to utilize electronic sources for required paperwork, and DHS is continually working towards more paperless systems, but is still within that process.

With respect to telephone inquiries, the E-Verify program has a Tier system when addressing phone calls. While most calls go directly to the first level, Tier One, for general program information or employer questions, there is a system in place to escalate calls to other Tiers depending on the complexity of the case. The program has subject matter experts on staff to address phone calls that require further attention. For cases that they are unable to resolve, USCIS has a Special Case Resolution unit in the Washington, DC Headquarters office that the cases can be referred to for further review. The average wait time is less than 20 seconds for a phone call to transfer from Tier 1 to Tier 2 and calls to the program are currently answered within 0.2 minutes or 12 seconds on average. The E-Verify program has substantially increased its customer service and program staff over the past two years in an effort to work with employers and ensure that every question or difficulty that arises is addressed.

In any specific case where additional time may be needed to address an issue or research the case information before a verification query can be resolved, it is important to note that the employer would receive a ''case in continuance'' response and cannot take any adverse action on an employee during this time.

DHS and SSA are constantly exploring ways to make the system more efficient and effective. However, the suggestion made here, that the system can be made totally web based so that individuals receiving a tentative nonconfirmation could prove that some factor generating the nonconfirmation was in error, is unrealistic. Generally, SSA requires documented proof of the factors that might be in question, SSN, date of birth, name, citizenship; and that the documents used be originals. The documents used to prove these elements (driver's licenses, birth certificates, etc.) are subject to forgeries, which are much easier to detect when a human being inspects original documents. Use of photocopies or fax copies, which would be necessitated by a totally Web based process, would make the process much more susceptible to fraud.

If an employee believes that s/he has been discriminated against during the employment eligibility verification process, he or she should contact OSC at 1–800–255–7688 or 1–800–237–2515 (TDD). Employers that have questions relating to the anti-discrimination

provision should contact OSC at 1–800–255–8155 or 1–800–237–2515 (TDD).

d. Photo Identification

Comment: Many commenters stated that there is an estimated 11 percent of the population that does not have a Government-issued photo identification. Some of those same commenters also stated that studies have indicated members of minority populations such as African Americans, Latinos, Women, and Senior Citizens are less likely to have photo identification as well as many lawfully present immigrants such as refugees and asylees. These commenters also state that there are situations where an individual may have the right to work but has not yet received a physical Employment Authorization Document (EAD) and that the proposed rule fails to make exceptions for cases where photo identification has been lost or destroyed due to crime, accidents, natural disasters, or other causes.

Response: The Councils recognize the concerns of the commenters in regard to the percentage of the U.S. population that do not have photo identification, but note that there is no evidence from the extensive operations of the E-Verify program to date that this has been a significant problem. There are also cases and studies that find a far lower percentage of individuals lack a photo identification, at least in the context of evaluating photo identification requirements for voting. See *Indiana Democratic Party* v. *Rokita*, 458 F.Supp.2d 775, 803 (S.D. Ind. 2007), *aff'd sub nom. Crawford* v. *Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 128 S.Ct. 1610, 553 U.S. —— (2008); see also *Voter IDs Are Not the Problem: A Survey of Three States*, American University Center for Democracy and Election Management, January 9, 2008, found at *http://www.american.edu/ia/cdem/pdfs/VoterIDFinalReport1-9-08.pdf* (finding that 1.2% of registered voters lacked a government issue photo identification). Photographs serve a unique and essential function and significantly minimize the opportunities for document fraud, unlike fingerprints, by allowing a contractor to immediately compare the picture embedded in the document against the employee. IIRIRA Sec. 403(a)(2)(A)(ii), 8 U.S.C. 1324a note, thus requires photo identification from employees of employers participating in the E-Verify program. In order to be consistent with these standards, the E-Verify MOU requires all employees of Federal contractors participating in E-Verify to present a photographic identification document.

Moreover, the documentation requirement is a basic requirement for the I–9 process that has to be completed regardless whether or not the employer is in E-Verify. The E-Verify photo identification requirement does limit the scope of acceptable ''List B'' identification documents somewhat, but we are not aware of a basis to conclude that the non-photo identity documentation that is currently permitted for the I–9 is broadly available to, or used by the referenced populations. In other words, the effect of limiting the non-photo documents would appear to be marginal.

USCIS has taken substantial steps to expedite EAD issuance, especially for refugees and asylees. The non-photo List B documents are not normally available to aliens who need EADs in any case. Those that reasonably might be available, especially the driver's license, contain photographs and thus are acceptable for E-Verify. Thus, this is not really an E-Verify issue per se; rather, it is a general issue about the I–9 compliance that employers are responsible for whether or not they participate in E-Verify.

To address situations of lost or stolen documents, the DHS regulations permit temporary presentation of a receipt for the application for a replacement document, and this is permissible for E-Verify employers as well as those just using the paper I–9.

For the six commenters who assert that employees need to show an EAD, the Councils note that there is no requirement to states that if an employee has an EAD card they must provide it for purposes of the Form I–9. Employees may choose to provide any approved List B document with a photo for the purpose of verification through E-Verify. It is true that many aliens who apply for an EAD card would not normally have List C evidence of work authorization and thus cannot comply with Form I–9 requirements until they receive the EAD. But this is a concern generally applicable to Form I–9 compliance and E-Verify participation would not affect it one way or another.

e. SSN Number

Comment: One commenter noted that the SSN is not required for the Form I–9.

Response: The Form I–9 (Rev. 06/05/07) states ''[p]roviding the Social Security number is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify).'' Additionally, providing an SSN to employers is generally necessary to comply with the IRS statutes and regulations that already require every employee in the United States to have an SSN.

f. Privacy

i. System Security

Comment: Several commenters suggested that E-Verify has ongoing system security problems that jeopardize the privacy and security of individuals' personal information. These comments focused on (1) general concerns with DHS, and more generally the U.S. Government, in the handling of personal information, and (2) general concerns about the potential for cyber attacks.

Response: The Councils disagree with these comments. Any database of personal information would be attractive to hackers or cyber attacks. That is why USCIS has developed a robust security program to protect the Verification Information System (VIS), the technical system that supports the E-Verify program, from such attacks. This security program fully complies with Federal Information Security Management Act (FISMA) requirements and has been certified and accredited as secure. The security measures in place include among other things both strong and limited access controls, transmission encryption, and extensive audit logging. Accordingly, the Councils have no reason to believe that these systems are not secure enough to ensure the effectiveness of the rule.

ii. Privacy Protections

Comment: A number of comments stated that E-Verify does not adequately protect the privacy of individuals' personal information. These comments focused on (1) general concerns with E-Verify handling of personal information, (2) specific concerns about potential for employer misuse of E-Verify for pre-screening and other misuse, (3) specific concerns about the potential for misuse of E-Verify by those falsely claiming to be employers, and (4) specific concerns with E-Verify relying on external databases.

Response: The Councils disagree in part with these comments. Several comments addressed non-specific privacy concerns about the handling of personal information. USCIS fully appreciates the significant responsibilities of handling this large amount of personal information. DHS, and specifically the E-Verify program, has developed a robust privacy program to not only ensure that the privacy of this information is respected but also to ensure that the public is made aware of

how their information is being treated. There is a dedicated staff of privacy professionals who work at the operational, tactical, and strategic planning levels and every significant change to E-Verify is documented in a system of records notice (SORN) or privacy impact assessment, as appropriate. USCIS continuously seeks to improve security and privacy protections as the E-Verify program develops.

Several commenters noted that E-Verify could be misused by employers, either by pre-screening applicants or by treating differently employees who have received a tentative nonconfirmation. The Westat report suggests that this indeed does take place. Unfortunately, some employers do not follow the requirements and guidelines for participating in E-Verify. Those requirements and guidelines address these concerns in several ways. First, E-Verify is educating employees and job applicants about how E-Verify should work and what their options are to address perceived misuse or abuses of the program. To this end, the E-Verify MOU requires that E-Verify informational posters be placed in the work site where employees can see them. These posters provide employees with a concise statement of their rights and contact information for submitting complaints regarding misuse and abuse of the program. In addition, E-Verify conducts outreach to educate employers and the general public about the program. Moreover, E-Verify requires user training and testing in addition to providing users with guidance on the appropriate use of the E-Verify program. Finally, USCIS has developed a monitoring and compliance capability to assist in identifying when an employer may be misusing the E-Verify program.

Several commenters noted that E-Verify does not currently screen employers who register with E-Verify, therefore it is possible that some may not be actual employers, but rather groups or individuals seeking to ''phish'' E-Verify to validate personal information for identity theft purposes. E-Verify does capture information on employers and, as part of the program's monitoring and compliance activities, researches on an ad hoc basis whether E-Verify users are actually employers. E-Verify has sought authority to verify employer authenticity directly from other Government sources but has not, as of yet, received that authority. Last year, in particular, the Administration sought a statutory change to the current prohibition on Internal Revenue Service sharing of Employer Identification Number data with other Government agencies, such as USCIS. In advance of such a statutory change to that prohibition, USCIS is currently undertaking a robust reengineering of the employer registration process, including exploring ways of verifying the authenticity of employers registering for E-Verify.

Finally, commenters noted that E-Verify relies to a large extent on databases external to DHS. The commenters questioned the integrity of the data in these external databases and specifically recommended that they be made to provide full Privacy Act protections without being exempt from any of the Privacy Act requirements. The SORN and privacy impact assessments for VIS, the underlying E-Verify system, can be found at the DHS Privacy Office Web site *http://www.dhs.gov/privacy*. The SORN and privacy impact assessments describe more fully what information is collected and how it is used, protected, and shared. The particular Privacy Act exemptions and the extent to which the external source systems apply the Privacy Act vary based on the type of system and reason for collection. USCIS has asserted no Privacy Act exemptions and fully embraces the Privacy Act protections for the E-Verify VIS. E-Verify fully appreciates that because it is making such significant decisions based on information over which it does not have direct authority, it must be very careful to ensure that these decisions are made as accurately as possible. E-Verify will often check more than one database for verification of a single data element acknowledging that data may occasionally be wrong. In any event, individual employees are not deemed unauthorized to work as long as they are contesting a tentative nonconfirmation from E-Verify.

iii. Identity Theft

1. *Comment:* Several commenters addressed E-Verify's current ability to combat identity theft. One commenter stated that there is no rational relationship between the E-Verify mandate on Federal contractors and the aim of having more efficient and dependable procurement sources because E-Verify does not prevent identity theft. The same commenter also stated a concern that the use of E-Verify would encourage identity theft. Another commenter stated that E-Verify could not prevent the hiring of unscrupulous workers because it does not check identity. A third commenter stated that E-Verify is inadequate because it does not prevent identity theft.

Response: The Councils disagree. E-Verify has had remarkable success preventing those from maintaining employment who are not authorized to work in the United States. When Congress established E-Verify, one of its goals was to prevent employment of those who are not authorized to work by detecting document fraud during the hiring process. Information matching and the photo identification requirement, while not airtight, are parts of this process. When an individual has presented fraudulent documents to an employer, the E-Verify program is more likely to identify that fact than the paper I–9 process and, is thus an improved process in relation to document fraud.

Criticism has arisen from E-Verify's limited ability to detect identity theft, *i.e.*, when legitimate documents are presented but have been stolen from another individual. A concern also has been stated that identity theft may increase as more employers use the E-Verify program. The Councils note that E-Verify was not established to prevent identity theft, but increasingly has the effect of doing so.

First, while document fraud requires some level of ingenuity, identity theft requires far more ingenuity. E-Verify continually forces unauthorized workers to resort to more and more difficult methods to obtain unauthorized employment. USCIS anticipates that this increased burden and the increased danger of involvement in identity theft criminality causes a significant number of unauthorized workers not to seek employment with employers who use E-Verify.

Second, E-Verify introduced a photo screening capability (''photo tool'') into the verification process in September 2007. When an employer is presented with an employment authorization card or permanent residence card during the Form I–9 documentation process, the employer can match the photo on the documents to the photo which appears on the computer screen during the E-Verify process because the two should be the identical photo. Fifteen million photographs are contained within the USCIS databases. This has led to instances where employees who have either used photo substituted documents or have created entirely counterfeit documents have been identified. USCIS is currently in discussions with the Department of State to add United States passport and visa photographs to the E-Verify process as well. It is USCIS's long-term goal that the E-Verify photo screening process will be able to verify photos on all identity documents that an employee may present during the Form I–9

process. The photo tool has identified numerous cases of document and identity fraud and prevented unauthorized workers from gaining employment. Accordingly, the Councils consider the E-Verify process superior to the current I–9 process for identifying and deterring document fraud and identity theft.

2. *Comment:* Many commenters stated a concern that E-Verify's inability to prevent identity theft leaves employers that use E-Verify vulnerable to sanctions. Additionally, many commenters stated that the threat of penalties resulting from the use of E-Verify or pressure to comply with the system would encourage employers to forego hiring certain workers.

Response: The Councils disagree with these comments. As explained above, the E-Verify system makes an employer more, not less, able to prevent document fraud and identity theft. If a Federal contractor participating in the program obtains confirmation of identity and employment eligibility in compliance with the terms and conditions of the program the contractor will have the benefit of establishing a rebuttable presumption that the contractor has not violated INA 274A(a)(1)(A) with respect to the hiring. See 8 U.S.C. 1324a, note, Sec. 402(b). Moreover, no Federal contractor participating in the E-Verify program can be held civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the E-Verify system. *Id.* at 403(d). USCIS and ICE may also use law enforcement discretion in relation to specific instances of good faith operation of the program. Accordingly, the Councils do not view the stated concern over employer sanctions resulting from identity theft as an impediment to implementing this final rule.

With respect to the comments regarding selective hiring, an evaluation of the E-Verify program, publicly available on the Internet at *http://www.dhs.gov/E-Verify* under ''Program Highlights''/''Findings of the Web-Based Basic Pilot [E-Verify] Evaluation—September 2007,'' included an analysis of employer's confidence in hiring certain workers with information collected directly from E-Verify employers. Most employers who use E-Verify stated that they are neither more nor less willing to hire immigrants. When use of the program was reported as impacting employer hiring practices, employers almost always stated that the provision of an additional means to determine work authorization through E-Verify resulted in increased confidence and security in the employee's work status and therefore, made the employer more likely to hire immigrants.

3. *Comment:* One commenter stated that DHS needs to reduce the number of documents acceptable to prove authorization to work to reduce identity theft and confusion. The same commenter also stated that E-Verify does not have the ability to determine if an SSN is being run through its system multiple times.

Response: The number of documents acceptable for demonstrating authorization to work is governed by the INA and by the regulations on the Form I–9. The E-Verify program requires documents with a photograph when the employee presents a ''List B'' document for Form I–9 purposes. See 8 U.S.C. 1324a note, Sec. 403(a)(2)(A)(ii). The requested change to further restrict the documents that may be used for the Form I–9 or for E-Verify would be better directed to DHS than to the Councils, and is outside of the scope of this rulemaking.

E-Verify is fully capable of detecting multiple uses of SSNs. Through the USCIS Monitoring and Compliance unit, steps are taken to identify those instances where suspected fraud has occurred and corrective action is taken where appropriate. Additional methods to combat identity theft, including methods to determine if a single SSN is being used in different geographic locations, are under investigation with a focus on suspected or clearly identified fraudulent use of SSNs, based on the number of times and geographic areas in which a number has been used. The Councils note that an employee could have more than one job, in different locations.

g. Communications

Comment: A professional association commented that certain materials should be made available prior to enrollment (*e.g.*, user manual) and that E-Verify should create a list of items for employers.

Response: Currently, E-Verify does provide many materials on the program's Web site at *http://www.dhs.gov/E-Verify* including the E-Verify Users Manual, a ''How Do I Use E-Verify'' guide, and a copy of the E-Verify MOU among other informational materials. E-Verify continues to engage in employer outreach to further educate employers regarding their responsibilities under the program.

2. User Liaison Organizations and Other Assistance to Contractors

Comment: One industry association requested establishment of a user liaison organization to solicit, assess, and prioritize with the user community implementation of needed system enhancements and corrective actions.

A university requested establishment of an E-Verify Ombudsman to assist with the expected higher than average error rates for foreign nationals on college and university campuses.

Another university commented that DHS should provide Federal funding assistance to employers for initial setup of record retention capabilities and staff training and initial and ongoing verification of expenses.

Response: DHS has informed the Councils that it is continually looking at ways to improve the E-Verify system, and believes that support is already provided to employers in a consistent and effective way. E-Verify provides general assistance through information found on the Web site and trained staff to address questions before or during the registration process in addition to continued support after an employer registers as an E-Verify participant. The MOU provides points of contact. The program also goes beyond this general support to provide presentations and system demonstrations to individuals or groups such as employers, Federal, State and local governments, community-based organizations, and various industry associations. The E-Verify program has participated in outreach events designed to provide information to the public and interested stakeholders regarding the program. The program conducts demonstrations, participates in conferences and outreach events, hosts webinars for interested parties, and created public awareness campaigns nationally and on the web and on radio, print and billboard in the states of Arizona, Georgia, Mississippi, and the metro Washington, DC area. The E-Verify Outreach branch has coordinated closely with the Small Business Association since April 2008 to conduct outreach events to ensure specific concerns relating to small businesses are heard and addressed.

With regard to the request for financial assistance, the Westat evaluation reports that the majority of employers reported that they spent $100 or less for initial setup costs for E-Verify and a similar amount annually for operating the system. There is no additional record retention beyond Form I–9 requirements, with the exception of those employers who are presented with green cards (I–551s) or EADs (I–767) and need to retain photocopies of these documents for the photo tool as long as they are retaining the Form I–9.

3. Staffing

a. SSA and DHS Staffing for E-Verify

Comment: Many commenters raised various concerns over the overburdening of both SSA and DHS if E-Verify is expanded. Many commenters commented that the rule would overwhelm DHS and SSA as neither organization is adequately staffed to deal with the increased number of tentative nonconfirmations expected. Some of these commenters wrote that there is a substantial difference between the current number of E-Verify employers and the number of E-Verify employers that would use the system as a result of the rule. Those commenters were concerned with the scalability of staff to handle the increased number of employers.

Response: The Councils disagree with these comments. DHS (and its predecessor agencies) and SSA have worked closely for more than a decade to improve the E-Verify process. Since SSA does not receive appropriated funding for E-Verify, it is reimbursed by DHS for labor costs associated with resolving mismatches with SSA field offices. These costs include salaries and overhead for SSA field office employees who resolve mismatches in the field, and salaries and overhead for SSA employees who staff the SSA 1–800 number to answer calls from employees and employers. DHS has worked hard to decrease E-Verify related work undertaken by SSA field offices.

In May 2008, the E-Verify program launched the inclusion of naturalized citizen data as part of the initial E-Verify check. E-Verify now automatically performs an initial query to check information against the USCIS naturalization databases for all U.S. citizen new hires. In the short time since this new routine was put into place, E-Verify tentative nonconfirmations for naturalized citizens have decreased by 30 percent. In the event a naturalized citizen receives a SSA tentative nonconfirmation due to citizenship status, that individual now also has the option of calling DHS to reconcile the citizenship status mismatch rather than physically visiting SSA. DHS's efforts in this area will further reduce the number of E-Verify mismatches for naturalized citizens, thus reducing the instances of ''walk-ins'' to SSA offices for naturalized citizens.

Many commenters in addressing this issue did so in terms of a nationwide mandatory expansion of E-Verify to all employers and cited statistics that would apply to such an expansion. It is likely that SSA would need to increase its own workforce to meet the demands of a nationwide mandatory system that would be used by approximately 7 million employers. However, the SSA reports that the numbers of employers and the workloads associated with this FAR rule would be far less than they would be under a nationwide mandatory system. This is especially true given the recent improvements made to the E-Verify system and the effect those have had in reducing the numbers of people contacting SSA.

b. Effect on Other Agency Functions

Comment: Some commenters were specifically concerned with the effect that the rule would have on SSA's ability to fulfill its primary mission of administering benefits.

Response: Since E-Verify uses a system separate from other SSA verification services, increases in E-Verify queries would have no effect on disability claims. As stated above, SSA and DHS are sufficiently staffed to handle E-Verify, therefore there should be no adverse impact on carrying out any of the other core functions of these agencies.

4. System Technology Issues

Comment: Many commenters suggested that the E-Verify program would be unable to handle the increased strain on its system, and specifically on the transactional database. Several of those commenters stated that the requirement to check all new hires will overwhelm the current system and lead to an increase in workforce disruption. Several other commenters argue that E-Verify is ill-equipped to handle a vast increase in users, queries, transactions, and communications volumes. Some commenters suggested that the E-Verify program and its system needs further study of its capabilities and needed functionalities, that problems with the present technology have not been addressed, that the requirements of the rule would require major E-Verify system changes, and that the system is unable at present to handle the anticipated increases in usage absent the rule. Another commenter was concerned with the availability of an Internet-based system in the event of a natural disaster that would inhibit the ability of an affected company to access a computer and Internet access to use E-Verify.

Response: The commenters are correct that the FAR rule is expected to significantly add to the number of queries run through the E-Verify system. However, many commenters in addressing this issue did so in terms of a nationwide mandatory expansion of E-Verify to all employers and cited statistics that would apply to such an expansion. Based upon their exaggerated projections, the commenters assert that there is a high probability that disputes will not be resolved in a timely manner. But the numbers of employers and workloads associated with this FAR rule would be far less than they would be under a nationwide mandatory system, and they would not be difficult to absorb. The Councils, in consultation with DHS and SSA, are confident that the system will be able to accommodate the required greater volume of enrollments and queries within the time allotted. The Verification Information System (VIS), which is the database that supports E-Verify, underwent vigorous load testing in July 2007 in partnership with the SSA data systems. Those tests conclusively showed that the existing VIS will scale to meet even the most demanding current estimate of VIS operation, considering peak volumes for both queries and registrations. Currently, VIS is capable of handling 40 million queries annually. The testing found that the E-Verify system has the capacity to accommodate at least 240 million queries annually, four times the projected 60 million new hire queries per year that would result from mandatory E-Verify legislation applicable to all U.S. employers. It is also worth noting that the employer registration process is automated, and testing indicates that E-Verify is capable of handling up to 145,500 registrations per day, well over the estimated 4,000 per day that would occur under a nationwide all U.S. employer use scenario.

As of September 13, 2008, over 85,500 employers representing over 446,000 sites are registered for E-Verify. This calendar year, approximately 10 percent of all new hires nationwide have been run through the E-Verify system. In fiscal year 2008 to date, E-Verify has run over 6.2 million new hires through the program, which is nearly double the 3.2 million new hires run through the program in all of fiscal year 2007. Both SSA and DHS agree the current system is more than adequate to handle the volume increase associated with the FAR rule.

With respect to comments regarding contingency plans in the event of a failure of information technology systems in a natural disaster, the Councils believe that the agencies and the Government generally have standards and requirements for such circumstances. USCIS and SSA are required to follow Federal Government policies and procedures related to

information technology continuity of operations and emergency planning. In any event, section 403(a)(3)(B) and the MOU provide for an extension of the three day period if E-Verify systems are down.

5. Other Impacts on Society

a. Macroeconomic Impact

Comment: Many commenters, notably community organizing groups and religious societies, an agricultural employer, trade associations, a human resources society and several individual employers stated that the rule will have a ''devastating effect'' on the United States economy, will lead to increased discrimination and an unwillingness to hire workers who look or sound foreign, and will lead contractors who need workers to hire them ''off the books.'' One commenter stated that ''the economic impact of this regulation could be devastating to the point where agriculture in the United States will cease to operate as it does today.'' In this same vein, several commenters stated that this is not an appropriate time for this rule, given a recent ''meltdown'' of the American economy, the mortgage crisis, and the resulting difficulties currently faced by United States employers and employees.

Response: The Councils consider these comments as outside of the scope of this rulemaking. The Councils are implementing a directive from Executive Order 12989 that Federal contractors agree to use an electronic eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of all persons hired during a contract term by a contractor to perform employment duties within the United States and of all persons assigned by the contractor to perform work within the United States on the Federal contract. Decisions related to the potential impact of this directive on the entirety of the United States economy or on individual sectors within the United States economy are not delegated to or exercised by the Councils in this rulemaking.

Moreover, these comments obviously assume that the existing Form I–9 process does not verify employment authorization, and that there will be a significant change in the number and type of employees found authorized to work in the United States with the implementation of E-Verify for Federal contractors. This should not be the case. E-Verify is merely a better means of verifying the work eligibility of the Federal contractor workforce. The Councils are not persuaded that permitting a less effective verification system to continue for the purpose of maintaining a status quo in which illegal employment is common is a valid reason not to implement the system as to all Federal contractors when a more effective system is available that will create a more stable and dependable cadre of Federal contractors.

As to driving employers to hire more illegal workers ''off the books,'' the Councils' position is that all Federal contractors are bound to comply with Federal, State and local laws, and that they should continue to do so should they wish to continue to contract with the Federal Government.

b. Religious and Disability Accommodation

Comment: One commenter stated that requirements to access the Internet violate some religious tenets, making the rule discriminatory. Other commenters indicated that the requirement that employees present a photographic identification unduly burdens certain religious beliefs. Another commenter requested confirmation that the E-Verify system would accommodate persons with visual disabilities.

Response: While the Councils remain sensitive to the concerns of different religious groups, they must balance those concerns against the need to have stable and dependable Government contracting and to minimize document fraud in the E-Verify program in support of that goal. In particular, photographs serve a unique and essential function and significantly minimize the opportunities for document fraud, unlike fingerprints, by allowing a contractor to immediately compare the picture embedded in the document against the employee. IIRIRA Section 403(a)(2)(A)(ii), 8 U.S.C. 1324a note, thus requires photo identification from employees of employers participating in the E-Verify program. In order to be consistent with these standards, the E-Verify MOU requires all employees of Federal contractors participating in E-Verify to present a photographic identification document.

The Councils recognize that there may be occasions where U.S. citizens assert that religious beliefs preclude their being photographed and, as a result, they may not be able to present the required photographic documentation. The E-Verify program complies with all applicable civil rights laws and will provide accommodations where appropriate, as required by law, on a case-by-case basis.

DHS is also implementing other processes and procedures to accommodate religious beliefs and disabilities, as required by law, in relation to the E-Verify program. These include telephonic means of verifying employment authorization. These alternative employment authorization verification methods will permit compliance with E-Verify while accommodating user religious beliefs and disabilities.

c. Employment Discrimination

1. *Comment:* One commenter stated that E-Verify creates grave risks for immigrant women, particularly those who are victims of domestic violence, human trafficking, sexual assault and other criminal activity to the extent the program requires employers to enter the name, SSN and other identifying information of each employee into the E-Verify database, which is then available to the public. The commenter alleged that, as such, E-Verify does not adhere to Violence Against Women Act (VAWA) and Trafficking Victims Protection Act (TVPA) confidentiality provisions.

Response: The Councils agree that the E-Verify program should be conducted in compliance with all Federal laws, rules and regulations related to privacy and confidentiality of personally identifiable information. USCIS and the SSA do comply with all of those requirements in the administration of E-Verify program. Contractors are required by MOU to safeguard confidential information, and means of access to it (such as PINS and passwords) to ensure that it is not used for any other purpose and as necessary to protect its confidentiality, including ensuring that it is not disseminated to any person other than employees of the employer who are authorized to perform the employer's responsibilities under the E-Verify MOU. The Councils direct the commenter to the E-Verify program systems of records notice published by USCIS in accordance with the Privacy Act for more information regarding the program's collection and use of personally identifiable information. 73 FR 10793, Feb. 28, 2008.

2. *Comment:* A Federal Government agency requested that the Councils supplement the proposed rule and that USCIS supplement the proposed MOU to add a specific reference to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. Section 2000e (1964), as amended, when discussing relevant prohibitions against illegal discrimination.

Response: USCIS has supplemented the MOU to add specific reference to Title VII. The Councils supplement the statements in the preamble to the NPRM to clarify that Title VII, as well as INA

Section 274B, 8 U.S.C. 1324b, prohibits unlawful discrimination against any individual in hiring, firing, or recruitment or referral practices because of his or her national origin. Such illegal practices can include selective verification or use of E-Verify in a manner not provided for in paragraph 16 of the MOU; discharging, refusing to hire, or assigning or refusing to assign to Federal contracts qualified employment eligible employees because they appear or sound ''foreign''; and premature termination of employees based on tentative nonconfirmations. As such, Title VII applies to all employment actions not otherwise protected by IIRIRA Section 403(d), 8 U.S.C. 1324a note, or precluded by other law.

3. *Comment:* Several commenters expressed concern that the photo identification requirements in the proposed rule will result in lawfully present immigrants and U.S. citizens being terminated from or denied employment because they cannot present photo identification.

Response: The Councils disagree with the premise of this comment. There is no requirement that an employer terminate an employee who cannot present photo identification. The MOU will be amended to instruct contractors to contact USCIS regarding possible accommodation. The contractor is prohibited from taking adverse employment action against the employee until the contractor receives a final nonconfirmation.

4. *Comment:* Many commenters, and in particular immigrants rights advocates, religious associations, employers, unions, chambers of commerce, and employer groups commented that verification through the use of E-Verify will result in increased disparate treatment employment discrimination. Some of these commenters speculate that contractors will give preference in hiring and assignment of work to applicants they believe ''look like'' U.S. citizens and discriminate against applicants who sound or dress ''foreign'' or have ''foreign sounding'' names.

Several commenters stated that use of E-Verify will lead to disparate impact discrimination claims because approximately 10 percent of foreign-born U.S. citizens receive tentative nonconfirmations for work eligibility versus 0.1 percent for native-born U.S. citizens.

Response: The Councils oppose unlawful discrimination in any form and, in particular, unlawful discrimination that undermines the intent and purpose of this E-Verify final rule. As was stated above, contractors who use the E-Verify system to unlawfully discriminate against individuals in hiring or employment violate Title VII, as well as INA Section 274B, and are subject to civil penalties and termination of participation in the E-Verify program after suspension and debarment procedures. Such illegal practices can include selective verification; discharging, refusing to hire, or assigning or refusing to assign to Federal contracts to qualified employment eligible employees because they appear or sound ''foreign''; and premature termination of employees based on tentative nonconfirmations. Contractors are protected from civil or criminal liability under IIRIRA Section 403(d), 8 U.S.C. 1324a note, when taking actions in good faith reliance on information provided through the E-Verify confirmation system. This, however, does not permit contractors to unlawfully discriminate against applicants or employees in other aspects of the employment relationship.

The Councils are not aware of any opportunity to discriminate in use of the E-Verify system that is any greater than the potential for discriminating against employees in application of the Form I–9 process. Contractors may also unlawfully select out candidates for employment because of foreign sounding names or other ''foreign'' characteristics because they do not believe those employees will be able to complete the I–9 process. There is thus no reason to believe that the E-Verify program will spur any greater disparate treatment discrimination than the current Form I–9 process. See *Chicanos Por La Causa, Inc. et al.* v. *Napolitano et al.*, Civil No. 07–17272, 2008 WL 4225536 at *8 (9th Cir. 2008) (''Congress requires employers to use either E-Verify or I–9, and appellants have not shown that E-Verify results in any greater discrimination than I–9.'').

With respect to comments related to disparate impact claims potentially arising from differing tentative nonconfirmation issuance rates for foreign-born U.S. citizens and U.S.-born citizens, the Councils agree that DHS and SSA should improve their database administration to help alleviate all instances of tentative nonconfirmations. As one commenter observes, ''myriad reasons'' account for errors in the SSA database, including clerical errors made by agency employees and an employer's or a worker's own errors when completing Government forms. Moreover, an error may stem from a name change due to marriage, divorce, or naturalization. An error may also come from the misuse of an SSN by an unauthorized worker. There are thus many legitimate nondiscriminatory reasons why these databases might produce a greater percentage of tentative nonconfirmations for one group of persons than another. However, these tentative nonconfirmations can be contested and resolved prior to final confirmation or nonconfirmation of employment eligibility. Contractors must agree not to take an adverse action against an employee based upon the employee's perceived employment eligibility status while SSA or DHS is processing a verification request unless the contractor obtains knowledge (as defined in 8 CFR 274a.1(l)) that the employee is not work authorized. A tentative nonconfirmation, or the finding of a photo non-match, does not establish and cannot be interpreted by the contractor as evidence that the employee is not work authorized. Accordingly, the tentative nonconfirmation provided by the DHS and SSA databases does not necessarily lead to an employee's termination from employment or any other adverse action. In fact, the employee is protected from such actions during the process. The Councils therefore do not view the possibility of disparate impact claims as an impediment to issuing this final rule.

The MOU

1. Need for the MOU

Comment: One commenter urged that the proposed rule be modified to make explicit its linkages to the required MOU. Another commenter suggested that the proposed rule, and all prime- and sub-contracts issued under the proposed rule, should set forth with specificity the sanctions and enforcement protocols provided for by the MOU. One commenter suggested that MOU use is not necessary, and that the new contract clause created by this rulemaking should be sufficient to detail E-Verify's compliance requirements.

Response: The Councils do not agree. As noted above, the purpose of the FAR clause is solely to require contractors to agree to use E-Verify and to specify when the program will be used. The clause is not intended to duplicate the E-Verify program's internal terms of use. Those program use requirements are appropriately addressed under the MOU. DHS has statutory responsibilities and law enforcement authorities that are addressed under the MOU and those responsibilities and authorities are inappropriate to address either in the FAR or in a contract clause. For the same reasons that industry and Federal standards are not required to be incorporated in full into each contract

that requires adherence to them, it is not necessary to incorporate the E-Verify MOU requirements in each covered contract. Incorporating by reference laws, regulations, industry standards, and other FAR clauses is normal practice in Federal contracting.

2. Public Comments on the MOU

Comment: One commenter asserted that the public should be afforded an opportunity to comment on the provisions in the E-Verify MOU.

Response: The Councils placed the proposed MOU reflecting the program participation requirements for Federal contractors into the public docket, and discussed the requirements under that document in the preamble of the proposed rule. See 73 FR 33376–77. In response, the Councils received many comments related to the MOU in general and as to specific provisions within the MOU, which are addressed in greater detail later in this section. Accordingly, commenters were afforded an opportunity to comment on the provisions of the MOU and, in fact, did provide such comments to the Councils. A final version of the MOU will be available on the E-Verify Web site *http://www.dhs.gov/E-Verify*.

3. Specific MOU Provisions

1. *Comment:* Three commenters expressed concern with provisions of the draft MOU regarding those employers who may one day wish to become Federal contractors. One commenter commented that employers will be terminated from E-Verify for technical violations of the (MOU) thereby becoming an obstacle to an employer's later participation in Federal contracts. Another comment stated that those employers who are not currently Federal contractors will not be permitted to query existing workers thereby harming the interests of those employers who may be preparing to enter the Federal marketplace. A comment observed that greater clarity is needed with respect to when termination or suspension can be invoked. One commenter commented that the FAR rule materially changes the MOU between USCIS, SSA and companies participating in E-Verify. A university suggested that the employer have the ability to resolve DHS tentative nonconfirmations on behalf of their employees.

Response: The Councils agree that employers who seek to obtain their first Federal contract may be at some disadvantage in relation to employers who already hold Federal contracts covered by this rule, since the new entrant would face the start-up costs associated with running E-Verify queries of its existing workforce that the already-established contractor has previously incurred. The Councils note, however, that this small ''barrier to entry'' is no different from the myriad other such ''barriers'' that new contractors must face to come into compliance with the unique requirements for Federal contracting that are codified in the FAR.

USCIS retains its authority to investigate violations of the E-Verify program. DHS and SSA may terminate a contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS or SSA terminates a contractor's MOU, the terminating agency will refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222–54. If the contractor is suspended or debarred as a result of the MOU termination, the contractor will not be eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must reenroll in E-Verify.

The Councils appreciate the recommendations of the commenter with respect to the ability of employers to resolve a tentative nonconfirmation on behalf of those employees whose work authorization stems from J–1, H–1B or O–1. The system is designed to give the employee the responsibility to handle their own case to reduce employer burden, allow the employee to maintain their own documents regarding their status and protect employee privacy. Additionally, it is important to note that the responsibility of providing documents for employment eligibility purposes is on the employee. The instructions accompanying Form I–9 currently require employees to present original documents. Placing the burden on the employee to resolve tentative nonconfirmations is consistent with the requirement that the employee provide documents establishing his or her employment eligibility. Privacy concerns, including confidentiality related to certain visa status, preclude employers from resolving tentative nonconfirmations on behalf of employees. Nothing prohibits an employer from assisting an employee with this process at the request of the employee.

2. *Comment:* One commenter stated that the language referencing the ''rebuttable presumption'' that an Employer has not violated Section 274 (a)(1)(A) of the Immigration and Nationality Act exists only in the draft MOU and not in the FAR rule and that the MOU must be altered to include additional time for cases involving an SSA no match.

Response: The commenter is correct that certain provisions mentioned by the commenter do not exist in the current clause contained in the rule. This is not required by the FAR. With respect to the recommendation that the MOU be changed to allow additional time for addressing SSA ''no-match'' cases, the comment appears to confuse the time allotted under the MOU to contact SSA (or DHS) to start resolving a mis-match with the time allotted under DHS's no-match rule for an employee to complete the process of resolving a mis-match.

3. *Comment:* A building trade's association commented that several provisions of the draft FAR MOU is using the same disclaimer language as previous versions of the MOU and that that language has not been subjected to judicial review.

Response: The commenter is correct that the provisions of the draft MOU have not been subjected to judicial review. However, the provisions contained in that draft MOU closely follow language in MOUs currently in use by over 80,000 employers, which have gone unchallenged over the life of the program, and which have been drafted consistent with the controlling law related to the E-Verify program.

4. *Comment:* A chamber of commerce commented that current employees of Federal contractors should be allowed to opt out of work prior to being verified in E-Verify.

Response: The rule does not seek to tell employers which current employees they should assign to Federal contract work, or what privileges or rights employees may have relating to which tasks they are assigned in their workplace. Unless there is something in the specific contract relating to that, that is an internal business and labor management decision for the contractor to make subject to its normal processes and requirements. Therefore, it would be inappropriate to include provisions relating to employees ''opting out'' of work on Federal contracts.

a. Reporting Change in Status

Comment: There is no comment listed for this topic but the Councils nonetheless address this issue in the response below.

USCIS does not require that employees report a change in status to E-Verify. E-Verify is able to determine whether an employee is work authorized using numerous databases without receiving information directly from an employee. Once an employee has been verified through E-Verify, he or she does not need to be re-verified in E-Verify until employed by a new employer.

A related matter is the Form I–9. If the document presented by an employee (who indicated that he or she is an alien authorized to work) when completing the Form I–9 has expired, the employer is required to update the Form with the new document establishing that employee's work authorization. The new document should be listed under Section 3 (''Updating and re-verification'') of the Form I–9. The Employer may opt instead to complete a new Form I–9 with the new document.

b. Resolution of Tentative Nonconfirmations

Comment: Five commenters indicated that they were concerned that a tentative nonconfirmation might not be resolved within the time allotted by E-Verify. Of those, four commenters commented that employees had insufficient time to resolve a tentative nonconfirmation particularly if the employees are in remote areas that lack access to transportation and to a nearby SSA office. The other commenter also expressed concern that an SSA tentative nonconfirmation could not be resolved in 90 days.

Response: Under the program rules for E-Verify, after a tentative nonconfirmation has been generated, the employer must provide that notice to the employee. Once the employee actually receives the tentative nonconfirmation and decides to contest it, the employer initiates a referral through the E-Verify system. Once a case is referred, then the employee has eight Federal Government work days to contact the appropriate agency. He or she can do so by simply contacting SSA or DHS. Once the employee has initiated the process of contesting the tentative nonconfirmation, the employee may continue working until the case has been resolved.

The Councils believe that providing the employee with eight days is a sufficient amount of time for the employee to contact SSA or DHS to begin working out any discrepancy, even taking into account remote locations. It is important to note that the eight-day timeframe in the E-Verify program rules is the time allotted for the employee to initiate the process of resolving his or her tentative nonconfirmation—not the time allotted for a tentative nonconfirmation to be finally resolved. Most SSA tentative nonconfirmations are resolvable within two days, and DHS statistics show that SSA resolves 96.6 percent of cases within 7 days of the date the individual first contacts SSA. In a few cases, the SSA has extended the time period in order to allow for the employee sufficient time to obtain a required document.

With respect to employees who reside in remote locations, it is important to note that employees who receive a tentative nonconfirmation from DHS are not required to visit a USCIS office. Moreover, in most cases, a DHS tentative nonconfirmation can be resolved over the phone using a toll-free number. In an effort to make the process simpler for many employees living in remote areas, DHS has made system enhancements to E-Verify. As a result, in most instances, naturalized U.S. citizens who receive a tentative nonconfirmation from the SSA are no longer required to personally visit a SSA office. Naturalized citizens are now able to contact DHS directly (over the phone). USCIS believes that this process will greatly limit the number of employees who must make personal visits to a SSA office thereby easing the burden on those who are in remote locations.

The Councils also note that these comments relate to a previous E-Verify process that has since been replaced by a more efficient one. It is true that at one time, the way an employer verified that a tentative nonconfirmation was successfully resolved was to re-query the system. However, beginning in October 2007, SSA and DHS began using a new automated system known as EV–STAR to provide automated feedback to employers concerning the status and resolution of any tentative nonconfirmations received by employees. Since that time, there has been no need for employers to re-query the system.

c. Due Process

Comment: An immigrant rights advocacy group and a union commented that workers have insufficient due process procedures in place to allow them redress. One commented that there are insufficient judicial remedies in place to provide relief to an aggrieved employee.

Response: The Councils recognize the due process concerns raised by the commenters, but believe that the processes in place with the E-Verify system provide adequate opportunity for employees to contest and resolve any issues that arise. E-Verify, through the MOU and its internal practices and procedures, which are published on the E-Verify program Web site, has provided a system that protects the rights of employees while providing the means to verify the work authorization status of those persons. The MOU prohibits the Employer from discharging, refusing to hire, or assigning or refusing to assign to federal contracts employees because they appear or sound ''foreign'' or have received tentative nonconfirmations. The Employer is further warned in the MOU that any violation of the unfair immigration-related employment practices provisions in section 274B of the INA could subject the Employer to civil penalties, back pay awards, and other sanctions, and violations of Title VII could subject the Employer to back pay awards, compensatory and punitive damages. The MOU agreed to by the Employer also states that violations of either section 274B of the INA or Title VII may also lead to the termination of its participation in E-Verify. If the employee believes that s/he has been discriminated against, he or she should contact OSC at 1–800–255–7688 or 1–800–237–2515 (TDD). Employers that have questions relating to the anti-discrimination provision should contact OSC at 1–800–255–8155 or 1–800–237–2515 (TDD). Concerns regarding the judicial remedies are better framed to other offices within the Executive and legislative branches of Government.

The E-Verify program offers employees who receive a tentative nonconfirmation the opportunity to contest the finding and clarify their records with either SSA or DHS. This is a form of due process protection. If an employee does contest the tentative nonconfirmation and is not able to clarify his or her record with additional documentation, he/she will be issued a final nonconfirmation. Employers or employees may contact the E-Verify program if additional time is needed to provide such documentation or if they believe a final nonconfirmation was received in error. The E-Verify program may delay a final nonconfirmation finding on a case by case basis in those cases where employees have experienced delays in receiving needed documentation that will help prove their employment eligibility, and the program will work with the employer and/or employee to research the case and identify the reason for the final nonconfirmation.

The E-Verify program is committed to protecting the rights of employees who feel that they have been discriminated against or who believe they have

erroneously received a tentative nonconfirmation. On the E-Verify Web site, on all tentative nonconfirmation letters that employees receive, and in the MOU that E-Verify users sign when joining the program, E-Verify provides the contact information to OSC. In addition, E-Verify registered employers are also required to display two posters which apprise the employees of their rights and how to contact the OSC in the event of perceived discrimination: (1) The ''You Should Know Your Rights and Responsibilities under E-Verify'' poster produced by USCIS and (2) the ''Employee Rights Poster'' produced by the OSC. Once a complaint has been made, the Office of Special Counsel is able to investigate any case brought to its attention. The Councils believe that these due process protections are sufficient to ensure that the E-Verify system promotes economical and efficient Federal Government contracting.

Content of FAR Rule

1. Definitions (22.1801 and 52.222–54(a))

a. ''Assigned to the Contract'' and ''Directly Performing the Work''

Comment: Several commenters commented that there is no guidance as to how to identify an employee who is ''directly performing'' work under a contract and expressed concerns that this could result in inconsistent application of the rule and disagreements over which existing employees must be run through the E-Verify system.

One employer suggested that ''directly performing work under a contract'' be clarified to mean a person customarily performing more than 50 percent of his/her time in direct support of the covered contract or multiple covered contracts.

A university commented that the proposed rule is too unclear as to how to treat overhead employees who perform some work that benefits a contract and requests that the Councils clarify this situation.

Many other commenters expressed concern over whether the E-Verify requirement applies to employees who are only tangentially involved with covered contracts. Specifically, they inquired whether agreements to provide service, support, or maintenance on an ''as needed'' basis would be covered even if employees would spend only a small portion of their time on these contracts. Commenters also asked whether employees working to prepare a bid or proposal be covered.

One commenter requested clarification as to whether the requirement to verify current employees on covered projects extends beyond those working exclusively at project sites, or whether it extends to others working off-site but dedicated exclusively to the covered project. The commenter suggested that the regulations must provide a high degree of specificity on this issue, as the costs and employment administration ramifications are significant.

Response: The Councils have removed the definition of ''assigned employee'' and provided instead a definition of ''employee assigned to the contract'' because that is the term used in the final rule. The revised definition makes it clear that an employee is not considered to be directly performing work under the contract if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties under the contract. The Councils do not believe it is appropriate to try to establish a mathematical definition of an assigned employee. Contractors will instead have to interpret the definition stated in the final rule as it applies to various individual situations.

The Councils note that it is immaterial whether services are provided intermittently or for only a small portion of an individual employee's time as long as the work is done in the United States in direct support of a contract. However, tangential involvement, if it is in terms of indirect involvement instead of directly working on a contract, does not necessarily trigger the E-Verify requirement. For example, a mailroom clerk who delivers mail to a program office supporting a contract as well as to all other offices served by the mailroom, would not be required to go through the E-Verify process. Other non-FAR requirements, however, would necessitate that the employer vet the mailroom clerk at hiring through the I–9 process.

The Councils also note that working on a proposal, as opposed to working on an awarded contract, does not constitute work under the contract in question and would not trigger E-Verify requirements.

There is nothing in the definition of ''employee assigned to the contract'' that would imply that it makes a difference where that employee is working, as long as it is in the United States.

b. ''Commercially Available Off-the-Shelf (COTS) Item''

Comment: Various commenters advised that the definition of COTS items was not sufficiently clear with respect to ''bulk cargo.'' Several commenters sought clarification that the rule would not be applicable to their products because they believed their products qualify under the definition of COTS. These commenters recommended that the Councils make clear that the rule would not apply to the items they believed to be COTS. Specifically, the commenters asked that the final rule clarify the definition of COTS so that packaged agricultural products are clearly excluded from the definition of bulk cargo so as to avoid deliveries of fruit and other food stuffs from being considered ''bulk cargo'' and therefore outside of the definition of COTS items.

Response: The Councils concur and have amended the final rule in response to these comments to clarify the definition of COTS to explain that a cargo subject to ''mark or count'' is not bulk cargo. Nearly all food and agricultural products should fall within the definition of COTS. The only likely exceptions would be bulk shipments of grains in ship holds. The final rule has added an exception for bulk cargo as well as COTS items.

c. ''Contract'' and ''Contractor''

1. *Comment:* Commenters requested that the Councils define ''contract'' to exclude agreements that are not governed by the FAR, such as grants and cooperative agreements.

Response: The Councils do not concur with this request. The FAR already defines the term ''contract'' and the term does not include grants or cooperative agreements. A grant or cooperative agreement that is not governed by the FAR is not required to include the clause in this rule.

2. *Comment:* Several commenters suggested that the Councils more clearly define the term ''contractor'' to exclude subsidiaries of a parent where the parent holds the contract but the subsidiaries do not.

Response: Whoever signs a contract is the contractor. Only the legal entity that signs the contract and is bound by the performance obligations of the contract is covered by this E-Verify term. If ambiguity remains, this issue will have to be handled on a case-by-case basis consistent with traditional FAR principles.

3. *Comment:* One commenter was concerned about the effect of mergers upon implementation of the E-Verify program.

Response: If a novation agreement takes place, then the merged entity becomes the contractor. Otherwise, there is no impact.

d. ''Subcontract'' and ''Subcontractor''

Comment: A number of commenters, in addressing the proposed rule's subcontractor flowdown requirement, expressed concern as to the definition of ''subcontract'' and ''subcontractor'' and the extent to which the rule might apply to their activities. This was a concern common to agricultural and dairy interests. Two agricultural associations noted that there are numerous sales and supply arrangements that may or may not fall within the rule's coverage. There are direct sales by a producer of an agricultural commodity; direct sales by a packing operation that obtains fruits or vegetables or other commodities from other producers and then sells the product directly to the Government; sales by a broker or handler of agricultural products who purchases the products from a producer or producers but who directly contracts with the Government; and processors of agricultural products that purchase them from producers and sell them to the Government after processing them. One commenter requested clarification that farmers providing food for canning are not ''subcontractors'' and that truckers hauling processed food are not subcontractors for purposes of application of this clause.

In addition, it was noted that the proposed rule does not adequately address the distinct marketing characteristics of agricultural cooperatives. Several commenters pointed to the distinction between farmer cooperatives and their farmer members and referred to court decisions highlighting this distinction.

Another commenter stated that many employers hold contracts with delivery companies, suppliers, maintenance companies, and others who may perform work in support of the Federal contract, and noted that it was unclear from the proposed rule whether these subcontractors would also be required to enroll in E-Verify.

Response: With respect to agricultural and dairy products, the referenced items appear to fall within the definition of COTS or bulk cargo. COTS suppliers would not be subject to the E-Verify requirements because they are supplies, which are not covered at the subcontract level. With respect to the comment regarding potential coverage of delivery companies, suppliers, maintenance companies, and others who may perform work in support of the contract, it was determined that the existing FAR definitions of subcontractor when read in conjunction with previous applicability discussions would address the concerns noted above. The Councils have amended the rule at 22.1801 and the clause at 52.222–54 to include the definitions ''subcontract'' and ''subcontractor,'' found at FAR 44.101.

e. ''Period of Performance'' vs. ''Life of Contract''

Comment: One commenter requested that the ''Period of Performance'' should be defined as ending on the date that delivery is complete. Another commenter questioned the use of the term ''life of the contract'' in the preamble to the proposed rule.

Response: The Councils do not agree. The term ''period of performance'' is used throughout the FAR and various contracts further refine the definition of that period individually for that contract. In general, the period of performance would start at the award date of the contract and extend through the date delivery is complete, unless otherwise specified in the contract. The period of performance does not extend to the date of contract closeout. The Councils concur that for the sake of consistent terminology, the term ''period of performance'' is the correct term to express the required period of required compliance with E-Verify, not ''life of the contract.''

f. Distinction Between Products and Services

Comment: One commenter stated that the rule should make a clearer distinction between products and services.

Response: The Councils do not concur with this comment. Contracts for services are clearly defined in Part 37 of the FAR.

2. Mandatory Enrollment (22.1802 and 52.222–54(b)(1)(i))

a. Noncompliant Employers Only

Comment: Several commenters stated that the rule should be restricted in its applicability only to contractors who have engaged in the knowing employment of unauthorized foreign nationals or who have shown that they routinely shirk their obligations under I–9 procedures, such as those who receive multiple ''no-match'' letters demonstrating that their concern for the work eligibility of their workforce may be lacking. Alternatively, the commenters recommended application of E-Verify only to verify employees whose work eligibility may be in question due to receipt of a ''no-match'' letter.

Response: The Executive Order 12989, as amended, does not authorize such a limited approach. In any event, restricting the applicability of the rule to employers who routinely shirk their obligations would not foster the stability and dependability across the entire Federal contractor community in the manner envisioned by Executive Order 12989. Using E-Verify at the beginning of the contract should reduce the number of ''no match'' letters received by the employer later in the process.

b. Non-Citizens

Comment: Another commenter suggested that contractors should only verify non-citizen employees using E-Verify to reduce employer burden.

Response: Executive Order 12989, as amended, directs the Councils to implement the President's procurement policy through a FAR rule that requires federal contractors to agree, as part of their contract performance, to verify all new hires without differentiating between citizens and non-citizens. Modifying the rule to require verification only of non-citizens would not satisfy the requirements of this presidential directive. Moreover, the Councils believe that verifying only those who do not claim to be U.S. citizens would be discriminatory and would not meet the ultimate goal of fostering a more stable and dependable Federal contractor workforce.

Verifying only those employees who attest to work-authorized alien status would defeat the basic purpose of E-Verify and this rule. E-Verify is designed to guard against identity and immigration fraud in the paper-based I–9 process, which may take the form of false claims of U.S. citizenship backed up with either false or fraudulently obtained driver's licenses, birth certificates, social security cards and/or other Form I–9 documentation other than DHS immigration status documents. An alien-only verification system would not only fail to deter this kind of fraud, but it would encourage it.

Using E-Verify only for non-citizens would likely violate the anti-discrimination provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b, which prohibits discrimination with respect to hiring, firing, or recruitment or referral for a fee, on the basis of national origin or, for certain classes of protected individuals, on the basis of citizenship status. Employers may not treat individuals differently on the basis of national origin, and U.S. citizens, recent permanent residents, temporary residents, asylees and refugees are protected from citizenship status discrimination. This anti-discrimination provision is enforced by OSC. If an employee believes that he or she has been discriminated against during the employment eligibility verification

process, he or she should contact OSC at 1–800–255–7688 or 1–800–237–2515 (TDD). Employers that have questions relating to the anti-discrimination provision should contact OSC at 1–800–255–8155 or 1–800–237–2515 (TDD).

c. Increase in Program Abuse

Comment: Several commenters were concerned that mandatory use will increase abuse of the program. One commenter stated that preliminary reports from Arizona's mandatory use of E-Verify suggest that some employers are violating the terms of the MOU and engaging in illegal employment practices such as verifying existing employees, rather than verifying only new hires and that they are doing so in a discriminatory way. The commenters believed that implementation of the proposed rule will exacerbate the situation regarding discriminatory use of the program. Also, some commenters claimed that employers do not understand the ways in which E-Verify is to be implemented in the workplace, and that as a result they take mistaken actions, such as firing workers when they are not required to do so (or are prohibited from doing so).

Response: The rule is clear in its requirements to verify existing employees. All who are assigned to a contract must be verified. This provides no latitude for discrimination. Also, the E-Verify program MOU will actually serve to reduce confusion over employer responsibilities when workers are in the process of clearing up questions as to their authorization to work in the United States. The MOU gives clear descriptions that prohibit employers from firing workers during that period or from taking other adverse actions.

To address employer abuse and/or fraud, the E-Verify program has created a Monitoring and Compliance unit that can detect, deter, and remedy improper use of the system. The Monitoring and Compliance unit also works to safeguard personal privacy information; prevent the fraudulent use of counterfeit documents; and refer instances of fraud, discrimination, and illegal or unauthorized use of the system to enforcement authorities. Once fully staffed, the E-Verify's Monitoring and Compliance unit will carry out its mission by educating employers on compliance procedures and guidelines and providing assistance through compliance assistance calls. The unit will also conduct follow-up with desk audits and/or site visits to unresponsive employers if necessary, and refer cases of fraud, discrimination, and illegal use to the OSC or ICE, as appropriate. The Monitoring and Compliance unit will also monitor system usage to identify when registered employers have not used the system within an appropriate time period given the size of the organization.

3. Application to Employees (22.1802(b)(2) and (c), and 52.222–54(b))

a. All New Hires During Period of Performance of the Contract

Comment: Several commenters suggested that it is inappropriate to require an entire company to be subject to E-Verify for all new hires when the company has only a small number of Federal contracts that comprise a small proportion of its business. They argued that the proposed rule is an overbroad use of the procurement authority to cover new hires that are not associated with performance of a contract and stated that the rule should apply only to new hires at a work site that is performing a contract.

Response: Applying the duty to verify all new hires of the entire organization of the contractor is a requirement of Executive Order 12989, as amended. If the requirement were limited only to new hires at locations doing Government work, the rule would be impractical and too easy to undermine by transferring employees from non-contracting work sites to contracting work sites. Not all hires of a contractor are hired through the location where they work. It is very common for a contractor to hire through a central site that has no connection to various work sites. In addition, there are few Federal contractors who have segregated their workforces in the manner suggested in the comments. Modern technology, most notably email, has broadened and facilitated doing work in multiple dispersed locations through a national and even international network of collaborators. Thus, defining the work site would be too unwieldy for an effective rule, making enforcement of this aspect of the rule too difficult and too easy to misinterpret or undermine.

With respect to providers with few Government contracts, the rule does include an exception for COTS to recognize that COTS providers will generally be predominantly commercial, with only a small proportion of business with the Government, as well as exceptions for institutions of higher education; State and local governments and governments of Federally recognized Indian tribes; and for sureties performing under a takeover agreement.

b. Existing Employees Assigned to the Contract

i. No Verification

Comment: Many commenters requested that the rule eliminate the requirement for verification of employment of existing employees assigned to the contract. One commenter states that there is no policy reason why Federal contractors should be so radically different from all other employers who participate in the program. More detailed reasons for opposition to verification of existing employees are also separately addressed in the following paragraphs.

Response: The Councils do not agree with this approach. The final rule reflects the requirements stated in Executive Order 12989, as amended, that the FAR incorporate a rule that will require verification of all existing employees assigned to a contract. Verification of existing employees who work under contracts is a critical element of this rule, and the elimination of that aspect of the rule would be contrary to the Executive Order.

ii. Burdensome To Track Which Employees Have Been Verified

Comment: Many commenters were concerned about the burden of identifying employees assigned to the contract, including time and money required to develop new systems. For example:

- One commenter observed that assigned employees may work on several projects at once and it is burdensome to require them to be tracked to determine which ones have been verified by E-Verify.
- Another commenter stated that the chance of a single employee being ''dedicated'' to a single contract—whether for a private customer or a Government agency—is the rare exception in a large company. A large, multi-jurisdictional company will be challenged to identify which employee in fact ''directly performs work'' under a covered contract.
- Another commenter recommended verifying all employees at all hiring sites.
- Another commenter stated that in normal circumstances it will impose considerable burdens and take months, if not years, to put in place the required tracking processes.
- Several university commenters stated that these requirements would impose significant financial and organizational burdens on all affected employers, including substantial costs associated with developing new software systems.

- Another commenter stated that employers would need to create a new process for screening current employees and a process for tracking which employees already have been through the E-Verify screening process every time an employee is assigned to work on a Federal contract.

Response: With regard to tracking which employees have been verified, the Councils do not believe this is a problem that warrants a change to the proposed rule. Modern personnel and payroll systems identify numerous qualifications and attributes for each employee. It is a minor effort to add one more attribute to those already included in the accounting and payroll systems. For example, each employee is typically identified against a wage rate, security level, FLSA coverage or not, vacation records, professional qualifications, labor category, etc. Personnel/payroll systems that track these sorts of data typically permit ready modification and expansion in the number and type of attributes that are tracked. It is typically a simple operation to add an attribute to such a system.

Further, contractors can recover associated costs incurred to comply with this program in their proposed prices as they already do with other overhead costs. However, the Councils recognized that the task of identifying which employees are assigned to the contract may be more problematic for some employers. Should the employer find the task of identifying which employees have been assigned to the contract and tracking those employees who have already been verified unduly burdensome, the Councils have amended the rule consistent with Section 8. (a) of Executive Order 12989 to permit a contractor to verify its entire workforce.

iii. Conflicts Between Public and Private Contracts

Comment: Several commenters stated that employers are currently prohibited from using E-Verify to confirm the employment eligibility of existing employees not assigned to a Federal contract. They believe that the proposed rule therefore poses potential problems for firms that hold both public and private contracts.

Response: The current MOU required to be signed by all employers that register for E-Verify does prohibit the use of E-Verify to confirm the employment eligibility of existing employees. Upon promulgation of this rule, however, there will be a revised MOU with requirements applicable to Federal contractors. The revised MOU does not contain the same prohibition on verification of existing employees as to Federal contractors, because the Executive Order and this final rule require the use of E-Verify to confirm the employment eligibility of existing employees who are assigned to Federal contracts. If a contractor that was already using E-Verify enrolls in E-Verify as a Federal contractor, then that contractor may need to sign a new MOU, which will allow the use of E-Verify for existing employees.

iv. Selective Verification Issues

Comment: Some human resources organizations stated that selective screening verification of existing employees increases an employer's exposure to allegations of discrimination based on document abuse, citizenship status discrimination, national origin discrimination or other characteristics protected by Title VII and the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b. Another commenter questioned whether employers might register or bid for contracts only so they can verify existing employees.

Response: The requirement to ensure that any employee who is assigned to work directly on a contract in the United States is, in fact, authorized to work in the United States is not discriminatory as that term is defined by Title VII and case law. However, the Councils agree that it is appropriate to limit as much as possible opportunities for unscrupulous companies to abuse the E-Verify system. That is why the rule clearly specifies which employees must be verified by the employer. It is also important to note that OSC investigates allegations of national origin and citizenship status discrimination in the workplace, as well as demands for additional documentation in the employment eligibility verification process (''document abuse'') and retaliation under the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b. The E-Verify MOU makes clear that an employer may not use E-Verify procedures for pre-employment screening of job applicants. In addition, an employer cannot verify only certain employees selectively—for example on the basis of perceived national origin—and may be subject to penalties under the anti-discrimination provision of the INA if it prescreens employees on the basis of perceived national origin or citizenship status.

With regard to an employer bidding on a Government contract just to use E-Verify to verify existing employees, the employer would not be authorized to verify existing employees unless the contract was actually awarded to that contractor.

v. Permitting Multiple Alternatives

Comment: Another commenter requested that if the proposed current employee verification system is to remain a part of these regulations, the Councils should provide an option for employers in the regulations so that they can adopt a compliance method that meets objectives with the least disruption or cost to contractor operations. Suggested examples included allowing an employer to verify all employees at all hiring sites, all employees at any hiring site that services a covered contract, or only those employees assigned to work on the contract.

Response: Consistent with Section 8.(a) of Executive Order 12989, as amended, which requires implementation of the Order ''in a manner intended to minimize the burden on participants in the Federal procurement process,'' the Councils have included a provision in the final rule permitting contractors a voluntary alternative: The option to verify all existing employees of the contractor, provided the contractor initiates verification within 180 days of notifying DHS of its decision to verify its entire workforce. The Councils believe that this alternative best prevents opportunities for discrimination or the appearance of discrimination, relative to other possible alternatives, while potentially reducing the burden of compliance for some contractors.

vi. Workforce Stability

Comment: Several commenters stated that requiring verification of current employees will severely impact workforce stability due to expected errors, delays, and other disruptive effects such as employer misuse of tentative nonconfirmations. The commenters stated that the decision to extend the E-Verify requirement to existing employees actually undermines the FAR Council's stated view that the Federal Government's procurement interests are advanced by a stable workforce with less turnover. The commenters claim that subjecting existing employees to E-Verify is guaranteed to exacerbate, rather than alleviate, the posited problem of instability and turnover in the workforces of Federal contractors and subcontractors.

Response: The Councils do not concur. The Councils consider that the additional time allowed in the final rule should alleviate the commenters'

concerns regarding expected errors, delays, and other disruptive effects. The Councils do not believe that the concerns that E-Verify will exacerbate instability and turnover in the workforce are well founded, assuming that employers are currently complying with existing law and only employing individuals who are actually authorized to work in the United States.

vii. Employees Hired After November 6, 1986

Comment: A university commenter believed that the proposed rule is applicable to all employees hired after November 6, 1986. The commenter stated that its concerns are magnified by the proposal in the proposed rule that the E-Verify program be extended to all employees hired after November 6, 1986 and that this requirement greatly expands the cost and process burden on employers far beyond the current pilot program.

Response: The commenter is mistaken about the requirements of the proposed rule. The proposed rule was not to be applicable to all employees hired after November 6, 1986. However, because of concerns by some contractors that determining and tracking employees assigned to the contract is too difficult, the final rule does provide an option to contractors to verify all employees hired after November 6, 1986.

c. All Employees of the Contractor

Comment: Several commenters believe that the contractor might have to verify all existing employees to achieve compliance and recommended that the rule should provide additional flexibility to allow this. Some employers may find it easier to verify all existing employees and new hires, rather than attempt to distinguish between those who are and who are not working on Federal contracts, thus ensuring compliance. Another company commented that it would be very burdensome to create a mechanism to identify ''assigned employees'' under a process accounting system because no one individual charges to a particular job (contract).

Response: The Councils agree with these comments and have amended the proposed rule. In situations where a contractor does not believe it has an economical or efficient way to identify employees who perform work principally under a particular contract, or if the contractor believes it is more efficient to verify all employees, the final rule will give the contractor the option to initiate verification of the employment eligibility of all existing employees, within 180 days, rather than limiting the employees who can be verified only to those who are assigned to work under a contract. This approach is entirely at the option of the contractor.

The Council notes that the great majority of ''process accounting'' would be under COTS contracts, which are exempt from the rule.

Job order costing—work is broken into jobs; each job is tracked separately.	*E.g.*, auto mechanics, carpenters, painters, print shops, computer repair.
Process costing—a large quantity of identical or similar products are mass produced.	*E.g.*, auto assembly plants, hot dog manufacturing, any large mechanized production facility.

Each cost accounting system gathers and reports on the same information. The method used depends on the needs of the business. Process costing traces and accumulates direct costs, and allocates indirect costs, through a manufacturing process. Costs are assigned to products, usually in a large batch, which might include an entire month's production. Eventually, costs have to be allocated to individual units of product.

Accordingly, the final rule will permit a contractor to choose between two alternative approaches. The rule will permit the Federal contractor to choose either to run only existing employees who are assigned to the contract and all new employees through E-Verify, or to run all existing employees and all new employees of the company through E-Verify.

d. Need for Re-Verification

Background: It is important to distinguish what commenters mean by re-verification. They may mean re-verification of employees who have been verified by a system other than E-Verify, or they may mean re-verification of employees who have been verified through E-Verify, by another employer or by the same employer. Each of these types of re-verification will be separately addressed.

i. Re-Verification of Existing Employees

Comment: Many commenters stated that the requirement of re-verification of existing employees working on Federal contracts is unnecessary because those employees who have been hired after November 6, 1986, have already been through the employment eligibility verification (I–9) process. For example, one commenter asked the Councils to eliminate the requirement to use E-Verify for employees assigned to work on contracts because such employees who were hired after November 1986 will have already been through an employment eligibility verification process.

The following are some of the objections raised to re-verification for employees whose I–9s were completed long ago:

- A contractor may have accepted documents to demonstrate identity (drivers' licenses) or work authorization (passports or green cards) that have now expired.
- Until 2007, it was permissible for naturalized U.S. citizens to present certificates of naturalization to prove work eligibility, and many employees chose to use these forms in the I–9 process. Those certificates are not usable as part of the E-Verify process.
- The I–9 process does not require an employee to provide an SSN, but E-Verify does require it. The contractor will have to devise a process to collect and authenticate SSNs for many employees, especially those who started as foreign national legal immigrants, who were not required to have a number when they started work.
- The E-Verify process requires a picture identification document.

Another commenter remarked that the money spent re-verifying employees who are assigned to work directly on a Federal project would be much better spent in fundamental research being conducted by the commenter.

Response: Executive Order 12989, as amended, requires the re-verification of existing employees assigned to the Federal contract, even if the employees were screened previously using the I–9 process. The E-Verify process is expected to achieve a much higher level of accuracy in verification than was achieved under the I–9 process alone; E-Verify has built-in tools for accessing databases to further verify the employment eligibility of an employee, whereas the documents submitted by employees under the I–9 process were probably subjected to very little additional verification if they looked acceptable on their faces.

With respect to the process for re-verifying existing employees, the draft MOU contemplated and addressed the matters raised by the commenter. Employers may use a previously completed Form I–9 as the basis for initiating E-Verify verification of an assigned employee as long as that Form I–9 complies with the E-Verify documentation requirements and the employee's work authorization has not expired, and as long as the employer has reviewed the Form I–9 with the employee to ensure that the employee's stated basis for work authorization has not changed (including, but not limited to, a lawful permanent resident alien having become a naturalized U.S. citizen). If the Form I–9 does not comply with the current E-Verify requirements, or the employee's basis for work authorization has expired or changed, the employer shall complete a new I–9. If the Form I–9 is otherwise valid and up-to-date but reflects documentation (such as a U.S. passport or Form I–551) that expired subsequent to completion of the Form I–9, the Employer shall not use the photo screening tool, subject to any additional or superseding instructions that may be provided on this subject by USCIS. While in some cases these procedures will place on employers and employees the initial burden of completing a new Form I–9, they are designed to avoid the greater burden of unnecessary tentative nonconfirmations resulting from the use of stale data to run E-Verify queries.

Some contractors that are submitting an E-Verify query for a current employee may be put in the position of asking that employee to produce an I–9 document that is different from what was presented during the initial I–9 process. It is important that contractors not engage in illegal discrimination during this process, such as by selectively requesting or rejecting documents during the verification or reverification process with the purpose or intent of discriminating against employees on the grounds that they appear or sound foreign. See 8 U.S.C. 1324b. If an employee believes that he or she has been discriminated against during the employment eligibility verification process, he or she should contact OSC at 1–800–255–7688 or 1–800–237–2515 (TDD). Employers that have questions relating to the anti-discrimination provision should contact OSC at 1–800–255–8155 or 1–800–237–2515 (TDD).

In addition, it is not technically correct that certificates of naturalization were acceptable until 2007. They were taken off the acceptable document list in the regulations in 1997, but DOJ and then DHS had a policy not to enforce violations of this regulation until it updated the Form I–9 instructions to reflect this change, which did not happen until 2007. With respect to SSNs, the Councils do not anticipate that the commenter or other employers should have significant difficulty obtaining their current employees' SSNs, as they already should have these on file for other business purposes.

ii. Re-Verification of Employees Verified by Another Employer

Comment: One commenter believed that employees covered by a collective bargaining unit should not have to be re-verified each time they switch to a new company, *e.g.*, in the construction business.

Response: The commenter's point appears to relate to the existing statutory provision regarding employment pursuant to a collective bargaining agreement in section 274A(a)(6)(A) of the INA, which provides that in certain cases a subsequent employer is deemed to have complied with the Form I–9 requirements by virtue of verification by another employer within the agreement. If a previous employer within such an arrangement has completed the Form I–9 and E-Verify, a subsequent employer does not have to reverify, as long as the employment is within the scope of the statutory provision.

iii. Re-Verification of Employees Already Verified by the Contractor

Comment: Many commenters were concerned about the requirement to re-verify an existing employee when the employee is assigned to work on a contract. One commenter concluded that by mandating that Federal contractors verify or re-verify existing employees each time they are assigned to work on a new contract, the proposed rule too radically restructures the E-Verify program, making it unmanageable and unworkable for employers.

Response: The proposed rule clearly stated that a contractor is not required to perform additional employment verification using E-Verify for any employee whose employment eligibility was previously verified through E-Verify by that contractor. It is not necessary to run the employee through the E-Verify program again each time the employee is assigned to work on a new contract. When, however, an existing employee is assigned to a contract and that employee has not previously been verified through the E-Verify system, then that employee must be processed through E-Verify at the time of assignment to work on the contract. The end result of this procedure is that for any single company, no employee, whether existing or newly hired, needs to be verified through the E-Verify system more than once.

In addition, the Councils have revised the final rule to exempt employees who hold an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual. The rule also exempts employees for which background investigations have been completed and credentials issued pursuant to HSPD–12, promulgated by the President on August 27, 2004.

4. Time Periods (52.222–54(b))

Background: The proposed rule set forth the following timeframes:

Timeframe	Start point	Required action
Within 30 calendar days	After contract award	Enroll in E-Verify.
Within 30 calendar days	After enrollment	Initiate verification of employees assigned to the contract at time of enrollment.
Within 3 business days	After date of assignment to the contract; or	Initiate a verification of each assigned employee who is assigned to the contract after enrollment in the E-Verify program.
Within 30 calendar days	Of the award of the contract.	

1. *Comment:* Many commenters were concerned that the timeframes provided were insufficient for compliance. These commenters requested longer timeframes because employers would need to develop complex systems to track and report employees. Among the various recommendations:

- Extend the registration period to 90 days after contract award, to allow time for orderly transition and provide time for employers.

• Permit larger organizations to implement E-Verify in stages across worksites;
• Allow a 6-month phase-in period to allow for registration, training and implementation and verification;
• Add a 90-day transition period before a contractor must begin verifying employees, after the date of contract award.
• Provide a time period to initiate verification of assigned employees that is no less than 60 days from enrollment and 30 days from assignment to a contract, respectively.
• Extend the phase-in period applicable to verification of existing employees for employers who are already signed up for E-Verify. Three days is not long enough to change systems to handle verification of existing employees.

Response: The Councils carefully considered all the requested extensions and concur that some of the timeframes need to be extended. The Councils recognize that some of the periods for contractor action in the proposed rule did not all allow sufficient time. The Councils have substantially extended various periods to permit contractors more latitude on when they must begin verifying employees.

The Councils also noted concerns that the requirements for a contractor that is already enrolled as a Federal contractor in E-Verify were not clear. These requirements were only addressed in the policy section of the proposed rule, not in the clause. Nor did the proposed clause specify whether the enrollment referred to was as a non-Federal contractor or as a Federal contractor (which will become important as the implementation of the rule progresses). The Councils have added specific instructions applicable to contractors already enrolled as Federal contractors in E-Verify and amended the time periods in the clause by which the contractors must have taken various actions.

The Councils have simplified the policy section and added more details in the clause. The changes in time periods in the final rule are summarized as follows:

• After new enrollment in E-Verify as a Federal contractor, 90 days to initiate verification of new employees within three business days of hire. This allows a contractor time to set up a new system, or modify an existing system from the non-Federal to the Federal form of E-Verify.
• 90 days (instead of 30) to initiate verification of existing employees after enrollment into the program (or after contract award, if already enrolled as a Federal contractor). Contractors will likely have to make adjustments to current employee information systems to be able to identify employees assigned to the contract and to track whether employees have been vetted through E-Verify. 90 days after award of a contract that contains the clause should be sufficient for this.
—Thereafter, verify the employee 30 days (instead of 3) after an employee is assigned to work under a contract.
—180 days for initiation of verification of all existing employees (if chosen at the option of the contractor).

The Councils did not extend the 30-day period to enroll in E-Verify. Very few commenters argued that this timeframe was insufficient. The Councils also considered that employers already enrolled on the Federal E-Verify program should not need additional time to continue verification of new employees within three business days of hire. The Councils also did not make amendments to timeframes that are required by the MOU rather than the FAR clause.

2. *Comment:* One commenter suggested that E-Verify should provide employers with an option to mark that an SSN has been ''applied for'' when foreign nationals are waiting on SSN cards that could take weeks to receive. Another commenter expressed concern over the fact that SSNs are not required on the Form I–9 and the SSN is the basis for the electronic verification.

Response: DHS has informed the Councils that the MOU will be amended to provide that notating the Form I–9 satisfies ''initiating verification'' in the narrow situations where (1) the employee has applied for an SSN from SSA and is waiting to receive a SSN; and (2) the employee has requested an accommodation from the photo identification requirement from the E-Verify program and is in the process of resolving the issue. The employer still has an obligation to work in good faith to follow through on that process and ultimately verify the employee with the system.

5. Threshold for Applicability in Prime Contracts (22.1803(b))

Comment: A number of commenters requested an increase in the dollar threshold for applicability of the clause. Commenters state that there is no rationale for the $3,000 threshold.

• For example, several commenters proposed increasing the dollar threshold for applicability of the proposed contract clause from the micro-purchase threshold of $3,000 to the simplified acquisition threshold of $100,000. One of these commenters stated that the applicability standard should be proportionate to its requirement.
• Another commenter proposed raising the threshold from $3,000 to $50,000.

Response: The Councils have raised the threshold for inclusion of the clause in a prime contract from the micro-purchase threshold to the simplified acquisition threshold. The statute at 41 U.S.C. 427 directs the FAR to provide for simplified acquisition procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold. In order to promote simplified processes for such small acquisitions, the Councils have revised the final rule to exempt all prime contract awards under the simplified acquisition threshold from application of this rule.

According to *Federal Procurement Data System* (FPDS) data, during FY 2007, there were approximately 2.8 million contract awards (new contracts, not orders) Governmentwide totaling approximately $9 billion for which the basic contract value were less than or equal to the simplified acquisition threshold ($100,000) each. This is less than 3 percent of total obligations made during FY 2007. Therefore, the exclusion of such low dollar value contracts should have minimal impact on achieving the objectives of the Executive Order, while being of great benefit to small businesses, since acquisitions below the simplified acquisition threshold are generally set aside for small business.

In addition, the Councils have added to the final rule a threshold relating to length of the period of performance of the contract. Since contractors have 30 days to enroll in E-Verify and another 90 days to initiate verification of employees, the Councils concluded that it was not practical to require compliance with the clause in contracts that have a period of performance of less than 120 days.

6. Subcontractor Flowdown (22.1802(b)(4) and 52.222–54(e))

Comment: Analysis of the comments relating to the subcontractor flowdown requirements (22.1802(b)(4) (22.1802(c) in proposed rule) and 52.222–54(e)) discloses five general concerns from a broad range of commenters.

a. Definitions

For concerns relating to the definitions of ''subcontract'' and ''subcontractor,'' see G.1.d.

b. Flowdown Thresholds

Comment: Various commenters recommended limitation of subcontract flowdown as follows:

• The flowdown threshold of $3,000 is extraordinarily low, and that an explanation and justification for this dollar threshold should be provided to the public.
• Raise the threshold to $10,000 and make it applicable only to first tier subcontractors whose subcontracts meet the stated criteria, consistent with the flowdown requirement for the annual EEO–1 report and affirmative action obligations under Executive Order 11246 and Section 503 of the Rehabilitation Act.
• Raise the threshold to $100,000.
• If the flowdown requirement is maintained, limit it to (1) first tier subcontractors, or (2) subcontracts valued at more than the threshold for obtaining cost or pricing data under FAR 15.403–4, currently $650,000.
• Remove the flowdown requirement or, at a minimum, limit it to major subcontracts exceeding $5 million.

Response: The Councils do not agree. Although the selection of the appropriate threshold is always somewhat subjective, unless specified by statute or Executive order, rulemakers seek to achieve balance between achieving the policy objectives and not unduly burdening smaller subcontracts. With respect to subcontract actions, the flowdown is already limited by the proposed rule to only subcontracts for construction and for services. These types of subcontracts often involve lower dollar amounts and increasing the threshold would leave too high a portion of the targeted subcontracts not covered by the rule. There is no particular logic that would tie this threshold to EEO reporting, the simplified acquisition threshold (which applies only to prime contracts), or the cost or pricing data threshold. There is no compelling reason to either eliminate or limit the flowdown requirement since the obligation to include the clause at 52.222–54(f) is not any more burdensome than many other flowdown requirements, and the objectives of the Executive Order 12989, as amended, will not be adequately met without extensive subcontractor flowdown. The Councils have therefore maintained the subcontractor flowdown for services and construction to all tiers of subcontracts above the threshold of $3,000.

c. Period of Performance

Comment: One commenter urged that consideration be given to recognizing that an early finishing subcontractor or supplier to a Federal prime construction contractor should not, without exception, be bound to the duration of the prime contract.

Response: When flowing down the clause to the subcontractor, it would be effective only for the duration of the subcontract. By the very nature of subcontract to prime contract, many subcontracts are of shorter duration than the prime contract. However, the Councils decided not to extend the 120-day limitation on flowdown. The period of performance of the subcontract is not within the control of the Government. If the subcontractor does not have any subcontract running longer than 30 days, the subcontract term would end before the subcontractor would be required to register with E-Verify. However, if the subcontract period runs beyond 30 days, the subcontractor would be required to enroll in E-Verify, and if the subcontractor continues to receive subcontracts it will be obligated to begin using E-Verify for its new hires.

d. Prime Contractor Responsibility for Subcontractor Violations

Comment: There was broad concern raised by commenters (covering the service, construction, educational, transportation, and agriculture sectors) regarding the extent to which a prime contractor may be held accountable for violations by its subcontractors. A number of commenters suggested that the prime contractor's flowdown obligation was too difficult to monitor. One commenter noted, for example, that subcontractors do not have privity of contract with the Government, thus they are not normally required to be identified in a Government contract as a party. There was substantial concern among these commenters with respect to the prime contractor's compliance assurance responsibilities. Specifically, these comments focused on the extent to which the prime contractor is responsible for subcontractor failure to comply with the contract obligation to use the E-Verify program. Many commenters questioned how a prime contractor could monitor subcontractor compliance and the extent to which a prime contractor would be accountable for a lower tier subcontractor's non-compliance.

Many commenters argued that the prime contractors' flowdown responsibilities should be limited to ensuring that the clauses are included in their subcontracts and that their subcontractors should be responsible for initiating the E-Verify enrollment process and carrying through with use of E-Verify for employee verification. As an exception to this general consensus, one commenter suggested that it would be appropriate to require prime contractors to obtain written assurances from contractors that they are complying with all Federal rules, including verification of employment eligibility.

Response: The Councils believe that prime contractors are responsible for all aspects of contract performance including subcontract requirements. The methods used to assure compliance are also the responsibility of the prime and the subcontractor. The contractor should perform general oversight of subcontractor compliance in accordance with the contractor's normal procedures for oversight of other contractual requirements that flow down to subcontractors. Prime contractors are not expected to monitor the verification of individual subcontractor employees. Nor is the prime contractor responsible for the subcontractor's hiring decisions. However, the prime contractor is responsible for ensuring by whatever means the contractor considers appropriate, that all covered subcontracts at every tier incorporate the E-Verify clause at 52.222–54, Employment Eligibility Verification, and that all subcontractors use the E-Verify system.

Further, these roles and responsibilities are adequately addressed in the Federal Contractor MOU. Accordingly, the MOU contains a provision that the employer (prime contractor and subcontractors alike) acknowledge that compliance with the MOU is a performance requirement under the terms of the Federal contract or subcontract and that the employer consents to the release of information relating to compliance with its verification responsibilities under the MOU to contracting officers or other officials authorized to review the employer's compliance with Federal contracting requirements.

The Councils consider that it would be an unnecessary information collection to impose a requirement that the prime contractor obtain written assurances from subcontractors that they are complying with all Federal rules, including verification of employment eligibility.

e. Notice to Subcontractors

Comment: One commenter recommended that the proposed clause impose a requirement for a prime contractor, and any higher-tier subcontractor, to provide a notice along with its requests for bids from prospective subcontractors and suppliers on the Federal construction

contract. Such notice should make explicit to prospective subcontractors and suppliers that the prime contract is subject to the proposed new FAR Subpart 22.18 (Employment Eligibility Verification) and that the requirements of the proposed new clause (FAR 52.222–54, Employment Verification) will be imposed on a subcontractor at any tier, if the subcontract falls within the reach of proposed new FAR 22.1802(b)(4).

Response: The Councils do not endorse the need for a separate notice to subcontractors, apart from the notice that is provided by flowing down the clause to the appropriate subcontractors. Many requirements flow down to subcontractors, and it is the responsibility of the subcontractor to review all requirements associated with the requests for bids or proposals. However, the Contractor may write such a notice.

7. Waiver (22.1802(d))

Comment: The proposed rule allows the head of the contracting activity to waive the clause requirement in exceptional cases. Several commenters noted that the proposed rule did not define the term ''exceptional cases'' and proposed that a definition and/or standards for using the waiver be added to the final rule. One commenter proposed that the term be defined to include national security emergencies, natural disasters, acts of terrorism against the United States, urgent military war fighter needs, and FAA emergencies.

Response: The term ''exceptional cases'' is intentionally not defined in the rule in order to allow the head of a contracting activity the flexibility to use this waiver as unique situations arise within each agency. Each head of the contracting activity will be accountable to the agency leadership to appropriately balance the needs of the agency and the policies and goals of the Executive Order 12989.

8. Safe Harbor

Comment: Public comments indicated numerous concerns over the mechanics and operability of the E-Verify system. Specifically, employers expressed concerns about potential litigation that could be brought against them as they rely on E-Verify to verify not only newly hired employees, but also to verify existing employees. For example, one commenter cited the legal risk in the event that an unauthorized worker erroneously verified by E-Verify is later found to have committed identification fraud and was therefore improperly employed. Likewise, some companies fear litigation from employees who are fired as a result of the E-Verify process and file claims of wrongful discharge because E-Verify provided wrong answers in the verification process.

Several commenters believed that the revised MOU for E-Verify leaves employers to face any such legal liability on their own. Article V, ''Parties'' paragraph E of the revised MOU reads: ''Each party shall be solely responsible for defending any claim or action against it arising out of or related to E-Verify or this MOU, whether civil or criminal, and for any liability wherefrom, including (but not limited to) any dispute between the Employer and any other person or entity regarding the applicability of Section 403(d) of IIRIRA to any action taken or allegedly taken by the Employer.''

Other companies claimed that they enjoy immunity as a result of the language in the MOU that states ''no person or entity participating in a pilot program authorized [by IIRIRA] shall be civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the confirmation system.'' This immunity language was also repeated in the preamble to this rule. However, there is concern that these immunity provisions may not apply to situations where an adverse employment action is taken against an existing employee.

As a result of these litigation concerns, commenters requested that the rule provide protection from both DHS enforcement actions, as well as discrimination lawsuits, if employees are terminated after the employers have properly complied with program requirements. They recommended that provisions be included in the rule that would indemnify the employer with full disclosure of this indemnification to the employee. As one commenter stated, the rule should be revised to provide a safe harbor that explicitly protects contractors and subcontractors from penalties or other reprisals under state law related to the use of the E-Verify system. The commenter recommended that the preamble immunity language be inserted into the regulatory text as a clear safe-harbor to make it clear that it applies to all employees.

Response: The applicable statute, section 403(d) of IIRIRA, provides broad legal protection to employers participating in E-Verify. The MOU language in Article V. E. only clarifies that the Government does not guarantee any level of legal protection under this or any other statute to employers, and will not defend or indemnify claims that may be brought against employers.

The E-Verify statute (IIRIRA Section 403) does not distinguish between new hires and existing employees in the immunity protections it provides employers. IIRIRA section 403(d). The Councils find that the statutory protection from liability for actions taken by employers in good faith reliance on information provided by the E-Verify system provides sufficient protection.

Issues with respect to compliance with E-Verify and adverse actions taken as a result of such actions are the responsibility of DHS and not the contracting officer. Therefore, the proposed safe harbor language is not appropriate for inclusion in the FAR.

9. Enforcement and Sanctions for Non-Compliance

Comment: Several commenters requested clarification in the rule of how MOU violations would warrant contract sanctions, and if so, what procedures for contract suspension or termination would apply in that circumstance.

Response: USCIS retains its authority to investigate violations of E-Verify program. DHS may terminate a contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS terminates a contractor's MOU, DHS will refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222–54. If the contractor is suspended or debarred as a result of the MOU termination, the contractor will not be eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must re-enroll in E-Verify.

10. Process for Resolving Disputes About Applicability of the Clause

Comment: One commenter expressed concern that a decision about what contracts are required to include the clause will be left entirely within the discretion of the contracting officer. The commenter was concerned that the presumption would be in favor of including the clause even though it is not required with certain types of contracts, such as those for purchase of COTS items. The commenter was concerned that there is no method for disputing the applicability of the clause.

Response: The Councils do not concur with the commenter's concerns. As an initial matter, the contracting officer's conclusions about whether the clause applies will be informed by what the Government is acquiring with the contract. The contracting officer will take into consideration whether the contract is for services or supplies, and whether the supplies are COTS items. The contracting officer will then evaluate whether any applicable exceptions apply such that compliance with E-Verify is not required. Therefore, the Councils do not agree with the commenter's statement that the contracting officer has ''complete discretion'' to decide whether the E-Verify clause will be inserted in the contract.

Further, the Councils do not agree that it is necessary to develop dispute resolution procedures, because appropriate procedures already exist in the FAR. If a contractor disagrees with a contracting officer's conclusion about the applicability of the clause in advance of award, the contractor may obtain review by submission of a protest to the Contracting Officer, Agency Head or GAO in accordance with FAR Part 33.

- FAR 33.101, Protest, defines a protest as a ''written objection by an interested party to * * * [a] solicitation or other request by an agency for offers for a contract for the procurement of property or services.''
- FAR 33.102(a) states that upon receipt of a protest, the contracting officer ''shall consider all protests and seek legal advice * * *'' The requirement to seek legal advice after receipt of a protest ensures that the contracting officer's conclusion about applicability will be reviewed.

If a contractor's disagreement with the contracting officer's conclusion about the applicability of the clause arises after award and during administration of the contract, the process for resolving the dispute is set forth in FAR 33.202, Contract Disputes Act of 1978. Again, upon receipt of a claim, FAR 33.211 requires the contracting officer to ''secure assistance from legal and other advisors.'' The FAR also requires the contracting officer to seek input from other agency officials, including that of agency counsel, and therefore the contracting officer's conclusion about the applicability will be legally reviewed.

Despite commenter's statements, the FAR specifies when the E-Verify requirement shall be included in a contract and the FAR also provides a method for resolving disputes about applicability, both pre-award and during contract performance. (See also H.3.f. on applicability at the subcontract level.)

C. Applicability of FAR Rule

1. Commercial Items

a. Commercial Items Exemption

Comment: Several commenters recommended that the rule should exempt all commercial items, not just COTS items, claiming that such a change would be consistent with procurement reforms facilitating government access to commercial products and services.

Response: The Councils do not concur with this comment. The final rule intentionally covers commercial item contracts that are not for COTS items. The intent of the rule was to cover as many contractors and contractor employees consistent with the mandate in Executive Order 12989. The only reason COTS items are exempt is because the Councils believe that COTS providers may choose not to do business with the Government rather than changing their practices to use E-Verify. The Councils concluded that this could result in an unacceptable reduction in the Government's access to items it needs in order to operate. On the other hand, contractors who provide commercial items that are not COTS items are providing commercial products that are custom-made for the Government or services that are categorized as commercial items. These contractors have decided to be part of the Government marketplace. These contractors have established procedures and sometimes created organizations designed to do business with the Government. The Councils determined that the requirement for these contractors to use E-Verify would not be sufficient to drive them from the Government market. Also, to the extent such a business incurs added cost to comply with the E-Verify contract clause, it is free to include that added cost in its proposed contract prices, but will be required to take into account the pricing practices of its competitors if it wishes to be awarded the contract.

b. Exempt COTS-Related Services

Comment: Various commenters pointed out that COTS suppliers typically sell services along with their COTS items and that the exemption of COTS items from the rule would not be adequate unless it also exempts related services. COTS suppliers who must provide services along with their COTS items would gain no benefit from the COTS exemption if the services are not also exempt.

One commenter requested that the Councils add services to the definition of COTS.

Response: The Councils concur in part with this comment. Although the definition of COTS is statutory and does not include services, the Councils agree that the clause should not apply to certain types of services:

- The services must be procured at the same time as the COTS item is procured.
- The services may be provided only by the COTS item supplier. That will eliminate services provided by other contractors who are in the service business. By covering the COTS provider services, the Councils intend to reduce the regulatory burden for companies who provide only COTS items that do not require use of E-Verify. The services must be performed only on or for the COTS item. This means that we do not exempt services that are ''custom.''
- Third, the services must be typical or normal for the COTS provider.

c. Applicability of COTS Exception to Food Products

Comment: Several commenters representing various agricultural interests commented that the rule will have far reaching and detrimental effects on the agriculture industry, most particularly growers and harvesters. Examples of sectors of the agriculture industry that were highlighted as problematic are: Fruit growers, fruit harvesters, suppliers of fruit to Federal school lunch programs, and distributors of fruit. These commenters wanted to make sure that the rule was not intended to apply to them or, if it was intended to cover them, they requested that it be made inapplicable to them.

Response: The Councils do not believe that any of the examples of agricultural products cited by these commenters would be covered by the rule as originally proposed or as promulgated in this final rule.

First, all food products described by the commenters would fall under the definition of commercially available off-the-shelf (COTS) items or a minor modification to a COTS item, which are exempt from the clause. COTS items are defined as ''any item of supply'' (food is an item of supply) that is ''a commercial item'' (the foodstuffs described by the commenters are commercial items) ''offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace'' (the foodstuffs described by the commenter meet these standards).

Secondly, most of the concerns relayed by the commenters centered on the growers and harvesters. Neither the proposed rule nor the final rule require flowdown of the clause to subcontractors which provide supplies such as food. The only subcontracts that are covered by this rule are services or construction subcontractors. In the unlikely event that a contractor enters a contract with the Government for food products that do not meet the definition of a COTS item or a minor modification of a commercial item, the subcontractors who sold the food to that contractor (farmers, or harvesters or distributors) are not required by this rule to have the contract clause in their subcontracts. This means that they are not covered by the rule when they are subcontractors because no subcontracts for supplies are covered by the rule for any subcontractor. The only providers of supplies who are covered by this rule are prime contractors, not subcontractors. The Councils purposely excluded all subcontracts for supplies from application of this rule for many of the same reasons that prompted the concerns of the agriculture industry commenters.

Nevertheless, the Councils have further modified the COTS-related exception to address these concerns. The exception in the clause prescription at 22.1803 for COTS-related items has been expanded also to exempt items that would be COTS items but for being bulk cargo. By incorporating this expanded exception for COTS-related items, the Councils intend to exempt foodstuffs such as grains, oils, produce and all other agricultural products shipped as bulk cargo, to the extent they are otherwise classified as COTS items.

d. Acquisitions of Commercial Items Under the FAR

Comment: Several commenters requested that the final rule make it clear that the rule applies only to commercial acquisitions under the FAR. According to these commenters, many grant recipients and State and local governments may incorrectly assume the rule applies to them. One comment also sought clarification of whether the rule would apply to a carnival operator hired to provide services on a military installation.

Response: The Councils do not concur. There are several parts to this question, addressing both the application of the rule to commercial items and the question of acquisitions under the FAR versus ''non-acquisitions.''

• The commenters misunderstand the applicability to commercial items. The rule does not apply only to commercial items. It applies to both non-commercial and commercial items (although COTS items are excluded).

• An exception has been added to permit State and local governments to limit their use of E-Verify only to employees assigned to the contract (allowing them to exclude new hires not assigned to the contract).

• Also, the requirements to use E-Verify only occur when a contract includes the FAR clause. There is no mechanism for the FAR to require insertion of the clause in any grants or contracts that use non-appropriated funds that are not covered by the FAR. Whether the clause would apply to a contractor providing carnival services will depend on several factors; the location of the contract performance alone will not be determinative, unless the contract is performed outside the United States.

2. Small Business

a. Unfair Impact on Small Business

Comment: Many commenters were concerned that E-Verify may impose significant and costly administrative requirements on small business, and that the rule will have a disproportionate adverse impact on small business.

• For example, one commenter noted that few small businesses have specific human resource departments to manage the increased workload, and many more lack the necessary equipment to run the program.

• Another commenter noted that small businesses do not have the luxury of large staffs to prevent lost productivity while employees resolve tentative nonconfirmations.

• Commenters suggested that small businesses may also face accessibility issues, such as lack of access to high-speed internet.

• The SBA Office of Advocacy stated that small businesses may lack the financial resources and human capital to adapt their technology infrastructure systems to changing requirements being imposed by the Federal Government.

• The SBA Office of Advocacy also noted that small business Federal contractors operate on very thin profit margins and these types of technology systems require capital outlays that cannot be easily recouped by passing the cost to the client and are costly to the small business owner.

• Another commenter stated that small companies that do not have the means to set up systems and staffing with adequate training to monitor nonconfirmations may find themselves at risk for noncompliance.

• Some comments argued that the burden is even greater on small businesses that are subcontractors. SBA Office of Advocacy expressed concern that the compliance cost burden on small business subcontractors could be disproportionate, because such businesses have fewer contracts among which they can spread the cost of doing business.

Some of these commenters were concerned that some small businesses would not have the resources to implement E-Verify and may therefore exit the Government market. For example, one commenter noted that E-Verify requires both infrastructure and an investment of employee expertise. Small businesses that do not have the resources to implement may decide not to pursue Government contracts. Further, a small business council was concerned that to stay competitive, small businesses would not be able to pass the extra costs of E-Verify on to the Government, and will therefore be deterred from bidding.

Several commenters expressed concern about the detrimental effect that loss of participation by small businesses will have on the Government and the taxpayers. One commenter noted that through the loss of competition by small businesses, the Government loses out on the innovative ideas of small businesses that exit the market. Another commenter stated that the Federal sector will lose the benefit from the ''ingenuity and flexibility'' that small businesses bring to the table.

Several commenters noted that Congress has expressed concern about the potential impact of E-Verify on small businesses. For example, various commenters cited to the mandated study of impact on small business in H.R. 6633, a bill passed by the House of Representatives that would have extended the E-Verify program for another 5 years.

Response: The Councils do not agree that this rule imposes an unfair burden on small businesses. The economic analysis found that total compliance costs increase as the size of the contractor increases. For example, a 10-employee firm may only need one person trained to execute E-Verify queries, but a 100-person firm may need 2 or 3 employees trained in E-Verify. However, when compliance costs are considered as a percent of revenue, the impact on smaller contractors is greater than the impact on larger contractors since smaller firms have less revenue available. The Small Business Administration publication The Impact of Regulatory Costs on Small Firms (2005) shows that on a per employee basis, smaller firms have a larger regulatory compliance cost burden than larger firms. The SBA study states: ''On a per employee basis, it costs about $2,400, or 45 percent, more for small firms to comply than their larger counterparts.'' Consequently, the results of the economic analysis that show a relatively higher regulatory impact burden on the smaller entities than the larger entities are not unusual or specific to this final rule.

The requirement for entities (both large and small) to enroll in E-Verify only applies to contractors and subcontractors who choose to perform certain work for the Federal Government. Presumably, entities which do not receive the desired return on revenue to justify the expense of participating in E-Verify would choose not to be a Federal contractor or subcontractor.

It has been the law since 1986 that all employers must verify the eligibility of new hires to work in the United States. E-Verify provides a tool that will make this verification easier and more reliable. Although the E-Verify system does require the employer to have access to some equipment such as a computer, Internet access, a printer, and either a scanner, photo copier, or a digital camera, the Councils believe that this equipment is not prohibitively expensive. Almost all small businesses doing business with the Government would already have such equipment or be able to readily acquire it. The equipment for a small business to implement E-Verify need not be particularly sophisticated or complex.

H.R. 6633, which has been passed by the House allows 2 years for the GAO study of the impact of E-Verify Pilot Program on small businesses, including specific details on small entities operating in States that have mandated the use of E-Verify. The bill has not been passed by the Senate, but it does not request that any implementation of E-Verify be suspended pending completion of the study. In addition, Congress reauthorized E-Verify and appropriated $100 million for the program for fiscal year 2009 in the Consolidated Security, Disaster Assistance, and Consolidated Appropriations Act, 2009, Public Law 110–329 (Sept. 30, 2008), without requiring this study, and it does not appear that there will be any additional legislative developments on E-Verify in the 110th Congress.

The Councils have endeavored to limit the impact of this rule on small businesses by raising the threshold of applicability of the clause to contracts in excess of the simplified acquisition threshold. As a result of this change, a substantial quantity of contracts below that threshold will be exempt from the E-Verify clause, and will be available to small business contractors that do not wish to participate in the program. Since the FAR currently requires set-aside of contracts below the simplified acquisition threshold for small business participation, contracting opportunities that do not necessarily require E-Verify use will remain available for small businesses.

b. Small Businesses Exemptions

Comment: Various commenters suggested exemption or waiver for some or all small businesses. For example:

• Exempt all small businesses: The SBA Office of Advocacy recommended that, until better data is available, small businesses should be exempted from the requirements of the rule. Another commenter recommended consideration of exempting all small businesses that qualify under the size standards established by SBA.

• Exempt small businesses with less than 15 employees: One commenter recommended that the applicability standard should be proportionate to its requirements and suggested that this rule should follow E.O. 13201, under which the Notice of Employee Rights Concerning Payment of Union Dues does not apply to contractors with less than 15 employees.

• Exempt small businesses with less than 75 employees: Several commenters recommended exemption for businesses with less than 75 employees. One commenter asserted that small enterprises do not have the administrative capacity to comply with this contract clause. Another commenter stated that applying the new verification requirements only to locations employing at least 75 individuals full-time would allow for sufficient personnel to manage the system and ensure compliance and consistency.

• Waive the requirement for certain small businesses: Several commenters recommended waivers for certain small businesses for which compliance with the system would be burdensome.

Response: The goal of this rule is to apply verification broadly, to the extent feasible and consistent with Executive Order 12989, in order to enhance the stability of Government contractors' and subcontractors' workforces and to assist them in compliance with the immigration laws of the United States. Nonetheless, the Councils have inserted certain dollar and contract duration thresholds for applicability and have provided specific exceptions because the Councils have concluded those thresholds and exceptions are consistent with their mandate to implement Executive Order 12989 in a way best calculated to improve the efficiency and economy of the Federal contracting system. The Councils do not believe providing exemptions for small businesses based on the number of employees will further that goal and note that other revisions, discussed above, will likely ease the burden on small businesses.

c. Alternatives To Lessen the Burden on Small Businesses

Comment: Various commenters suggested other ways to reduce the burden on small businesses that participate in E-Verify under this rule, for example:

• Allow small businesses more time to initiate the clearance process for new assigned employees (see G.4).

• Raise the thresholds to the simplified acquisition threshold (or other thresholds more than $3,000).

Response: Most of these comments are discussed elsewhere in the report in more detail. The Councils have agreed to the above modifications to the E-Verify rule which will lessen the burden on small businesses, as well as other revisions, such as:

• Lengthening other time periods for compliance (See G.4).

• Applying a period of performance of 120 days (See G.5).

In addition, the USCIS E-Verify Program's outreach office has coordinated closely with the Small Business Administration since April 2008 to conduct outreach events to ensure specific concerns relating to small businesses are heard and addressed.

3. Agriculture

a. Applicability to Agricultural Cooperatives

Comment: Some commenters asked if the agricultural cooperative is the prime contractor under a FAR contract, whether the grower member is considered the prime contractor as well for purposes of checking the status of grower employees. Commenters also asked whether the answer would be the same when the agricultural cooperative is a marketing cooperative.

Response: The Councils have made clear in the final rule that virtually all food products are COTS and COTS contracts are exempt from the rule. Therefore, the Councils believe these concerns have been addressed.

However, there are various types of cooperatives, and many are corporations. Some cooperatives buy the

agricultural product from the grower and resell to the Government. In this case, the grower is a subcontractor and would be exempt from the rule because—

• This involves a supply rather than a service; and

• Supplies are exempt from subcontract flowdown.

Other cooperatives involve pooling arrangements that are not subcontracts, but rather under which there is one prime contract between the Government and the cooperative (on behalf of the growers). In this case the answer is more difficult. If the growers are considered prime contractors for other purposes of Government contracting, then they would be so for purposes of E-Verify application. If, on the other hand, the cooperative alone is the prime contractor, then the growers are not the prime contractor. Applicability of the clause to each contract and different types of agricultural producers is a fact-based analysis that cannot be definitively answered by the Councils.

b. Rural Farms

Comment: Some commenters pointed out that many growers are small farms located in remote rural areas. Many farms hire seasonal workers at field sites that are not in an office, and so electronic or telephonic use of E-Verify is not readily available to the employer. In addition, employer and employees are not near the Social Security office.

Response: The Councils have made clear in the final rule that virtually all food products are exempt from the requirements of this rule. The commenters concerns about access to technology necessary to use E-Verify or the remote location of the contractor have been raised by other commenters as well and addressed in this rule.

The Councils believe that most entities involved in Federal contracting at any level, or their designated agents, will have access to basic office equipment such as a telephone, computer, and internet access. The employer is not required to visit the Social Security office; only the employee must visit if an SSA tentative nonconfirmation is received, and he or she is afforded eight Federal Government working days in which to contact SSA or USCIS. As noted above, when the employee is a naturalized citizen, the employee may choose to call USCIS directly to resolve a citizenship-based tentative nonconfirmation, rather than visit the SSA office. DHS tentative nonconfirmations can be handled with a telephone call rather than a personal visit.

c. Implementation During Harvest

Comment: Some commenters stated that implementing the rule in some agriculture sectors will be unworkable because of the rapid pace required for harvest. Seasonal laborers will move out to another job long before employer is able to obtain verification of employment status. Seasonal laborers need to work on harvesting/packing, not traveling to and spending time at the Social Security office.

Response: The Councils have made clear in the final rule that virtually all food products are exempt.

d. Government Sales

Comment: Some commenters noted that the increased costs, and risks of losing large percentage of workforce, would be too great for some growers to continue selling to the Government. Increased grower costs and less competition would increase the Government's costs. If food growers stop selling to the Government, commenters claim that foreign countries will become the source of food for U.S. servicemen and school children.

Response: The Councils have made clear in the final rule that virtually all food products are exempt, therefore the concerns expressed by the commenters have been addressed.

e. Agricultural Employees

Comment: One commenter noted that the Westat study data on recently enrolled users showed that recently enrolled users were more likely than long-term users to have a small percentage of foreign born employees. This is different from U.S. agricultural employers, where according to a recent USDA study, over a third of hired farm workers do not have citizenship status, and of those 90 percent list Mexico as the birth country.

Response: The FAR Council notes that agricultural employees are more likely to have immigration issues than most other kinds of employees. Nevertheless, because of the exception for COTS, non-agricultural employers are much more likely to be covered by the electronic verification requirements of the rule.

f. Shift to Foreign Agricultural Growers

Comment: One commenter noted that prime contractors might not want to hire U.S. agricultural growers as subcontractors because of wanting to avoid E-Verify problems. Also, the prime contractors might force subcontractors to use E-Verify even when the FAR would exempt the subcontract.

Response: The E-Verify clause does not flow down to subcontracts for supplies. A subcontractor for supplies that has an E-Verify clause in the subcontract should contact the prime contractor or next higher tier subcontractor that included the clause. If unable to obtain resolution, the subcontractor may contact the contracting officer for assistance in resolving the issue.

4. Institutions of Higher Education; State and Local Governments and Governments of Federally Recognized Indian Tribes; and Sureties

a. Institutions of Higher Education

Comment: Seven universities and two associations opposed the application of the rule to educational institutions. In general, the universities supported efforts to encourage improvements to compliance with requirements to demonstrate work authorization and citizenship, but recommend an exemption for research and higher education institutions, arguing that the rule would impose an unnecessary financial and administrative burden. The commenting associations predicted that including academic institutions within the scope of this rule would place stress on the E-Verify system.

The several commenters emphasized various aspects of the interrelated problems that universities face, as follows:

• One of the largest universities contended that E-Verify is difficult to use and that the proposed rule underestimates the time and resources required by an organization of its size to implement E-Verify, and its impact on U.S. citizens and lawful permanent residents.

• Another university described its use of a ''sponsored pool accounting system'' to facilitate frequent changes in researchers' and staff members' funding sources, and how its separation of contract administration and human resources processes complicates E-Verify's clearance procedure.

• Another university that employs a large number of foreign nationals claimed to have a strong program to monitor work authorizations. It stated that the added procedural burden on the university and its employees will hamper its ability to attract highly sought foreign nationals, impacting the quality of its research programs.

• Another estimated that modifying its existing employment eligibility monitoring system to comply with the proposed 3-day clearance requirement would cost $1 million because new processes would need to be implemented outside the payroll system it currently uses. In addition, the commenter claimed that employee relations issues would be a major impact, and notes that Federal contracts are only 2 percent of its business.

• Another university described universities as low-risk employers because their international population is already subject to oversight through the Federal visa approval processes and their own internal recruitment and other mechanisms.

• Another university was most explicit about the other internal mechanisms that reduce the vulnerability of educational institutions to immigration violations. According to this comment, research organizations operate in an environment of strict regulation and control, including export control and intellectual property as well as immigration and employment requirements. These contribute to their high level of regulatory compliance and they rarely encounter problems with document fraud or with employees lacking proper documentation of their employment authorization.

• Another university also recommended exempting universities from the proposed contract term, but also expressed concerns about the impact on grants and cooperative agreements as well. (Grants and cooperative agreements are not covered by FAR, so the requirements do not in fact apply.)

• One association cited, as an example of potential stress on the E-Verify system's resources, the fact that the University of California employs approximately 170,000 faculty and staff. The demand on system resources at a university is subject to annual spikes at the beginning of the academic terms, according to another association. Association commenters were also concerned about the potential impact of this rule on international personnel at colleges and universities who face delays in securing SSNs. Its members report that many international employees were incorrectly denied SSNs by the SSA. According to these commenters, many who eventually received SSNs did so only after repeated interventions by institutions and after a process that took, in many cases, several months. These delays may be as long as some student workers or staff members are employed by the institution. Such individuals can be employed in a range of positions, from short-term work-study jobs in smaller offices to long-term research projects in large laboratories. The commenters claimed that delays resulting from E-Verify use could jeopardize both the individuals and employers.

Response: The Councils do not find the comments about value, accuracy, or capacity of the E-Verify system to be bases to exempt educational institutions from the rule, for reasons addressed elsewhere in this final rule. Moreover, other Government contractors also attract a foreign talent base that supports U.S. science and technology capabilities.

However, the Councils recognize that coverage of a large number of educational institutions was not anticipated in the proposed rule. These entities have a large number of students with intermittent employment, which may complicate these institutions' efforts to comply with E-Verify requirements. Most Federal funding of universities is in the form of Federal grants, and there are relatively few Federal contracts, but under the proposed rule, a single contract could be sufficient to require an entire university to use E-Verify for all its new hires.

The Councils are also concerned that including universities under this broad rule may increase incentives for academic institutions to insist on grant funding rather than agreeing to enter into contracts. This would increase costs and performance risks to the Federal Government.

Accordingly, the Councils have reduced the burden on institutions of higher education by revising the applicability of the E-Verify requirements to cover only those employees assigned to a Government contract. In order to focus this exception, it is limited to institutions of higher education as defined at 20 U.S.C. 1001(a).

b. State and Local Governments and Governments of Federally Recognized Indian Tribes

Comment: One commenter was concerned about whether the rule might be misconstrued when applied to contracts under the Randolph-Sheppard Program. The concern was whether the State licensing agency, which signs the contract with the Federal Government on behalf of the blind entrepreneur would be required to enroll in E-Verify.

Response: The State licensing agency would be considered the contractor, but the Councils have decided that State and local Governments, as well as the Governments of federally recognized Indian tribes, should only be required to use E-Verify to verify the employment eligibility of employees assigned to the Government contract. The clause would be included in the contract, however, and would flow down to covered subcontractors for services or construction, including the blind entrepreneurs under Randolph-Sheppard.

c. Sureties

Comment: A sureties association requested a *de minimis* exception. Government construction contracts require that contractors obtain performance and payment bonds in accordance with the Miller Act, 40 U.S.C. 3131 *et seq.* A performance bond secures the contractor's performance in the event of a default. If the construction contractor defaults, the surety steps in to complete the contract using one of three methods.

• Sureties can enter into a takeover agreement with the Government and then the surety completes the project using a completing construction contractor.

• The second method involves the surety obtaining bids for completion of the project after which the Government contracts with the winning bidder to complete the project.

• The third method permits the surety to reimburse the Government for the excess costs incurred by the Government to pay a completing contractor.

The first method, where surety enters into a takeover agreement directly with the Government, is frequently selected. Sureties are concerned that if the rule applies to sureties who enter into takeover agreements, then many sureties will select one of the other options to avoid the cost of complying with the FAR rule. Additionally, issuing performance bonds on Federal construction contracts is often a very small portion of each surety's business because the sureties often sell other types of insurance such as auto, homeowners and general liability. If the FAR rule applies to all employees performing activities unrelated to bonds as well as new hires of the surety after the effective date of the takeover agreement, sureties may conclude that it is too expensive to enter into takeover agreements. The commenter also noted that when a surety enters into a takeover agreement with the Government, the actual work of completing the construction project is performed by a construction contractor hired by the surety and not by the surety itself. The sureties requested a *de minimis* exception ''under which companies whose contracts with the Federal Government are a small portion of the company's total revenues need only verify the eligibility of employees involved with the contract.''

Response: The Councils, while not agreeing to an across-the-board *de minimis* exception, have individually

considered the issues and agree that an exception applicable to sureties is appropriate. E-Verify use will not be necessary unless a surety provides a performance bond, the contractor defaults and the surety subsequently enters into a takeover agreement with the Government to complete the project. Prompt completion of construction projects using the most appropriate method available is a priority and it is not in the Government's interest to create an obligation that will discourage sureties from entering into a takeover agreement with the Government if such an agreement is appropriate. Therefore, E-Verify compliance will apply only to those employees of the surety directly assigned to the takeover agreement and to the construction contractor(s) that are hired by the surety. The full clause requirements will flow down to the construction subcontractors.

5. Financial Institutions

1. *Comment:* Several commenters recommended that banks and other financial institutions whose contracts are limited to serving as issuing and paying agents for U.S. savings bonds and savings notes or being insured by the FDIC should be excluded from the e-verification requirement. One commenter requested similar treatment for financial institutions that are parties to financial agency agreements (FAAs) with the Federal Government because FAAs are not subject to the FAR. This commenter stated that FAAs explicitly state: ''This FAA is not a Federal procurement contract and is therefore not subject to the provisions of the Federal Property and Administrative Services Act (41 U.S.C. Sections 251–260), the Federal Acquisition Regulations (48 CFR Chapter 1), or any other Federal procurement law.''

Response: Agreements or activities performed by financial institutions that are not subject to the FAR are not required to comply with the E-Verify provisions and clauses of the FAR.

2. *Comment:* One commenter requested clarification that the rule applies to ''contracts in which a Federal agency is purchasing goods or services, and does not apply to companies who purchase goods or services from the Federal Government.''

Response: Contracts for purchase of goods by companies from the Federal Government are not subject to the FAR and therefore are not required to comply with the E-Verify provisions and clauses in the FAR.

6. Hospitality Industry

Comment: One commenter commented on the difficulty of applying E-Verify to hotel employees. This commenter stated that it is impossible to determine beforehand which specific employee would be interacting with a guest, since many of the individual interactions are initiated by the guest and could involve one of many possible employees in each instance. Further, hotels do not have segregated areas for Government employees nor do they assign specific employees to serve Government employees. This situation is further complicated by the fact that employers are specifically prohibited from screening existing employees through E-Verify, except for those employees assigned to the Government contracts.

Response: First, the revision to the proposed rule that will make the clause inapplicable to contracts that will have a period of performance of less than 120 days may eliminate almost all hotel contracts from being subject to the rule. Second, the decision to allow contractors the option of using E-Verify for all existing employees, rather than just those assigned to the contract, will likely resolve any remaining issue.

7. Other

a. Security Clearances

Comment: Several commenters recommended that the rule permit employees who hold security clearances or HSPD–12 identification to be an equivalency for use of E-Verify.

Response: HSPD–12 mandates that a person must be suitable (minimum of a national agency check with inquiries (NACI)) in order to be issued an HSPD–12 card. Specifically, HSPD–12 imposes certain credentialing standards prior to issuing personal identity verification cards, including verification of name, date of birth, and social security number (among other data points) against Federal and private data sources. The Councils agree that the degree of scrutiny applied to individuals granted HSPD–12 credentials provides sufficient confidence that any such person is likely truthful about his or her authorization to work in the United States that additional investigation through E-Verify is not necessary.

With regard to security clearances, the degree of scrutiny applied to individuals granted security clearances also provides sufficient confidence that any such cleared person is likely truthful about his or her authorization to work in the United States that additional investigation through E-Verify is not necessary if the security clearance is active.

b. Hiring Halls and Intermittent Work

Comment: One commenter requested clarification about how new hires are impacted if they are not full time employees, such as ''hiring hall'' laborers hired for short time work on a specific project.

Response: The INA requires employers to verify the work eligibility of all new hires. There is no exception for short-term or part-time employment, as long as the situation involves ''employment'' as defined in 8 CFR 274a.1(h). When the employer completes the Form I–9 process, it should also use E-Verify to verify employment eligibility. If the employment is for less than three days, the I–9 must be completed at the time of hire, as opposed within the three days after hire that is allowed for longer-term employment. In either situation, the E-Verify query must be initiated when the I–9 process is completed. In addition, there is an existing statutory provision regarding employment pursuant to a collective bargaining agreement in section 274A(a)(6)(A) of the INA, which provides that in certain cases a subsequent employer is deemed to have complied with the Form I–9 requirements by virtue of verification by another employer within the agreement. If a previous employer within such an arrangement has completed the Form I–9 and E-Verify query, a subsequent employer does not have to reverify, as long as the employment is within the scope of the statutory provision.

c. Applicability To Change Orders and Material Modifications

Comment: Various commenters requested that the rule should specifically clarify whether and how the new requirements would apply to change orders or material modifications entered into after the effective date of the regulations on base contracts that were entered into before the regulations take effect. Another commenter recommended that the rule should be revised to specifically disallow inclusion of this E-Verify clause in such amendments, so that existing contractors are allowed to complete their current contracts under the same terms that were initially agreed upon.

Response: Inclusion of the E-Verify clause in change orders or material modifications will be implemented on a bilateral basis.

D. Implementation Schedule

1. Effective Date

a. More than 30 Days After Publication of the Rule

Comment: Several commenters asked that the effective date be some time more than the usual 30 days after publication of the final rule.

- Some commenters asked for an extension, but did not ask for a specific time period.
- Many commenters asked for 120 days after publication.
- Some universities and a personnel council asked for a minimum of 180 days. One commenter justified this because it needed time to hire and train new staff to use E-Verify, time to develop new processes to support compliance, and time to evaluate equipment and computer software upgrades.

Response: The rule will be effective on January 15, 2009. The timelines for initial verifications have been increased. In the proposed rule, verification queries on new and existing employees assigned to the contract had to be initiated within 30 calendar days of enrollment; whereas in the final rule it will be 90 calendar days.

Also note that the burden on some of the commenters (agriculture and education in particular) will not be as severe as the commenters expected. Agriculture will mostly be unaffected, due to the COTS exception. Institutions of higher education will be able to choose to only verify the existing employees and new hires that are assigned to the contract. The impact on sureties has also been minimized.

b. Congressional Action

Comment: Several commenters felt the final rule should not be published until Congress reauthorized the E-Verify program, which at the time was set to expire in November 2008. Another commenter wanted Congress to study the rule, or enact comprehensive immigration reform. One commenter suggested that a one year postponement would give an opportunity for Congress to consider the consequences of a mandatory program.

Response: Congress reauthorized E-Verify and appropriated $100 million for the program through the end of fiscal year 2009 in the Consolidated Security, Disaster Assistance, and Consolidated Appropriations Act, 2009, Public Law 110–329 (Sep. 30, 2008). If in the future Congress fails to extend E-Verify and the program is terminated, the rule will need to be reconsidered at that time. Otherwise, the Councils must implement the Executive Order 12989, as amended.

c. Finalization of the ''No-Match'' Rule

Comment: One commenter asked that the effective date be delayed until the ''no-match'' rule is finalized. It pointed out that the 2007 proposed rule regarding safe-harbor steps associated with SSA's no-match program would provide up to 90 days for employers to resolve discrepancies within their records.

Response: The Councils disagree. As an initial matter, DHS's No-Match Rule has been finalized with the publication of the Supplemental Final Rule on October 28, 2008. More significantly, the comment confuses two separate and independent programs. The DHS No-Match Rule provides guidance to employers that receive a no-match letter from SSA on how to conduct appropriate due diligence and settle questions raised by the no-match letter regarding the work authorization of employees identified by the letter. Employers that follow the steps set forth in DHS's No-Match Rule are guaranteed a safe harbor from the use of the no-match letter as evidence of the employer's violation of INA section 274A.

d. Finalization of the Revised MOU and Training

Comment: One commenter noted that DHS needed to finalize the MOU prior to the effective date of the FAR rule. Another commenter expanded upon this point to assert that DHS needs to finalize the E-Verify Web site, training materials, and program manual prior to the effective date of the FAR rule. A chamber of commerce wanted DHS to undertake a nationwide program to educate and train contractors prior to the rule's effective date.

Response: The Councils concur that implementation of the final rule must coincide with finalization of the MOU and other necessary systems revisions. The Councils expect that the MOU and other DHS systems and procedures will be ready in time for the effective date of the final rule.

e. Establishment of a Post-Final Nonconfirmation Process

Comment: One commenter, citing its experience with E-Verify, asked that DHS adopt processes for a post-final nonconfirmation process, initiated by either the employee or the employer, so that performance of contracts is not hampered by unnecessary termination of work-authorized employees.

Response: Under E-Verify rules, an employee must be permitted to continue working until a final nonconfirmation is issued. After the final nonconfirmation, if the employer has grounds to believe the final nonconfirmation is in error, the employer may still allow the employee to work, but the employer must inform DHS of its decision to retain the worker, and if the worker is later found to be unauthorized, the employer will be subject to a rebuttable presumption that the employer knowingly employed an illegal alien. See IIRIRA Section 403(a)(4)(C). Employers or employees may contact the E-Verify program if additional time is needed to provide such documentation or if they believe a final nonconfirmation was received in error. The E-Verify program may delay a final nonconfirmation finding on a case by case basis in those cases where employees have experienced delays in receiving needed documentation that will help prove their employment eligibility, and the program will work with the employer and/or employee to research the case and identify the reason for the final nonconfirmation.

f. Inaccuracies in the DHS and SSA Data Bases Are Fixed

Comment: Several commenters asked the rule be delayed until DHS and SSA fixed alleged inaccuracies in their data, which could stem from name changes, incorrect data entry, and delayed citizenship status updates.

Response: Some of these inaccuracies cannot be fixed until the employee takes steps to correct the problem, and the employee will discover the problem when the employer initiates a verification query and receives a tentative nonconfirmation. The actual numbers of inaccuracies can only be estimated, and the estimates vary significantly according to the estimator. As noted above, DHS has implemented several improvements to the E-Verify system to avoid tentative nonconfirmation responses resulting from out-of-date citizenship data. The Councils do not agree that the rule should be delayed.

g. Implementation of the Westat Report Recommendations

Comment: One commenter recommended that the Westat report recommendations be implemented before the E-Verify system is expanded.

Response: DHS's continues to improve and further develop the E-Verify system. Many of the Westat recommendations have already been implemented. There is no need to delay the rule.

h. GAO Study Completed

Comment: Some commenters asked that the rule be postponed until GAO completed its study called for under the pending five-year re-authorization legislation. One commenter felt the studies mandated by H.R. 6633 (if enacted) might offer insights on ways to strengthen the program. The first study is an examination of the causes of tentative nonconfirmations, and the second is an assessment of the impacts on small businesses.

Response: The Councils have decided not to postpone the rule. H.R. 6633, which has been passed by the House of Representatives, allows two years for the GAO study of the impact of E-Verify Pilot Program on small businesses, including specific details on small entities operating in States that have mandated the use of E-Verify. The bill has not been passed by the Senate, but it does not request that any further implementation of E-Verify be held up pending completion of the study. In addition, Congress reauthorized E-Verify and appropriated $100 million for the program through the end of fiscal year 2009 in the Consolidated Security, Disaster Assistance, and Consolidated Appropriations Act, 2009, Public Law 110–329 (Sep. 30, 2008), without requiring this study, and it does not appear that there will be any additional legislative developments on E-Verify in the 110th Congress.

2. Phased Transition

a. General

Comment: One commenter suggested that because of the existing ''error rates'' and capacity concerns, the Government should take a more measured or phased approach in increasing E-Verify participation, rather than implementing a rule that will encompass almost all Government contractors within a very short period. Another commenter argued that USCIS indicated the current issues could be adequately addressed in four to five years, which suggests that neither DHS nor SSA anticipated that the agencies would be required to immediately implement full coverage for all contractors at one time and instead contemplated a more realistic implementation period of anywhere from four to five years.

Response: The Councils have decided that a delay in the implementation of the rule is not necessary. DHS and SSA have stated that they are ready to handle full implementation.

b. Four-Phase Transition

Comment: One commenter recommended a four-step phase-in—

- New employees of prime contractors;
- New employees of subcontractors; following this, the Councils should evaluate the success of the program for new employees before proceeding to:
- Existing employees of a prime contractor assigned to a new Federal contract; and then
- Existing employees of new subcontractors.

Response: The Councils must implement the Executive Order expeditiously. The time periods for verification have been lengthened, to ease the burden on employers.

c. From Largest to Smallest Contractors or Contracts

Comment: Several commenters recommended phased implementation, over periods of up to 7 years, based on number of employees of the contractor, or the number of employees required to effectuate the contract.

- The first year of the program would be for the largest noncommercial contracts, and gradual rollout over the next four years in descending order of size, measured by the number of employees who would be required to effectuate the contract.
- Apply the first year to contractors and subcontractors with 2,000 or more employees. Do not count harvest-time employees as if they were year-round employees in measuring the number of employees for a phase-in.

Response: The Councils do not expect agricultural employers to be significantly affected by this rule, because of the COTS exemption. Implementation of the suggested phase-in would be very difficult, and the Councils have decided against this proposal. The dollar threshold exception for prime contracts has been raised to $100,000 (which will especially help small business) and the verification deadlines lengthened.

d. By Agency

Comment: One commenter suggested a phase-in over a period of time or perhaps by agency.

Response: The phase-in by agency is an interesting suggestion. However, the Councils do not believe it is necessary to phase-in by time or agency. DHS and SSA are prepared to support implementation of this rule as revised.

3. Applicability to Indefinite Delivery/Indefinite Quantity Contracts

a. Existing IDIQs

Background: The proposed rule's preamble stated that the proposed rule: ''Applies to solicitations issued and contracts awarded after the effective date of the final rule in accordance with FAR 1.108(d).'' Under the final rule, Departments and agencies should, in accordance with FAR 1.108(d)(3), amend existing indefinite-delivery/indefinite-quantity (IDIQ) contracts to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule and the amount of work or number of orders expected under the remaining performance period is substantial.

1. *Comment:* One commenter suggested that not applying the rule to existing IDIQ contracts would enable a more even rollout of the program.

Response: The Councils have been advised that DHS and SSA are prepared to process E-Verify queries of contractor employees subject to the rule, including those performing under existing IDIQ contracts.

2. *Comment:* The same commenter objected to applying the rule to existing IDIQ contracts because companies made business decisions to bid on these contracts initially without contemplating the significant cost that will be incurred as a result of this new requirement.

Response: The contracts would be modified on a bilateral basis. The contractor will be able to decide whether it wishes to accept the clause. There can be no unilateral imposition of the clause on any pre-existing IDIQ contract without the contractor's consent.

b. Cost Recovery for Modified Contracts

Comment: Two commenters asked for the rule to spell out the amount contractors would receive to implement compliance on existing IDIQ contracts.

Response: The FAR does not normally spell out the amount of consideration it expects the Government to pay on a contract negotiation. This is a contract-by-contract issue determined by individual contracting officers.

c. Meaning of ''Substantial''

Comment: One commenter asked the Councils to define ''substantial work'' or ''substantial number of orders.''

Response: The interpretation of ''substantial'' will be within the discretion of the contracting officer. The normal use of the word applies.

d. Meaning of IDIQ Contract.

Comment: One commenter stated that the FAR proposed rule would require re-verifying all employees currently employed under ''indefinite delivery/indefinite quantity'' contracts, and that most university Federal grants are multiyear agreements under which

thousands are employed. Another commenter discussed a multiyear contract it had with HHS to provide social services on a national level to victims of human trafficking, where HHS paid for services, up to a certain amount, and for a fixed period, to victims of trafficking on a per capital basis. This commenter asserted that—

- Its contract was not IDIQ;
- A contract extension is not a new contract; and
- A Federal contract for the provision of mainly social services to victims of trafficking is not an IDIQ contract.

Response: The commenters may be somewhat confused about what a FAR IDIQ contract is. A grant is not an IDIQ contract; grants are not covered by the FAR. A contract for social services to victims of trafficking might be an IDIQ contract. The contract itself will say whether it is an IDIQ contract; if so it would contain an IDIQ clause, such as 52.216–22 ''Indefinite Quantity.'' IDIQ contracts are described in the FAR at Subpart 16.5, especially at 16.504.

E. Regulatory Flexibility Analysis and/or EO 12866/Regulatory Impact Analysis/Paperwork Reduction Act

1. Benefit Analysis Issues

Comment: Several commenters believe this rule will increase the Government's cost of doing business because many contractors will pass back to the Government their costs of using E-Verify. Also, commenters claim that this rule will mean fewer businesses will want to bid on Government contract work.

Response: The Councils concur that this rule may result in additional compliance costs for contractors, and these additional costs could be passed back to the Government. However, Executive Order 12989, as amended, requires that contractors use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility. The President has found that Executive Order 12989 ''is designed to promote economy and efficiency in Federal Government procurement. Stability and dependability are important elements of economy and efficiency. A contractor whose workforce is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose workforce is more stable.'' Consequently, the President has made the finding that the increased economy and efficiency to the Government as a result of this rule outweighs the cost of the rule.

2. Cost Estimates

a. On Contractor

1. *Comment:* Commenters, including the SBA Office of Advocacy, argue that the Initial Regulatory Flexibility Analysis (IRFA) did not consider all of the relevant costs. They state that profit margins vary by industry, and even very low compliance costs could be significant for some businesses. For example, in the architecture and engineering contracting environment, the maximum allowable profit margin is six percent. Commenters also claim that the analysis did not consider costs such as the social welfare cost or the cost of penalties and lawsuits.

Response: The IRFA fully complied with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 603. The IRFA compared estimated compliance costs for four distinct sizes of small business (10, 50, 100, and 500 employees) to the respective revenue of these businesses, using information obtained from the Small Business Administration.

The Councils do not agree that a compliance cost burden of 0.03 percent of revenue could typically be regarded as a significant economic impact. The Councils further disagree that it would be appropriate to add additional cost factors such as the ''upcoming three percent mandatory IRS withholding'' when these costs are not direct compliance costs of the rule.

With regard to the full social welfare cost of the rule, Regulatory Flexibility Analyses are only to include the direct impacts of a regulation on a small entity that is required to comply with the regulation. *Mid-Tex Electric Coop.* v. *FERC,* 773 F.2d 327, 340–343 (D.C. Cir. 1985) (holding indirect impact of a regulation on small entities that do business with or are otherwise dependent on the regulated entities not considered in RFA analyses). See also *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (In passing the Regulatory Flexibility Act, ''Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. * * * [T]o require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.''). See, also, Regulatory Flexibility Improvements Act, Hearing before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, on H.R. 682, 109th Cong., 2nd Sess. (2006), at 13 (Statement of Thomas Sullivan, Chief Counsel for Advocacy, Small Business Administration, testifying on the RFA by noting that ''the RFA * * * does not require agencies to analyze indirect impacts.'').

2. *Comment:* A commenter stated that OMB guidelines direct agencies to account for all regulatory (*i.e.,* non-budgetary) costs and that, in general, costs that are not within the discretion of an agency to avoid or prevent are properly attributable to the statute, and an agency may assign them accordingly. The commenter further stated that, nevertheless, all regulatory (*i.e.,* non-budgetary) costs must be accounted for and must be included in the IRFA.

Response: The commenter has confused the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), with the requirements of other administrative reviews. For example, the commenter is apparently suggesting that the IRFA should comply with OMB Circular A–4 and Executive Order 12866. These analyses are not required by the RFA, nor are they mandated for this rule under any other provision of law. The internal, managerial nature of this and other similarly-worded Executive Orders has been recognized by the courts, and actions taken by an agency to comply with the Executive Order are not subject to judicial review. *Cal-Almond, Inc.* v. *USDA,* 14 F.3d 429, 445 (9th Cir. 1993) (citing *Michigan* v. *Thomas,* 805 F.2d 176, 187 (6th Cir. 1986)). Although the requirements of the RFA analysis is fairly compatible with many of the analytical requirements under OMB guidance, the comments invoking Executive Order 12866 and OMB Circular A–4 standards to identify alleged deficiencies in the IRFA are misplaced.

3. *Comment:* A commenter stated that, upon hiring a new worker or upon assigning an employee to Federal contract work, and running the employee against E-Verify, the employer who receives a tentative nonconfirmation for an employee must continue to pay and train the new employee, only to possibly find out later that the worker cannot resolve the nonconfirmation and must be terminated. According to the commenter the IRFA should have taken these costs into account.

Response: The economic analysis included a cost of $5,000 in termination and replacement expenses for each authorized employee that is terminated or resigns employment due to this rule. This $5,000 estimate is meant to include the full range of the direct costs of termination, such as administrative expenses and training costs.

4. *Comment:* The SBA Office of Advocacy claimed that the economic analysis did not distinguish between prime small business contractors and small business subcontractors and that there is a disproportionate compliance cost burden on small business subcontractors.

Response: It is not clear how the direct cost of complying with the rule would materially differ depending on whether the contractor was a prime contractor or a subcontractor. The commenter did not give any specific examples of how a subcontractor's direct compliance costs would differ from a prime contractor's direct compliance costs.

5. *Comment:* The SBA Office of Advocacy stated that some contractors in the construction or manufacturing industries, for example, can have hundreds of employees and still be considered small. The commenter claimed that it is doubtful that DHS' $419 figure is an accurate statement of the costs of the rule to these small businesses.

Response: The economic analysis did not state the cost to a contractor with ''hundreds of employees'' would be $419. The economic analysis presented information showing how the rule would impact four sizes of small entities (10, 50, 100, and 500 employees) by comparing their estimated compliance costs to their respective revenues. The estimate of $419 was for a contractor with ten employees. The economic analysis estimated the compliance cost to a company with 500 employees to be $8,964, so the Councils agree with the commenter that a contractor with hundreds of employees would be expected to incur more than $419 in compliance costs.

6. *Comment:* The SBA Office of Advocacy stated that if, after reviewing the comments received regarding its RFA certification, the FAR Council has reason to believe that it can no longer certify that the proposed rule will not have a significant economic impact on a substantial number of small entities, then the FAR Council should examine feasible alternatives that would lessen the burden on small entities. In that event, the commenter stated that the FAR Council should also publish an IRFA detailing those alternatives, describing the scope and impacts of the proposed rule on small entities, and provide another opportunity for small businesses to comment prior to publication of the final rule.

Response: The Councils did prepare an Initial Regulatory Flexibility Analysis. The Councils did not certify that the rule would not have a significant economic impact on a substantial number of small entities. For the final rule, the Councils have prepared a Final Regulatory Flexibility Analysis. The proposed rule, at 73 FR 33379, explained the alternatives that were considered in order to minimize the impact of the rule on small entities. The Councils have considered additional alternatives in the FRFA based on public comments.

7. *Comment:* Many commenters argued that the assumption contained in the economic analysis that the costs related to unauthorized workers, such as the turnover and replacement costs and lost productivity costs due to the employment of unauthorized workers ''are attributable to the Immigration and Nationality Act, not to the Federal Acquisition Regulation'' would be true only if the Immigration and Nationality Act imposed on employers a continuing duty, post-hire, to investigate the immigration status of existing employees. The commenters are of the opinion that the Act imposes no such duty, and that Congress deliberately decided against imposing such a duty when it enacted IRCA in 1986. They argue that an employer who is currently employing unauthorized employee Jane Roe, after having hired her in 2002 in full accordance with I–9 procedures, and who has no knowledge or suspicions as to Roe's immigration status, is not breaking any law and is not illicitly avoiding any cost of doing business by keeping Roe in its employ without periodically investigating her status. Therefore, the commenters conclude that any new regulation that would force the employer to investigate Roe and acquire the knowledge that would require the employer to terminate her and replace her would impose a cost on the employer.

Response: The Immigration and Nationality Act expressly prohibits employers from knowingly continuing to employ an alien who is not authorized to work in the United States. INA section 274A(a)(2), 8 U.S.C. 1324a(a)(2). How an employer obtains knowledge of an employee's illegal status is immaterial—employers that have actual or constructive knowledge of their employees' illegal work status are statutorily obligated to cease their employment, and any costs that result are attributable to the statute, not to this rulemaking.

The commenters suggest that they would not have discovered the illegality but for their compliance with this rule, and that the consequences of their discovery should be accounted as a cost of this rule. This argument appears to rest on the belief that the INA's prohibition on illegal employment applies only until the employee has filled out the Form I–9. While it may be that many employers have taken a misguided ''see no evil'' approach under which they hope to avoid learning inconvenient truths about the legal status of their existing workforce, that is not an approach that is countenanced by the INA.

While the cost of terminating or replacing unauthorized workers cannot properly be considered a cost of this rule, some turnover involving legal workers that are unable or unwilling to resolve their tentative non-confirmations can be counted as a cost of the rule. Such turnover costs for legal workers were estimated in the IRFA and Final Regulatory Flexibility Analysis (FRFA).

8. *Comment:* A commenter stated that the economic analysis assumes that the employee would bear the cost of driving to SSA, ''but it will be the employer who likely will bear the salary cost of that time.'' In addition, the commenter believed that contractors and subcontractors will suffer far larger lost opportunity and productivity costs than those included in the economic analysis.

Response: The Councils disagree with the commenter. The economic analysis actually assumes the employer would incur a lost productivity cost 100% of the time an authorized employee needed to visit SSA to resolve the tentative non-confirmation and used ''fully-loaded'' wages to estimate lost productivity. A fully-loaded wage includes such benefits as retirement and savings, paid leave (vacations, holidays, sick leave, and other leave), insurance benefits (life, health, and disability), legally required benefits such as Social Security and Medicare, and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The Councils used data from the Bureau of Labor Statistics in order to estimate the fully-loaded wage. Nevertheless, in practice we believe some employers may not incur lost productivity or opportunity cost if the employee takes personal time to resolve their non-confirmations. Also, to the extent employers have the capability to plan around employee absences and other employees are available, the productivity losses estimated in the economic analysis could be higher than what employers may actually incur. Given the fact that the economic analysis estimated a lost productivity cost 100 percent of the time an authorized employee needed to visit SSA at the fully loaded wage rate for a full eight hour day, the Councils do not believe that the lost-productivity cost estimate for going to SSA is unreasonable.

9. *Comment:* Commenters stated that the economic analysis did not allocate costs for the time required for employers to identify covered employees and manage compliance with E-Verify. For new employees, commenters noted that these costs are admittedly nominal, as new employees are self-identified, and the E-Verify process goes hand-in-hand with the I–9 process already required. But the commenters stated that this is not the case for current employees because—

- To comply with current employee requirements, the employer must first take steps, through performance file review or manager interviews, to determine which employees are subject to the current employee obligation;
- Once the covered employees are identified, the employer must then ascertain if an E-Verify query is required, by checking E-Verify or I–9 records to see if a prior query was obtained;
- If not, the employer must then proceed to obtain the information necessary to conduct an E-Verify query for all such employees.

Response: The rulemaking requires existing employees assigned to the contact to be vetted through E-Verify. The economic analysis accounted for the marginal cost of the time it would take to execute the queries for the existing employees; however, the Councils agree that additional time should be added to account for the time needed to identify the covered existing employees.

Contractors will incur an opportunity cost of time to determine which of their existing employees will actually need to be vetted. After those employees have been identified, the contractor will review the employee's previously completed I–9 form to see if the I–9 complies with the terms of E-Verify enrollment. If the I–9 meets the criteria for E-Verify enrollment, the human resources specialist is expected to contact (by telephone for example) the employee to ensure that the information on the existing I–9 is still accurate (such as the stated basis for work authorization).

Some commenters appear to have assumed that each I–9 required a ''face-to-face'' meeting between the employee and a company representative. A ''face-to-face'' meeting may not be necessary if the I–9 does not need to be updated. Contractors will not normally need to spend several minutes with each employee discussing the need to confirm their Form I–9 information. For example, many contractors may send out an e-mail to their employees or otherwise communicate to alert them that human resources may be contacting them in the future to validate the information on their I–9. However, there will be occasions when a face-to-face meeting will have to be arranged between the human resources specialist and an employee (to review E-Verify acceptable work authorization documents for example). Assuming an average of 20 minutes for a human resources specialist to review an existing I–9 and either call an employee to validate this I–9 or meet with the employee to review documents and an employee's average opportunity cost of 10 minutes to discuss the I–9 information, the RIA will be updated. In addition, the RIA will include an assumption that 10 percent of the time a second 20 minute contact (phone call or meeting) between the employee and human resources specialist could be necessary to resolve any additional I–9 issues related to E-Verify.

10. *Comment:* A commenter stated the economic analysis estimates 3.5 million Government contractor employees will be required to be vetted through E-Verify in 2009. Using the Government's own estimate, the commenter stated that about 370,000 employees will be terminated even though they are legally entitled to work in the United States.

Another commenter stated that in the economic analysis of the proposed rule, the assumption is made that 3.8 million employees of Federal contractors will be required to be run through E-Verify as a result of this rule for the first year the rule is in effect. Based on prior statements by DHS, the commenter notes that two percent of these workers will ultimately be fired because of their inability to resolve a tentative non-confirmation with the SSA or DHS. Thus the commenter calculates that, as a conservative estimate, approximately 70,000 lawfully authorized workers will be fired as a result of this rule.

Response: The economic analysis estimated that two percent of the cases where the tentative non-confirmation was not resolved could potentially result in an authorized worker either choosing to resign instead of working diligently to resolve the tentative non-confirmation or the employee being terminated. The economic analysis indicated that 5.3 percent of the time there was a tentative non-confirmation that was not resolved. Multiplying 2 percent times 5.3 percent equals 0.106 percent. In order to estimate the number of authorized employees that choose to get employment elsewhere or otherwise do not resolve the tentative non-confirmation (for whatever reason), multiply the 3,831,992 employees vetted through E-Verify times 0.106 percent to get 4,060 authorized employees, not the 370,000 stated by the one commenter, nor the 70,000 ''fired'' as stated by the other commenter.

11. *Comment:* A commenter stated the RIA subtracted 10 percent of contract dollar volume but did not provide any basis for that assumption.

Response: Page 21 of the RIA stated that 10 percent was the approximation for contracts with no work performed in the U.S. The *Federal Procurement Data System—Next Generation* was the source of that information.

12. *Comment:* A commenter stated the economic analysis assumes that labor turnover at Government contractors mimics the annual labor turnover rates in private industry. Multiplying the calculated number of employees (1.5 million) by 1.4 yields 2.2 million contractor employees, a number that is compounded at a 5 percent annual rate for future years. The commenter stated that this appears to be a reasonable first approximation because contractors are not burdened by civil service rules that effectively forbid employee termination. The problem is that this assumption is logically inconsistent with the previous assumption that contractor labor and Government labor earn the same wages and salaries. The commenter concludes that, if this were true, turnover in Government employment would be no different than private sector turnover.

Response: The economic analysis stated ''in order to adjust for turnover we assumed an annual turnover rate of 40.7 percent as the Bureau of Labor Statistics (BLS) estimated the annual turnover rate for all industries and regions in 2006 at 40.7 percent.'' We disagree that it is ''logically inconsistent'' to assume for the purposes of the economic analysis that Federal Government contractors have a turnover rate that is equivalent to the turnover in ''all industries and regions'' in the U.S. It is not entirely clear if the commenter believes the turnover rate used in the economic analysis is too high or too low as the commenter did not suggest a specific turnover rate that should be used in place of the 40.7% rate used in the economic analysis.

According to the BLS publication *Job Openings and Labor Turnover: January 2007* (which is the same source used for the 40.7% turnover estimate), the turnover rate for the federal government was 25%. It is very possible that the turnover rate for the federal government contract workforce more closely resembles the 25% turnover in the federal workforce than the 40.7% ''all

industries and regions'' turnover rate used in the economic analysis and that we have overestimated the number of employees vetted through E-Verify. However, there are more factors involved with turnover than simply pay. For example, the perceived increased job security of federal employment compared with the private sector likely influences the federal turnover rate. Also, the pension a federal employee receives is based on age and years of service and likely serves to encourage federal workers who have accrued significant amount of federal service not to leave federal employment. Many federal employees also choose to work for the federal government in order to serve the public good. Consequently, we did not feel it was appropriate to assume that federal contractor turnover rate was equivalent to the federal government turnover rate since there are nonwage considerations involved with job turnover. If federal contract employees do have a turnover rate closer to the federal government of 25% rate than the 40.7% estimated in the analysis, the amount of turnover and number of employees vetted through E-Verify have been overestimated in the economic analysis and the costs of the rule are therefore an overestimate.

13. *Comment:* A commenter stated the RIA includes what is described as an uncertainty analysis, but in fact it consists of merely a numerical sensitivity analysis with respect to two assumptions: (1) The number of contractors and subcontractors affected by mandatory E-Verify; and (2) the number of contractor and subcontractor employees that would be vetted through mandatory E-Verify. The commenter stated that ''[t]he product of this 'uncertainty analysis' is a series of impressive looking, but substantively and presentationally misleading color graphs.'' The commenter also claimed that this analysis violates Office of Management and Budget's Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies (2002); Notice and Republication.

Response: The Regulatory Flexibility Act does not require any sensitivity analysis or uncertainly analysis be performed in an IRFA. However, the RIA provided a sensitivity analysis simply to show how the costs of the rule could change if the primary estimates of two key cost drivers were varied. First, the sensitivity analysis varied the number of employees that are vetted through E-Verify (holding all else constant) and determined how the overall cost of the rule would change. Secondly, the sensitivity analysis varied the number of covered contractors and subcontractors (holding all else constant) that have to be enrolled into E-Verify and determined how the overall cost of the rule would be impacted. Finally, the sensitivity analysis varied both the number of employees and the number of contractors simultaneously in order to get an overall sense of how uncertainty in these two key variables impacts the overall cost.

The model developed by the Councils to estimate the number of employees vetted through E-Verify included variables that were informed by professional judgment. Such variables include the contract percentage for labor (26 percent), overhead (26 percent), material expenses (26 percent), general and administrative (12 percent), subcontractors (20 percent), and the average wage of a Federal contract worker ($66,705). (Some of these figures are percentages of others.) Changes in any of these variables would impact the estimate of the number of employees vetted through E-Verify. As the estimate of the number of employees vetted through E-Verify is directly influenced by these variables, we believe it is useful to show how the overall costs of the rule could change if the number of employees vetted changed. The Councils continue to believe its estimate of the number of employees vetted through E-Verify is reasonable; but the sensitivity analysis does show how the costs would change if the number of employees estimated were varied by 50 percent using a triangular distribution.

The estimate of the number of primary contractors within the scope of the rule is based on a query of the *Federal Procurement Data System-Next Generation* and is not based on a professional estimate. However, the number of covered subcontractors that are not otherwise a prime contractor is not available and this variable is a professional estimate. The sensitivity analysis shows how the costs would change if the number of covered contractors estimated were varied by 25 percent using a triangular distribution. Both the 25 percent and 50 percent ranges used in the sensitivity analysis were selected based on professional judgment.

14. *Comment:* A commenter disagreed with the Fiscal Year 2007 estimate that 3,475,730 employees will be vetted through E-Verify. The commenter believes that the Government is assuming that 75 percent of a contractor's employees will be assigned to a contract while only 25 percent will not. The commenter knows of many large employers and with few exceptions the portion of their revenue derived from Federal contracts is significantly less than 25 percent. The commenter believes many more employees will be vetted through E-Verify than has been estimated by the Government. Thus the commenter concluded that the costs have been understated.

Response: The Councils agree that there are numerous businesses which contract with the Federal Government but derive a relatively small portion of their revenue from the Federal Government. However, there are also many contractors that have enough Federal contracting business that they have organized themselves into business units that concentrate on Federal contracting sales. The estimate takes into account both businesses that do both relatively little Federal contracting and those that do extensive Federal contracting.

Many commenters appear to be interpreting the term ''contractor'' in an overbroad fashion. Only the legal entity that signs the contract is bound by the E-Verify obligation, not necessarily all affiliates or subsidiaries of that entity. Each contractor has the ability to organize or incorporate itself as it chooses, and questions of whether certain entities are a part of the contracting legal entity can only be answered in specific factual contexts.

Regarding the commenter's belief that the number of employees vetted through E-Verify is understated, there were several assumptions made when conducting the economic analysis that may mean the actual number of employees vetted has been overestimated. The proposed rule does not apply to any employees hired prior to November 6, 1986, as these employees are not subject to employment verification under INA section 274A, 8 U.S.C. 1324a. The economic analysis did not remove any of these workers from the estimate of the number of employees vetted.

In addition, several States have laws that already require varying degrees of E-Verify use. There are also Federal contractors that have already chosen to enroll in E-Verify that do not operate in a State with an E-Verify requirement. Since many Federal contractors are already enrolled in E-Verify or operate in a State with an E-Verify requirement, these contractors have already incurred many of the enrollment costs of this rulemaking and their newly hired employees would be vetted through E-Verify even absent this rulemaking. The economic analysis did not reduce the cost estimate to account for the costs of employers who have already enrolled in E-Verify.

Furthermore this final rule has narrowed the scope of those required to be vetted through E-Verify. For example, the final rule clarifies that the E-Verify requirement does not apply to prime contracts with performance periods of less than 120 days and raises the threshold for prime contractors to the simplified acquisition threshold ($100,000) instead of the micro-purchase threshold ($3,000). However, the estimate of the number of employees vetted through E-Verify has not been reduced. We believe for these reasons the cost estimates are not understated.

15. *Comment:* Other commenters, including the SBA Office of Advocacy, that believed that the number of contractors that will be vetted through E-Verify has been underestimated criticize the fixed factors (*e.g.*, 26 percent for labor) used in the economic analysis as well as the estimate that the number of subcontractors is assumed to equal 20 percent of the number of prime contractors. One commenter claims that the estimates used by the Councils are not based on ''empirical data'' and that the economic analysis was not explicit regarding how these factors were determined.

Response: The dollar value of the contracts estimated to be within the scope of the rule was found by querying the *Federal Procurement Data System* and does not rely on an estimate by the Councils. Instead of simply providing a ''top-level'' estimate, the Councils developed a model to estimate the number of employees that would be expected to be vetted through E-Verify. The factors utilized (*e.g.*, 26 percent for labor) are all multiplied against the estimated dollar value of contracts. When describing the percentage estimates used to estimate factors utilized, the economic analysis specifically stated ''we understand these assumptions are rough and we welcome public comment providing more precise information.'' However, the commenters have not provided better information.

We note that the analysis required by the Regulatory Flexibility Act need not produce statistical certainty. The law requires that the Councils ''demonstrate a 'reasonable, good-faith effort' to fulfill [the RFA's] requirements.'' *Ranchers Cattlemen Action Legal Fund,* 415 F.3d 1078, 1101 (9th Cir., 2005). See also *Associated Fisheries of Maine* v. *Daley,* 127 F.3d 104, 114–15 (1st Cir. 1997). The IRFA and economic analysis produced by the Councils in this rulemaking meet that standard. The assumptions underlying the economic analysis are reasonable, and the Councils have utilized the best data available to produce the IRFA and the economic analysis. We continue to believe the estimates we provided are reasonable.

16. *Comment:* A commenter stated that over 54 million people are currently employed by companies that work on Government contracts (commenter cited *Wall Street Journal Examines How Federal Government Use of Contract Workers Contributes to Number of Uninsured U.S. Residents,* Wall Street Journal, 26 March 2008). The commenter assumed an 8 percent error rate for E-Verify, and claimed that as many as 432,000 legal employees could have their employment disrupted.

Response: The article cited by the commenter stated there were ''5.4 million Federal service-contract workers'' not the 54 million contract workers cited by the commenter. We note that the 5.4 million estimate may include contracts that are not covered by the rule. For example, the scope of the rule excludes contracts that do not include any work that will be performed in the United States.

The Councils disagree that 432,000 legal employees will have their employment disrupted. The economic analysis stated there was a 5.8 percent tentative non confirmation rate. Multiplying 3,831,992 employees by 5.8 percent equals 222,256 employees (who are both authorized and unauthorized) that would receive a tentative non-confirmation under the projections in the economic analysis. Current experience with E-Verify shows that about 0.5 percent of employees successfully take steps to resolve the tentative non-confirmation, which equals 19,160 authorized employees who may be required to resolve a tentative nonconfirmation.

17. *Comment:* The SBA Office of Advocacy stated that the Regulatory Planning and Review section of the rule states that the rule will impact 168,324 businesses. The commenter further stated that the regulatory flexibility analysis states that there will be 162,125 small businesses affected by the rule. The commenter concludes that the public is left to assume that there are 162,125 small business with prime contracts and subcontracts. The commenter cites data from the Small Business Administration that in FY 2006 agencies awarded $60,703,667,336 to small business subcontractors. The commenter calculates that if this amount were distributed to 162,125 small business subcontractors it would mean that each business received on the average a contract valued at $375,000. However, the commenter noted that DHS cites the average annual revenue of a ten-person firm as approximately $1.4 million.

Response: The estimate of 168,324 contractors impacted is the FY09 annual estimate. However, the 162,125 small business subcontracts is not an annual estimate. As noted in the proposed rule at 73 FR 33378, ''while there are no reliable numbers for subcontracts awarded to small businesses, the Dynamic Small Business database of the Central Contractor Registration—a database of basic business information for contractors that seek to do business with the Federal Government—gives a number of 324,250 small business profiles that are registered. Assuming that 50 percent of these small businesses contract with the Federal Government at either the prime or subcontract level, then that number is 162,125 small businesses.'' Registration with the Central Contractor Registration (CCR) does not mean the small business is currently or ever will be a Federal contractor; it simply means the registrant seeks to do business with the Federal Government. Consequently, dividing 50 percent of the small business CCR registrants (162,125 small businesses) by the FY 06 SBA estimate of $61 billion in small business contract awards may yield $375,000, but the meaning of that statistic is not clear.

As explained in the economic analysis, the estimate of average annual revenue of $1.4 million for a ten-person firm is based on data from the Small Business Administration. We have no reason to believe this data from SBA is unreliable. We assume many small businesses have revenue from sources other than Federal Government contracts. The economic analysis also made no claim that a ten-person firm was the average size of a small business that received a Federal contract. Rather, it presented information on how the rule would impact four sizes of small entities (10, 50, 100 and 500 employees) by comparing their estimated compliance costs to their estimated respective revenues.

18. *Comment:* Commenters noted that, in order to comply with the E-Verify MOU, employers agree to only accept ''List B'' documents listed on the Form I–9 that contain a photo. Commenters stated that the cost of obtaining a photo ID for those employees should be included as a cost of this rule. In addition, commenters stated that 11 percent of U.S. citizens do not currently have a photo ID and cited the Brennan Center for Justice's report entitled ''*Citizens Without Proof, A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo*

Documentation, Brennan Center for Justice, New York School of Law, November 2006.''

Response: The cost of obtaining a photo ID should be included as a cost of the regulation, and it has been added into the economic analysis. However, the Councils do not agree that 11 percent of the employees covered by the requirements of the rule might not have a photo ID.

The entire study cited by the commenter was only three pages and did not include many details such as survey methodology and how the results were determined. In addition to the Brennan survey cited by the commenter, a publicly available American University study entitled ''*Voter IDs Are Not the Problem: A Survey of Three States*'' was reviewed. (American University Center for Democracy and Election Management, January 9, 2008. *http://www.american.edu/ia/cdem/pdfs/VoterIDFinalReport1-9-08.pdf*). This survey of 2,000 registered voters in Indiana, Maryland, and Mississippi determined that, overall, only 1.2 percent of the total respondents lacked Government-issued photo identification. Comparing the results of the American University study with the Brennan survey shows there appears to be considerable disagreement among the estimates of the percentage of Americans without a photo ID.

However, it is not clear how either the results of the Brennan study or the American University study is definitive for the purposes of the final rule's economic analysis. The rulemaking is regulating federal contractors. The universe of federal contractors is not directly comparable to either the population of ''voting-age American citizens'' (the Brennan survey sample) or ''registered voters'' (the AU study sample). Both the ''voting-age American citizen'' and ''registered voter'' populations by definition include people not in the workforce.

Consequently, the final economic analysis will assume 0.5 percent of workers vetted through E-Verify will need to obtain a photo ID and that employers will incur an eight-hour opportunity cost so that the employees can obtain a photo ID.

19. *Comment:* Commenters believed that the costs of implementing the rule are underestimated.

Response: The Councils agree in part, and have reviewed the economic analysis with the E-Verify program and have increased certain enrollment and training time cost estimates in the economic analysis for those contractors that enroll in E-Verify. Additional costs have been added for employers to identify those existing employees that need to be vetted through E-Verify. Consequently, the estimated implementation costs have increased for the final rule relative to the costs estimated for the proposed rule. Another category of implementation costs was added to the economic analysis. This category, called ''Miscellaneous Implementation Costs,'' is estimated to be an additional 10 percent of the total calculated implementation costs (such as employer enrollment, reviewing and updating the I–9's of existing employees, the purchase of a computer) to cover costs companies may incur to execute the rulemaking requirements, such as planning.

20. *Comment:* A commenter stated that the proposed rule requires contracting officers to modify covered existing indefinite quantity/indefinite delivery (IDIQ) contracts to add the proposed E-Verify contract clause. Commenters believe the RIA excludes the cost of modifying these IDIQs and that the Government will need to engage in negotiations with these IDIQ contractors. In addition, the commenter believes the Government will owe ''consideration'' to the contractors in exchange for agreeing to include the E-Verify contract clause. The commenter believes, based on the professional estimate of a former Federal procurement official, that the number of existing IDIQ contracts that would need to be modified is approximately 10,000.

Response: The Councils agree that the economic analysis did not include the cost of modifying these IDIQ contracts, but disagree regarding the extent of the cost burden of these modifications. For the purpose of the economic analysis, the commenter's estimate that 10,000 existing contracts will need to be modified was used. However, extensive ''negotiations'' between the Government and the contractors are not expected. The final economic analysis uses a two-hour opportunity cost of time for the contractor to process the modification and have discussions with the Government, if needed.

The **Federal Register** does not normally spell out the amount or type of consideration the Government expects to pay on a contract negotiation. This is a contract-by-contract issue determined by individual contracting officers. This is a pass-through cost to the Government. However, due to the statutory preference for multiple award IDIQs and the resultant competitive pressures, the Councils expect that the amount of consideration required at time of contract modification would be negligible.

21. *Comment:* A commenter disagrees with the estimate of the average wage of a Federal contractor used in the economic analysis. The commenter notes that the economic analysis assumed the average yearly salary a Federal Government employee earns ($66,705) is a reasonable proxy for the average annual salary of a Federal contractor and noted that, according to the Bureau of Labor Statistics, the average wage rate in the U.S. is approximately $40,000. The commenter believed that the average salary a Government contractor earns is less than the average salary a Federal employee earns and the BLS estimate of $40,000 is a better approximation of Federal contractor pay than the $66,705 used in the economic analysis. The commenter concludes that the consequence of the annual salary of Federal contractors being overestimated is an underestimate of the number of contract employees and an underestimate of the costs of mandatory E-Verify.

Response: The Councils do not have data that shows the average wage of a contract employee on a Federal contract. Consequently, we had to rely on our extensive knowledge of Federal contracts and our knowledge of the personnel who perform work on those contracts to inform our estimate of a reasonable wage rate of a Federal contractor.

The Councils continue to believe the average U.S. wage rate of approximately $40,000 annually is a poor proxy for the average Federal contractor wage. As explained in the economic analysis, the average educational attainment level of the average Federal Government employee is significantly higher than the educational attainment level of the general U.S. workforce. In addition, according to the Bureau of Labor Statistics, ''Although the Federal Government employs workers in every major occupational group, workers are not employed in the same proportions in which they are employed throughout the economy as a whole * * * The analytical and technical nature of many Government duties translates into a much higher proportion of professional, management, business, and financial occupations in the Federal Government, compared with most industries. Conversely, the Government sells very little, so it employs relatively few sales workers.'' (see *http://www.bls.gov/oco/cg/cgs041.htm*).

As a result of the higher Government educational level, which is driven by the higher proportion of professional, management, business, and financial occupations in Government when

compared to the U.S. workforce, the U.S. workforce's average annual $40,000 salary can not reasonably be used as a proxy for the work the Federal Government is required to perform. The Councils believe the average wage rate for employees performing the work the Federal Government is required to perform is certainly higher than the U.S. average wage rate and based on our experience with contracts we continue to believe that $66,705 is a reasonable approximation of the average Federal contractor's annual salary. This estimate is an approximation and the actual wage rate of a Federal contractor could be higher or lower than our estimate. The economic analysis includes a sensitivity analysis that shows how the cost of the regulation changes based on increases or decreases in the number of employees being vetted through E-Verify.

We further note there is some credible information that shows Federal Government employees are significantly underpaid when compared to similar private sector occupations. For example, according to the Federal Salary Council, ''Federal employees make an average of 23 percent less than their private sector counterparts.'' (see *http://www.govexec.com/story_page.cfm?articleid=38212&ref=rellink*). While we did not increase the $66,705 average Federal Government salary upward by 23 percent to account for this ''pay gap'' when estimating the wage of Federal Government contractors, commenters should be aware of this information.

22. *Comment:* A commenter provided wage survey data that established the prevailing rate for many occupations covered under the McNamara O'Hara Service Contract Act and the Davis Bacon Act for seven specific job titles. The commenter provided hourly and annual wage rates for the jobs: Accounting Clerk I, Data Entry Operator I, Cook I, Food Service Worker, Janitor, Laborer, Grounds Maintenance, Computer Operator I. The commenter noted that the wage rates for the seven specific occupations (selected by the commenter) were much less than the $66,705 average wage rate used in the economic analysis.

Response: While the Councils do not dispute that there are specific occupations in which Federal contractors make less than the average wage rate of $66,705 used in the analysis, the higher proportion of professional, management, business, and financial occupations in the Federal Government, compared to the U.S. workforce, means the work the Federal Government performs requires a relatively higher educated workforce that earns more than the national average.

23. *Comment:* A commenter stated that the economic analysis begins with a figure for the number of prime Government contractors in 2007 and assumes that this number will increase at a 5 percent compound annual rate over the study period. No justification is provided for this assumption.

Response: The economic analysis noted that it is difficult to project the number of contractors over the ten-year period of analysis (FY 2009–FY 2018) due to the number of variables that could influence the amount of Government spending and the amount of that spending that would be used to purchase contract support. The Councils continue to believe that a 5 percent growth rate is a reasonable assumption.

24. *Comment:* The SBA Office of Advocacy stated that the proposed rule does not allow small businesses to fully assess the impact of the rule because the economic analysis lacks transparency. The commenter argues that the economic analysis in the docket is problematic from a methodological point of view because the proposal includes only the number of contracts in FY06, total value of contracts in FY06, and the total value of contracts in FY07. The commenter concludes that the remainder of the analysis amounts to a series of behavioral assumptions that are neither substantiated nor justified.

Response: The Councils disagree that the economic analysis is problematic or that it lacks transparency. The write-up, accompanying tables, and sample calculations show exactly how the costs were calculated. In addition, the economic analysis included a section that showed how small entities of various sizes (10, 50, 100, and 500 employees) would be impacted by the specific cost categories of the rule (start-up and training costs, verification costs, authorized employee replacement cost) and compared those costs to the estimated revenue of companies in those respective sizes in order to get an idea of the economic impact of the rule on those sizes of small entities.

The economic analysis did use FY 2006 data to estimate the number of contractors, but as explained in the economic analysis, the number of real dollars spent on Federal contracts remained nearly the same in FY 2006 and FY 2007. The commenter did not provide any information to show why our assessment was incorrect or unreasonable, but just asserted that it was ''problematic.'' While there is not ''empirical data'' to support every assumption in the economic analysis, the use of professional judgment is accepted practice when conducting IRFAs. The IRFA requested comments in the section of the analysis that explained very methodically how the number of employees impacted were modeled and invited more precise information from the public to inform our model. None was received.

25. *Comment:* The SBA Office of Advocacy stated that the total number of contracts is derived by making various assumptions, such as assuming that subcontractors have a 20 percent share, there are 20 percent new contracts per year, and that the total number of contracts grows at five percent per year. The commenter states if any of these assumptions were to change the total number of contracts in the analysis would be affected. The commenter further states the proposal does not indicate where the percentages came from.

Response: Page 19 of the economic analysis stated ''The 20 percent estimate of covered subcontractors is a ''best guess'' provided by Government contracting professionals.'' Page 20 states ''* * * the Federal Government does not have an estimate of the total number of assigned employees that perform work on Government contracts or an estimate of the number of new hires at a covered contractor or subcontractor. In order to estimate the number of employees that will be vetted through the E-Verify system, we must make a series of assumptions that allow us to estimate the amount of contract labor being purchased by the Government and then convert the amount of labor being purchased into Full Time Equivalent positions (FTE's).'' Pages 21 through 23 explain the calculations and clearly label which numbers are estimates.

The Councils agree that changes in these assumptions would change the number of contractors and the number of personnel vetted through E-Verify. The economic analysis includes an appendix that shows how the cost of the rule would change if the number of contractors and the number of employees vetted through E-Verify change.

26. *Comment:* A commenter stated that the rule should consider the cost of the rule on businesses that make a business decision not to do business with the Federal Government due to the rule.

Response: The Councils agree, but we note that under the Regulatory Flexibility Act, the economic analysis need only include the direct impact of a regulation on a small entity that is required to comply with the regulation. Nevertheless, the analysis provided

under the requirements of EO 12866 and the Regulatory Flexibility Act implicitly takes this potential impact into account. The analysis is conducted under the assumption that every federal contractor and subcontractor would choose to incur the cost of the rulemaking and continue to do business with the Federal Government. Businesses may choose not to incur the cost of compliance with this rule, but would presumably only do so were the cost of compliance higher than avoiding doing business with the government. In such cases, the analysis would actually have overestimated the impact of the rule.

27. *Comment:* A commenter believes the *Federal Procurement Data System-Next Generation* (FPDS–NG), the source for the estimate of the number of FY 2006 prime contractors in the economic analysis, contains inaccurate data. The commenter believes the use of data from the FPDS–NG in the economic analysis is ''questionable'' and that the number of contractors in FPDS–NG is underreported.

Response: The Councils disagree. FPDS is the comprehensive web-based tool for agencies to report contract actions. It collects, processes, and disseminates official data on Government contracts. It is therefore the best available source of data on Government contract actions.

28. *Comment:* A commenter stated that multiple people would need to be trained to run the E-Verify checks and estimated that it would take ''3 to 4 hours of time for one person to register, understand the MOU and take the tutorial.'' The commenter questioned estimates contained in the economic analysis such as: The ten-minute registration process, the training time needed for the different types of E-Verify Users (Corporate Administrator and General User 1.5 hours and Program Administrator 2.5 hours; Program Administrators and General Users would also incur 0.5 hours of recurring training), and the estimate of the amount of time needed to review the MOU. The commenter further noted that the economic analysis assumed that to sign the MOU would take 30 minutes for a Human Resources Manager; if a General Manager reviews the MOU (assumed to be 40 percent of the time) the General Manager's review would add another 30 minutes, and if an attorney reviewed the MOU (assumed to be 25 percent of the time), the attorney's review would add another one hour. The commenter did not believe these estimates were accurate for a multinational corporation.

Response: The burden estimates used in the economic analysis are assumed to reflect an average burden for all contractors that enroll in E-Verify. Experiences of one company or a specific group of companies may not accurately reflect the burden at the typical contractor. However, the E-Verify program office has reviewed the commenter's comments and has agreed that some of the estimates used in the economic analysis should be increased.

The economic analysis assumed that a human resources manager would take 0.5 hours to read and sign the MOU; that estimate has been increased to 1.5 hours. Also, the hours for attorney review are being increased from 1 hour to 2 hours, and the estimate for a general manager review will be raised from 0.5 hour to 1 hour. Note that in many companies, especially the smaller entities; the human resources manager is the same person as the general manager. We have assumed that, even though there is no requirement for more than one person to be involved with registering the company and signing the MOU, there may be multiple personnel involved in some instances.

The initial training hours for the corporate administrator have been increased from 1.5 hours to 2 hours, the program administrator initial training hours have been raised from 2.5 hours to 3 hours, and the general user initial training hours are increased from 1.5 hours to 2 hours.

The 30-minute estimate for annual recurring training for the program administrator and general user will be increased to a full hour for each. This ''recurring training'' includes time to review new additions to the user manual.

In summary, while it could take three to four hours to register, understand the MOU, and take the tutorial, these activities only occur when the contractor initially enrolls. Staff later registered by the contractor as general users and program administrators will only need to take the tutorial to begin utilizing the E-Verify system.

29. *Comment:* Commenters believed that on-going compliance obligations have been understated. The commenters stated that calculations did not include an analysis of coping with the constantly changing program. Commenters argue that—

- Every time the MOU changes, E-Verify employers will have to analyze whether they need to sign a new MOU;
- Every time the manual changes, employers will need to spend time reviewing what has changed, whether it impacts them, and how to accommodate any required changes; and
- Every time the photo tool changes and expands, all E-Verify organizations will need to train their staff and change their processes accordingly and then will need to audit compliance with the new standards.

The commenters consider that this on-going compliance obligation is compounded by the fact that a large employer cannot simply distribute the information provided by the Government about legal changes, because each change must be translated into materials specific to the employer's processes and procedures.

Response: We disagree with the characterization that E-Verify is a burdensome, constantly changing program. The September 2007 Westat report found that ''The vast majority of [E-Verify] employers (96 percent of long-term users) disagreed or strongly disagreed that the tasks required by the system overburden their staff.'' (pg. 65) The report also stated that approximately 97 percent of long-term users found the indirect set-up and maintenance costs associated with the system were either no burden or only a slight burden (pg. 106). DHS does not require employers to sign a new MOU when there is a change to the program. Currently, upon logging onto E-Verify, users are greeted with a message board that contains all new enhancements to the system and any applicable policy changes. The message board contains a full archive of all messages in the event that the employer has not logged on to the E-Verify system in several months. Of all the recent enhancements to the program, only the addition of the Photo Tool required E-Verify users to complete additional training. This action was atypical. This additional training was an unusual requirement for the program as changes to the program do not typically require mandatory training. The analysis includes a full hour of ''on-going'' training each year so that the user can keep current on any changes to E-Verify.

Federal contractors who happen to be currently enrolled in E-Verify will be required to take a tutorial refresher that addresses the verification of existing employees. However, the economic analysis assumed that none of the Federal contractors were currently enrolled in E-Verify and consequently estimated the costs for the full training module, not for the refresher module. To the extent that the contractor is an existing E-Verify user, the economic analysis likely overestimates the training burden.

30. *Comment:* A commenter noted the challenges and costs of resolving tentative nonconfirmations are understated. Commenter states that, for its members, consistency and compliance are critical and must be built into the process from day one. This is especially important for implementing tentative nonconfirmation procedures. Based upon the experience of its members that are E-Verify users, the commenter believes the RIA estimates are grossly understated. One large multinational employer provided the following data on its experience with E-Verify when it was hiring many student interns between January 1, 2008 and May 22, 2008. Out of 598 queries submitted, it received tentative nonconfirmation notices on 92 or 15.38 percent. Out of the 83 DHS tentative nonconfirmations (the remainder were SSA tentative nonconfirmations), about 80 percent of those tentative nonconfirmations required personal attention to resolve, at a great cost to the employer and the impacted foreign nationals.

Response: While the RIA estimated that 5.1 percent of the employees would receive SSA tentative nonconfirmations; the employer in the example only received 9 SSA tentative nonconfirmations (if 83 were DHS tentative nonconfirmations) out of 598 total queries. This is 1.5 percent, or significantly less than the 5.1 percent estimated in the RIA.

However, the Councils agree with the commenter that the RIA estimate of ten minutes to complete the tentative nonconfirmations should be increased. The Councils believe ten minutes is a reasonable estimate solely for the time needed to review the tentative nonconfirmation notice with the employee and for the employee to decide if he/she want to contest the tentative nonconfirmation. If the employee decides to contest the tentative non-confirmation, it should take an additional ten minutes for the employer to print out and provide the referral notice to the employee; this additional time is being added to the estimate.

The employee must then contact the appropriate Government office within eight Federal working days. The employer is not required to spend any additional time on the resolution process until the employee has resolved the case with the appropriate Federal agency. This time commitment is part of the verification process followed by all E-Verify users and is not unique to Federal contractors.

31. *Comment:* A commenter noted that its members report that corrections at the SSA usually take in excess of 90 days. The members report that employees must wait four or more hours per trip, with repeated trips to SSA frequently required to get their records corrected. The members also report that policies for handling this, *e.g.*, does the employee get paid time off to go to SSA, must be consistent and fair. One member reports that its biggest issue actually happens *after* an employee gets his or her record corrected by SSA. At that point, the member states that the employer must spend weeks waiting in limbo. According to the employer, E-Verify instructed this employer to check the record weekly because it was still not clearing even after SSA fixed the error. The commenter notes that when this occurs, the employer and employee are left in an awkward predicament because nothing happens—no approval is issued, no new tentative nonconfirmation is issued, and no final nonconfirmation is issued.

Response: First, this rule does not require that the employer compensate the employee for time away from work. Next, the September 2007 Westat report concluded that ''[m]ost case study employees who had received tentative nonconfirmations reported no costs associated with resolving the finding * * *.'' (pg. 101) Data capture methods instituted for E-Verify with the new electronic secondary process at SSA show that the vast majority of SSA tentative nonconfirmations (94.9 percent) are resolved within 24 hours of contacting the SSA Field Office.

32. *Comment:* A commenter stated that a number of the commenter's members have made arrangements to electronically deliver tentative nonconfirmations, and they inform the commenter that it is not unusual for 24 hours to pass before the tentative nonconfirmation even reaches the employee. The commenters state that where companies conduct some of their E-Verify queries in-house and outsource other queries to a third party, the amount of time needed to discuss a tentative nonconfirmation will vary depending on who submitted the query.

Response: A 24-hour or longer delay in passing a tentative nonconfirmation notice to an employee does not impact the eight-day timeframe for contacting DHS or SSA. The employee must be given the tentative nonconfirmation notice in advance of an employer referring a case to DHS or SSA. The employer must review the tentative nonconfirmation notice with the employee and ask the employee whether he/she chooses to contest the tentative nonconfirmation. If the employee chooses to contest the tentative nonconfirmation, the employer will then go back into the E-Verify system and initiate the referral in the system, which begins the eight-day period.

33. *Comment:* One commenter disagreed with the economic analysis regarding the one-minute estimate to resolve a final nonconfirmation.

Response: The one-minute period estimated for resolution of a final nonconfirmation refers solely to the time it takes for an employer to close the case in the E-Verify system, not the external processes the employer may take in response to a final nonconfirmation. The economic analysis includes a $5,000 termination and replacement cost for an authorized employee who leaves employment with the employer (the employee is terminated or resigns). The cost of replacing unauthorized workers is attributed to the cost of current immigration law and is not considered to be a cost of this rule.

34. *Comment:* Commenters stated that the eight-day timeframe provided to employees for resolving a discrepancy is likewise inadequate. They state that—

- When an employer receives a tentative non-confirmation, the employer must notify the employee and provide him or her with an opportunity to contest that finding;
- If the employee contests, he or she then has eight business days to visit an SSA office or call USCIS to try to resolve the discrepancy; and
- Eight business days does not provide enough time for many employees to visit an SSA office, particularly in cases where the employee is working on a remote jobsite potentially hundreds of miles away from the closest SSA office and/or where transportation is not readily available.

Therefore, the commenter suggested amending the requirement to allow employees thirty business days to try to resolve the discrepancy with SSA or DHS.

Response: An employee who receives a tentative nonconfirmation is given eight Federal Government work days to contact the appropriate agency. After visiting SSA, or placing a phone call to DHS, the applicable agency must also provide a response to the employee within two days.

The E-Verify statute (404(c) of IIRIRA) sets forth the design parameters for the secondary confirmation system. It states that the Secretary of Homeland Security shall specify a secondary verification system capable of providing a final confirmation or nonconfirmation within 10 working days after the date of the tentative nonconfirmation. USCIS experience in administering the program shows that 95 percent of secondary verifications are completed within 2 days. In order for the system

to comply with the statutory specifications, USCIS allows eight working days for the employee to visit SSA or contact DHS.

In cases where additional time may be required for resolving the discrepancy with SSA or DHS, the employer will receive a message through E-Verify called ''Case in Continuance,'' which may extend beyond the ten-day resolution period. During this time, the employer may not take action against the employee while the employee is resolving his or her case.

35. *Comment:* A commenter from an institution of higher education expected that most rejections will involve non-immigrant post-doctoral associates and fellows who have already undergone careful scrutiny in obtaining a visa to enter the United States.

Response: The Immigration Reform and Control Act of 1986 (IIRCA) requires all employers to verify the identity and work authorization of any employee working in the U.S. by having the employee complete a Form I–9. While nonimmigrant post-doctoral associates and fellows have already obtained a visa to enter the U.S., this does not alleviate the employer of its responsibility under IRCA. In addition, the fact that an alien has been issued a visa has nothing directly to do with whether the alien is work-authorized in the United States, as millions of aliens who are issued visas and admitted to the United States in B, F or certain other nonimmigrant categories are not authorized to be employed in this country.

36. *Comment:* The SBA Office of Advocacy was concerned about its ability to successfully complete the on-line tutorial, required by the MOU that contractors will be required to sign. The commenter states that, while the proposed rule acknowledges the tutorial, it does not acknowledge the requirement that a proficiency test at the end of the tutorial needs to be taken and a 71 percent pass rate achieved. The commenter is concerned about the cost implications to an employer who does not pass the test, stating that the costs involved have more dimensions than just the opportunity cost.

Response: The E-Verify program knows of no situation in the history of the program where an employer was ultimately unable to participate because it could not pass the mastery test. The cost and burden associated with the tutorial is more than adequate to also cover the mastery test as well.

Employers are able to retake the mastery test as many times as is necessary to pass. Taking the tutorial and the mastery test is a requirement to use the system and run verification queries. Those responsible for running queries (and passing the mastery test) are not always the same as those who have signed the MOU on behalf of the entire company.

37. *Comment:* Commenters stated that not all contractors have computers at all sites at which they engage in hiring. Consequently, they conclude that they will incur costs to computerize and establish Internet accessibility for every facility at which they hire employees. Given the mobile nature of traveling carnivals and circuses, as well as the sporadic availability of Internet access in some rural areas, the commenter does not believe that all employers can have reliable Internet access or even regular access to a computer while traveling to conduct business. Being mobile, the carnival industry would face additional costs associated with transporting this equipment from location to location.

Response: It would be unusual for a Federal Government contractor not to have Internet access and a computer. Still, employers have the option of using an outside company or vendor to run their queries. Through this method of using E-Verify, the third party engages in an MOU with the DHS and SSA on behalf of its client. Employers could also seek out other sources of Internet access, such as a public library. While the commenter offered no specific information on the increased marginal cost of transporting a laptop computer and printer, it does not appear to be significant.

The economic analysis estimated that two percent of contractors did not have a computer or Internet connection at their hiring site. The economic analysis stated ''If we do not receive comments indicating that covered Federal contractors or subcontractors would need to purchase a computer and/or internet connection, we may eliminate this category of costs in the final rule.'' As such comments were received, that cost will be included in the final rule.

38. *Comment:* Commenters noted the E-Verify MOU requires the employer to make photocopies of certain documents, and to print certain documents if a tentative non-confirmation occurs. The commenters stated that the analysis fails to consider the additional cost of printing and copying equipment an employer must acquire and maintain at each hiring site under the rule. Further, the commenters noted that the E-Verify MOU requires, under certain circumstances, that the employer either scan certain documents provided by the employer for electronic submittal to DHS or use an express mail account. The commenters stated that the added cost of a scanner—wherever employees are hired—is not considered by the analysis.

Response: The economic analysis will add additional printing costs to the analysis. The analysis will add the cost of an ''all-in-one'' printer/copier/scanner/fax machine for the contractors that may need to purchase a computer. The economic analysis had already considered certain photocopying costs. However, the printer/copier/scanner/fax machine that is being included provides an alternative (such as scanning a document) to photocopying documents.

39. *Comment:* The SBA Office of Advocacy stated that contractors will be required to sign a MOU that is an agreement between them, the SSA, and USCIS. The commenter stated that the proposed rule provides the contractor with an opportunity to negotiate the terms of the MOU and that the cost of compliance includes a line item for the contractor's attorney to read the MOU. The commenter recommended that the cost of compliance should recognize the cost for an attorney to negotiate an acceptable MOU.

Response: The terms of the MOU are not negotiable.

40. *Comment:* A commenter stated that the rule does not take into account the costs businesses would incur as a result of ''erroneous nonconfirmations'' that result from E-Verify database inaccuracies. The commenter stated that Government-commissioned reports, congressional testimony, and other evidence support its opinion about the unreliability of the E-Verify program. The commenter also stated that the recent reauthorization of the program by the U.S. House of Representatives specifically acknowledged this fact by requiring further study by the GAO of the erroneous tentative nonconfirmation rate.

Response: The Westat report in 2007 found that the erroneous tentative nonconfirmation rate for all workers from October 2004—March 2007 was 0.6 percent. (Westat report pg. 57, table) This means that 0.6 percent of workers that were found work-authorized by the system initially received a tentative nonconfirmation during the verification process. A system that correctly verifies authorized workers as work-authorized 99.4 percent of the time cannot reasonably be termed ''unreliable.'' Further, the economic analysis did estimate the cost to employers of resolving the tentative nonconfirmations.

41. *Comment:* A commenter stated that there are no reliable figures to report the number of erroneous final nonconfirmations because there is currently no process in place to appeal such an outcome. The commenter submits that most employers will simply fire individuals with a final nonconfirmation report from E-Verify.

Response: Employers or employees may contact the E-Verify program if additional time is needed to provide such documentation or if they believe a final nonconfirmation was received in error. The E-Verify program may delay a final nonconfirmation finding on a case by case basis in those cases where employees have experienced delays in receiving needed documentation that will help prove their employment eligibility, and the program will work with the employer and/or employee to research the case and identify the reason for the final nonconfirmation. Where an employer or employee has questions about a final nonconfirmation, DHS or SSA can place such cases ''in continuance'' for resolution by either SSA or DHS.

42. *Comment:* A commenter states that according to a June 7, 2008, Government Accountability Office Report, the existing electronic verification systems in place at DHS and SSA are frequently unable to provide the ''instant'' verification that E-Verify is supposed to provide. The commenter quotes this report as finding that in eight percent of the cases, ''[r]esolving these nonconfirmations can take several days, or in a few cases even weeks.'' June 7, 2008 GAO Report, ''Electronic Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System,'' p. 3. The commenter states that the delays are attributable to several factors, including USCIS's failure to promptly update its database when it receives new citizenship information. The commenter claims that, in those circumstances, an authorized worker will be terminated under the proposed rule even if he or she promptly attempts to correct the database error.

Response: Employees are not penalized if their case requires additional time to resolve. As long as they contact the appropriate agency within the required eight-day timeframe and begin the process of contesting a tentative nonconfirmation, they must be permitted to continue working until their case is resolved.

Contrary to the commenter's assertions, DHS does update its database when immigrants are naturalized as citizens. However, when naturalized employees properly state that they are citizens, their information is verified against the SSA database, which may not yet reflect their naturalized status. USCIS implemented a change to the E-Verify system in May 2008 to re-check against DHS naturalization databases any citizens that SSA cannot verify because of a citizenship mismatch. This change prevents naturalized citizens from receiving a tentative nonconfirmation if their information is available in the more current DHS database. However, new citizens remain responsible for updating their records with SSA when they are naturalized.

Moreover, the E-Verify MOU makes clear that employers are prohibited from discharging, refusing to hire, or assigning or refusing to assign to federal contracts employees because they appear or sound ''foreign'' or have received tentative nonconfirmations. The MOU also notifies an employer that any violation of the unfair immigration-related employment practices provisions in section 274B of the INA could subject the Employer to civil penalties, back pay awards, and other sanctions, and violations of Title VII could subject the Employer to back pay awards, compensatory and punitive damages. Violations of either section 274B of the INA or Title VII may also lead to the termination of the employer's participation in E-Verify. If the employee believes that he or she has been discriminated against, he or she should contact OSC at 1–800–255–7688 or 1–800–237–2515 (TDD). Employers that have questions relating to the anti-discrimination provision should contact OSC at 1–800–255–8155 or 1–800–237–2515 (TDD).

43. *Comment:* A commenter stated that the FAR Council says that the only currently employed lawful workers who will be casualties of its proposed rule are those who ''choose not to take the steps necessary to resolve a tentative nonconfirmation,'' and who thereafter are fired. 73 FR at 33377. The commenter states that that assertion is premised on the notion that there are no errors in the relevant databases that cannot be quickly corrected in the eight-day period provided for in the Proposed Rule. The commenter contends that that notion is undeniably false—as the GAO Report makes clear when it says that it sometimes takes ''weeks'' to correct an error under the E-Verify system.

Response: The commenter appears to misunderstand the eight-day period under the E-Verify program for an employee with a tentative nonconfirmation to contact SSA or DHS. Employees are not expected to resolve their tentative nonconfirmations within eight days—they are only required to contact the appropriate agency within that timeframe in order to challenge the tentative nonconfirmation. The economic analysis does assume there could be some authorized employees who are terminated, but this should occur only under unusual circumstances. The authorized worker has an economic incentive to ensure his/her information properly matches SSA's records both to preserve his/her job and to ensure the employee receives full credit for contributions made into Social Security. The analysis estimated that 2 percent of the 5.3 percent unresolved tentative nonconfirmation cases (2% × 5.3% = .106%) represent an authorized employee who either resigned or was terminated.

44. *Comment:* A commenter stated that, so far this year, the commenter has initiated nearly 1,400 new-hire queries through E-Verify and anticipates that new-hire queries will approximate 3,000 a year. The commenter states that its E-Verify tentative non-confirmation rate far exceeds the estimated rate of non-confirmations published by E-Verify and USCIS. The commenter notes that all of its tentative nonconfirmations have ultimately been cleared by E-Verify as work authorized, but only after significant investment of time and money.

Response: Employers' tentative nonconfirmation rates will vary depending on the makeup of their workforces. While the majority of SSA tentative nonconfirmations are resolved within ten days, E-Verify does accommodate employees whose cases cannot be resolved within that timeframe provided that they have contacted SSA and have followed all of the requirements.

USCIS continues to partner with SSA in the implementation of the E-Verify program, especially in diminishing database errors and resolving mistaken final nonconfirmations. It is the responsibility of individual citizens to update their records with SSA; this includes the most common updates of name change due to marriage and change in citizenship status due to the naturalization process.

45. *Comment:* A commenter stated that mandating contractors to use the Basic Pilot/E-Verify program will not eliminate the U.S. economy's demand for unauthorized workers. According to the commenter, contractors who need workers will continue to hire them ''off the books.''

Response: The INA prohibits hiring or continuing to employ aliens whom the employer knows are not authorized to work in the United States. INA section 274A(a)(1), (a)(2). Any employment of aliens whom the employer knows are not authorized to work in the United States is a violation of the law. We disagree with the implication that

employers will find a way to violate the law anyway, so lax enforcement of the law is in the U.S. economy's best interest.

46. *Comment:* A commenter stated that smaller businesses may find it financially more difficult to comply with Executive Order 12989. According to the commenter, the proposed rule indicates that the costs of participation in the E-Verify program will likely include startup registration costs, opportunity costs of the time spent on training, opportunity costs of the time spent on employee verification, productivity costs when employees need to leave work to visit SSA/USCIS to correct information, and employee turnover costs. The commenter quotes statistics drawn from a survey of employers who have used the system to demonstrate that the startup process for E-Verify can be burdensome.

Response: The statistics reported by the commenter in the example from page 60 of the September 2007 Westat report are incorrectly drawn from the table in the report. In fact, 72.9 percent of employers disagreed with the statement ''the on-line registration process was too time consuming''; only 13.4 percent agreed with the statement (of which 2.4 percent strongly agreed). Also, 75.9 percent of employers surveyed disagreed with the statement ''the on-line tutorial was hard to use,'' an additional 21.2 percent of employers surveyed strongly disagreed with the statement, only 2.8 percent agreed (of which 0.2 percent strongly agreed). Finally, 67.9 percent of employers disagreed with the statement ''the tutorial takes too long to complete;'' only 21.6 percent of employers agreed (of which 3.8 percent strongly agreed). The statistic on the importance of passing the mastery test and the perceived burden was correctly drawn from the table.

System set up and maintenance costs are a concern for the program and especially their impact on smaller employers. Therefore, questions on these costs have been and will continue to be asked in the independent evaluations of the program. The statistics cited in the example are accurately quoted from the Sept. 2007 Westat report, however, it must be noted that the average start-up and maintenance costs are calculated from a very widely skewed distribution of cost data. As stated on pg. 104 of the Westat report, ''Eighty-four percent of employers that used the Web Basic Pilot for more than a year reported spending $100 or less for start-up costs, and 75 percent said they spend $100 or less annually to operate the system. However, 4 percent of long-term users said they spend $500 or more for start-up costs, and 11 percent spent $500 or more annually for operating costs.'' The report does not segregate the employers that reported a high level of cost into large and small employers. However, the report does state on page 106 that ''[n]ot surprisingly, maintenance costs were higher for employers that verified employees at multiple locations than for those that verified at only one location ($1,653 versus $490).'' So, to the extent that small employers are less likely to verify employees at multiple widely distributed locations, their costs would be expected to be lower than the average provided in the report.

Separate from this final rule, the E-Verify program is working to identify and address issues that may result in an employee not fully understanding the opportunity to contest an initial mismatch, *e.g.*, the Plain Language Initiative. The program currently provides program materials in English and Spanish and is currently working to produce documents in nine additional languages.

47. *Comment:* Commenters stated that the RIA assumes that 2 percent of authorized workers for whom E-Verify generates a tentative nonconfirmation will not resolve their records to the Government's satisfaction. Commenters believe that failing to resolve a tentative nonconfirmation leads inexorably to a final nonconfirmation, which results in employee termination. The commenters note that the RIA claims that these workers ''choose not to resolve the non confirmation,'' but no evidence is provided showing that the lack of records resolution is the result of worker choice. Furthermore, the commenters note that the RIA does not explain why workers would intentionally choose a path that leads to termination. The commenters believe that a more plausible explanation is that these workers have unusually difficult problems to resolve or they are less capable than their peers at navigating multiple Government bureaucracies or they are marginal workers for whom the burden of resolving records exceeds the gain from remaining in the formal labor market. Whatever the cause(s), the commenters believe E-Verify will be responsible for these terminations and the RIA acknowledges this and includes, as a cost to employers, the additional recruitment and training that are required to replace these employees. However, commenters believe the RIA ignores the opportunity cost of termination to the employees themselves. The $10 billion present value cost estimate should be understood as a lower-bound for the true social cost of forced unemployment of authorized workers.

Response: The Councils disagree that there will be any significant ''forced unemployment'' cost caused by this rule on authorized workers. If the E-Verify program issues a tentative non confirmation to an employee, the employer cannot fire, prevent from working, or withhold or delay training or wages for that employee during the resolution process. All employees receiving tentative nonconfirmations are given the opportunity to contest and correct their records.

A limited case study in the 2007 Westat report notes that ''Most employees reported positive experiences correcting their paperwork with SSA or USCIS'' and ''Overall, employees who contested SSA findings did so quickly: The record review showed an average of only 2.1 days between the referral to SSA and the date the SSA representative signed the referral letter (if one was provided to the employee)'' (Appendix E pages E–13 and E–14). This 2.1 day average time to resolve a tentative non-confirmation suggests the resolution process is not an unreasonably difficult burden for those that choose to utilize the process.

As there is no law that compels an authorized worker to resolve a tentative non-confirmation, the Councils believe it is reasonable to add a cost for an employer to replace an authorized worker who does not resolve the tentative non-confirmation. For the purpose of the economic analysis, the Councils assumed that 2 percent of the 5.3 percent unresolved tentative non-confirmations were authorized workers leaving employment with the employer (2% × 5.3% = .106%). The employer would incur employee replacement (turnover) costs whether the authorized employee resigned or was terminated. Due to the economic incentive to ensure one's records are correct with SSA and to continue employment, it would be a very unusual circumstance for an authorized worker not to work diligently to resolve the tentative non-confirmation.

We disagree with the commenter's assertion of a ''$10 billion'' present value cost estimate of ''forced unemployment.'' The commenter's $10 billion estimate is apparently premised upon assuming a 15 year period of analysis of ''forced unemployment'' and a ''disemployment rate'' of ''1.060%.'' We assume the ''disemployment rate'' used by the commenter was meant to be the ''.106%'' estimate in the RIA for the proposed analysis of people who are authorized to work but either resign or

are terminated for failure to resolve the tentative non-confirmation. If true, this would cause an order of magnitude error in the commenter's calculations. Also, the economic analysis assumed the 2% replacement rate for authorized workers who do not resolve their tentative non-confirmations included any and all reasons an authorized employee potentially leaves employment, such as voluntary resignation.

Finally, the E-Verify program knows of no information that supports the commenter's assertion that workers who do not resolve their tentative non-confirmations have ''unusually difficult problems to resolve, or they are less capable than their peers at navigating multiple government bureaucracies, or they are marginal workers for whom the burden of resolving records exceeds the gain from remaining in the formal labor market.''

48. *Comment:* Commenters stated the RIA extrapolates to a coerced population of Federal contractors from the current E-Verify population, which consists of volunteers. In this case, the commenters believed volunteers are likely to be firms for which participation in the program is actually beneficial. The commenters concluded, if this were the only criterion for participation, then they would expect data from these firms to be ''better'' than data the Government will obtain once it makes participation mandatory.

Response: The economic analysis used actual information regarding the E-Verify authorization process (*i.e.*, percentage of tentative non-confirmations, percentage of final nonconfirmations, etc.) generated by the entities that were using the E-Verify program during October 2006–March 2007 in order to estimate costs.

The rate of tentative non-confirmations, percentage of final nonconfirmations, and other operational statistics may be different for entities that choose to be Federal contractors than for the existing E-Verify population, but there is no evidence to support the theory that data from the existing E-Verify enrollees would be ''better'' (lower tentative nonconfirmation rates) than data the Government will obtain once additional Federal contractors join E-Verify. We note there are many states that currently require certain employers to participate in E-Verify. For example, Arizona and Mississippi are currently requiring all employers to enroll in E-Verify and authorize the work status of newly hired employees. Also, Idaho, Minnesota, and North Carolina require state government agencies to vet newly hired state employees through E-Verify.

In fact, there is data that suggests there could be fewer tentative non-confirmations among the federal contractor population than in the general population. The September 2007 Westat report stated on page 41 (note that E-Verify was formerly known as ''Basic Pilot''): ''* * * establishments registering for the Web Basic Pilot differ significantly from employers not enrolled in the program. More specifically, pilot participants tend to be larger than most establishments, have higher proportions of foreign-born employees, and be more concentrated in certain industries and locations.'' The report also stated, ''* * * it appears currently that citizens are underrepresented in the Web Basic Pilot program compared to the nation. Since citizens are more likely than noncitizens to be authorized automatically and less likely to get an erroneous tentative nonconfirmation, it is reasonable to expect that a program that verifies all new hires nationally would have a higher percent verified automatically and a lower erroneous tentative nonconfirmation rate than is currently the case, if nothing else changes.'' (pg. 134) Consequently, we could reasonably expect that tentative non-confirmation rates for federal contractors could be lower than the rates experienced by current E-Verify enrollees.

49. *Comment:* A commenter stated that the calculations from the sample should be treated with caution because the sample consisted of a six-month season that did not include Spring- and Summer-hires. The commenter further stated that seasonal workers would be covered by E-Verify but are excluded from this sample. In addition, the commenter stated that if a Federal agency had proposed to collect data from volunteer E-Verify participants and use them to predict results from a mandatory E-Verify program, the Office of Management and Budget would have been compelled by law and its own regulations to disapprove the information collection on the ground that it lacked practical utility (commenter cited in footnote 24—''OMB's information collection rule forbids it from approving a statistical survey 'that is not designed to produce valid and reliable results that can be generalized to the universe of study.' '' See 5 CFR 1320.5(d)(2)(v); 60 FR 44988.

Response: The Council agrees a full year's worth of data would provide a better indicator of the likely impacts of the final rule. Therefore, for the final rule's economic analysis, a full 12 months of data are used, instead of the six months used in the proposed rule's economic analysis. However, given that the economic analysis did not conduct a ''statistical survey,'' the commenter's purpose in stating that the economic analysis did not comply with OMB ''statistical survey'' guidelines is not clear.

50. *Comment:* The SSA provided additional information regarding the marginal cost of the rule to SSA.

Response: The economic analysis will be revised to incorporate the cost estimates provided by SSA. For example, the economic analysis estimated the cost to SSA in FY09 to be $622,699, while the SSA estimated its FY09 costs to be $1,023,294.

b. On Federal Acquisition Workforce

Comment: A commenter stated that the proposed rule assumes only $1,547,194 in costs that the Federal Government will incur in 2009 as ''operating costs from each query that an employer executes'' and ''resolving tentative nonconfirmations.'' According to the commenter, the proposed rule has not considered costs associated with contracting officer time and effort.

Response: Contracting officer duties under the final rule consist almost exclusively of inserting the clause into appropriate solicitations and contracts. The marginal effort associated with that duty is so slight as to be practically immeasurable. Further, there is no reason to believe that additional contracting officers will need to be hired due to the impact of this rulemaking.

3. Reasonable Alternatives

Comment: The SBA Office of Advocacy suggested that the Administration should examine feasible alternatives to the proposed rule, if comments received indicate that the proposed rule would have a significant economic impact on a substantial number of small businesses. Another commenter wrote that the Administration's analysis of reasonable alternatives is flawed for failure to take into account all reasonable alternatives, and for failure to adequately address the lone alternative taken into account.

Response: The Council has considered all reasonable alternatives, as addressed herein and in the FRFA, and has adopted all the alternatives that fulfill the objective of the Executive Order.

4. Paperwork Reduction Act

Comment: An immigration lawyers association commented that the proposed rule violated the Paperwork Reduction Act by imposing an additional information collection

burden on employers and because employers who fail to keep such records will face significant liability.

Response: The Councils recognized in the proposed rule that the rule contains information collection requirements over and above the burden hours already approved for the E-Verify System. 73 FR 33379. The Councils have requested and received approval from OMB for this new information collection requirement. Accordingly, the information collection requirements of this rule fully comply with the requirements of the Paperwork Reduction Act.

F. Final Regulatory Flexibility Act Analysis

This Section F constitutes the Final Regulatory Flexibility Act Analysis (FRFA), as required by the Regulatory Flexibility Act, 5 U.S.C. 604. The issues covered here are also addressed in detail in the Regulatory Impact Analysis for FAR Case 2007–013, available at *http://www.regulations.gov*.

This final rule implements Executive Order, 12989, as amended, to enhance the stability and dependability of Federal Government contractor workforces by requiring them to use the USCIS' E-Verify system as the means for verifying employment eligibility of certain employees.

The Councils expect this rule to impact nearly every small entity in the Federal contractor base. However, the direct cost this rule imposes does not appear to have a significant economic impact on a substantial number of small entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*. Nevertheless, the Councils have not formally certified the rule as not having a ''significant economic impact on a substantial number of small entities,'' as allowed under section 605(b) of the Regulatory Flexibility Act.

In addition to the costs of this final rule, the Councils expect this rule to carry certain benefits to employers in that it provides an economical, web-based method for performing verification of employment eligibility of employees, improving the reliability of the employment verification procedures employers are already required to perform. Federal contractors' participation in E-Verify is also expected to reduce the likelihood that contractors will discover, long after the fact, that they have hired unauthorized aliens, thereby sparing contractors the cost of terminating and replacing employees not authorized to work under Federal immigration law after resources have been expended on the training of those employees.

In addition, a number of changes have been made in the final rule to lessen the impact on small businesses; they should also benefit large businesses in reduced compliance costs. Specifically, the timelines have been significantly extended (see Section B., ''Changes Adopted in the Final Rule'', paragraph 1., ''Significantly Extended Timelines'', for the precise changes); the threshold for prime contracts has been raised from $3,000 to the simplified acquisition threshold ($100,000); contracts with a performance period of less than 120 days are exempted; the COTS-related exemption has been expanded (see Section B., ''Changes Adopted in the Final Rule'', paragraph 9., ''Expanded COTS-related exemptions for:'' of this rule); contractors are offered the option of using E-Verify on all existing employees so as to eliminate the necessity of segregating employees performing directly on a Federal Government contract from those who are not; and contractors may exempt employees with an active, current security clearance or for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD) 12.

Executive Order 12989, as amended, prohibits Federal agencies from contracting with companies that knowingly hire employees not eligible to work in the United States and instructs Federal agencies to contract with companies that agree to use an electronic employment verification system to confirm the employment eligibility of their workforce. The E-Verify System is the best available means for contractors and subcontractors to verify employment eligibility. Consequently, this final rule is being promulgated to institute a contractual requirement for contractors and subcontractors to utilize E-Verify as the means of verifying that (1) all new hires of the contractor or subcontractor and (2) all employees directly engaged in performing work under covered contracts or subcontracts are eligible to work in the United States. The final rule adds a new FAR Subpart 22.18 and a new clause.

The prohibition against Federal agencies contracting with companies that knowingly hire employees not eligible to work in the United States has existed since 1996. Virtually all employers in the United States, including Federal Government contractors and subcontractors, are prohibited from hiring an individual without verifying his or her identity and authorization to work and from continuing to employ an alien whom they know is not authorized to work in the United States (section 274A(a) of the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. 1324a; 8 CFR part 274A). Many aliens, including lawful permanent residents, refugees, asylees, and temporary workers petitioned by a U.S. employer, are authorized to work in the United States (see 8 CFR 274a.12, listing classes of work-authorized aliens).

The new contractual requirement to use the E-Verify System will enhance the Government's procurement system by decreasing the employment of unauthorized aliens in the Government's supply chain and thereby fostering a more stable and dependable Federal Government contracting community.

This rule will impact many small entities in the Federal contractor base. Major exceptions are contractors providing commercially available off-the-shelf (COTS) items and items that would be COTS items but for minor modifications, entities that enter into contracts with a value less than $100,000, and subcontractors that provide supplies rather than services or construction. In Fiscal Year 2006, there were over 100,000 small businesses that received direct Federal contracts. While there are no reliable numbers for subcontracts awarded to small businesses, the Dynamic Small Business database of the Central Contractor Registration—a database of basic business information for contractors that seek to do business with the Federal Government—gives a number of 324,250 small business profiles that are registered. Assuming that 50% of these small businesses contract with the Federal Government at either the prime or subcontract level, then that number is 162,125 small businesses.

The Councils have placed in the public docket a detailed Regulatory Impact Analysis of the compliance requirements of this rule. Generally, employers will incur opportunity cost of the time their employees will spend complying with the requirements of the regulation. Employees will need to be trained in order to be able to operate the E-Verify system, as well as spending time on processing employee verifications. Employers will incur start-up costs from enrolling in the E-Verify program, including costs such as reviewing and updating USCIS Form I–9 (Employment Eligibility Verification) for existing employees and potentially a cost to modify an existing personnel or payroll system to be able to record the E-Verify status of their employees. We believe a small number of employers may need to purchase a computer,

internet connection, and printer for their hiring site. Certain employee replacement (turnover) costs may also be incurred due to this regulation.

In order to further inform our understanding of the economic impact of this rule on small entities, we considered hypothetical contractors with 10, 50, 100, and 500 employees and estimated the economic impact of the rule on those four sizes of entities in their initial year of enrollment. The initial year a contractor enrolls in E-Verify is expected to be the year with the highest compliance cost, as the contractor is incurring both the start-up costs of enrolling in E-Verify as well as the majority of the costs of vetting its existing employees through the E-Verify system.

The estimated average direct cost of this rule to a contractor with 10 employees is $1,254 in the initial year. For a contractor with 50 employees, the estimated average direct cost of participating in E-Verify is $3,163 in the initial year. For a contractor with 100 employees, the estimated initial-year impact is $5,615. A contractor with 500 employees is expected to have an initial year impact of $24,422. This level of direct cost burden is well under 1% of the expected annual revenue of these four sizes of entities and does not appear to represent an economically significant impact on an average direct cost per contractor basis. To the extent that some small entities incur direct costs that are significantly higher than the average estimated costs, those employers may reasonably be expected to face a significant economic impact.

As discussed previously, the Councils do not consider the cost of complying with preexisting immigration statutes to be a direct cost of this rulemaking. Thus, while some employers may find the costs incurred by replacing employees that are not authorized to work in the United States to be economically significant, those costs of complying with the Immigration and Nationality Act are not direct costs attributable to this rule.

In addition, the requirement for entities (both large and small) to enroll in E-Verify only applies to contractors and subcontractors that choose to perform certain work for the Federal Government. When an entity's leadership determines that participating in E-Verify would impose a significant economic impact on the operation, the leadership must make a business decision whether the revenue generated by doing business with the Federal Government would provide a financial return sufficient to justify the cost of such participation in E-Verify. Presumably, entities that do not receive the desired return to justify the expense of participating in E-Verify would choose not to be a Federal contractor or subcontractor.

The SBA Office of Advocacy claims that the initial analysis did not consider costs such as the social welfare cost or the cost of penalties and lawsuits. However, the IRFA fully complied with the requirements of § 603 of the Regulatory Flexibility Act. The IRFA compared estimated compliance costs for four distinct sizes of small business (10, 50, 100, and 500 employees) to the respective revenue of these businesses, using information obtained from the Small Business Administration, and identified a compliance cost burden of 0.03 percent of revenue for the small entity with 10 employees. The Councils do not agree that 0.03 percent would typically be regarded as a significant economic impact. Further, with regard to the full social welfare cost of the rule, regulatory flexibility analyses need not include anything other than the direct costs of a regulation on a small entity that is required to comply with the regulation.

The SBA Office of Advocacy believes that the Councils underestimated the number of contractors that will be vetted through E-Verify and criticizes the fixed factors (*e.g.*, 26 percent for labor) used in the economic analysis, as well as the estimate that the assumption that the number of subcontractors is 20 percent of the number of prime contractors. It claims that the estimates the Councils used are not based on ''empirical data'' and that the economic analysis was not explicit regarding how these factors were determined. The Councils respond that the dollar value of the contracts within the scope of the rule was found by querying the Federal Procurement Data System and does not rely on an estimate by the Councils. Instead of simply providing a ''top-level'' estimate, the Councils developed a model to estimate the number of employees that would be expected to be vetted through E-Verify. The factors utilized (*e.g.*, 26 percent for labor) are all multiplied against the estimated dollar value of contracts. When describing the percentage estimates used to estimate factors utilized, the economic analysis specifically stated ''we understand these assumptions are rough and we welcome public comment providing more precise information.'' However, no better information was provided in the comments. The SBA Office of Advocacy encouraged the FAR Council to revisit the economic analysis as more data become available. The Councils will consider reviewing this aspect of the economic analysis once the final rule has been in effect and useful data becomes available.

The Councils are unaware of any duplicative, overlapping, or conflicting Federal rules. There are current requirements for all employers, not just Federal contractors and subcontractors, to verify the employment eligibility of their newly hired employees. These requirements have existed since 1986. Arguably related rules include DHS's ''No-Match'' rule, which provides guidance to employers on how best to respond to the Social Security Administration's (SSA) no-match letters, through which employers are alerted annually about their employees whose names and Social Security numbers submitted on tax forms do not match up to the information in the SSA's database. Although this ''No-Match'' rule concerns the SSA's letters generated from one of the data sources used by the E-Verify system, the ''No-Match'' rule is not directly associated with use of the E-Verify System. The two rules interact insofar as use of E-Verify—and the resulting strengthening of Federal contractors' employment verification processes—is expected to reduce the incidence of SSA ''No-Matches'' in the Federal contract workforce resulting from the employment of unauthorized alien workers. But the ''No-Match'' rule is designed to assist employers to ensure that their entire existing workforce remains work-authorized, while this amendment to the FAR is designed to ensure that unauthorized aliens are not brought into the Federal Government's contractor workforce.

In addition to the alternatives discussed above in the response to public comments—particular, the section entitled ''Small Business,'' and its subsections including ''Alternatives to Lessen the Burden on Small Businesses''—the Councils considered the following alternatives in order to minimize the impact on small business concerns:

- Whether to exempt small businesses entirely from the requirement to use E-Verify. The SBA Office of Advocacy was concerned that small businesses do not have the financial resources and human capital to adapt their technology infrastructure systems to rapidly change requirements being imposed by the Federal Government. The Councils limited the applicability of this rule to small businesses by raising the dollar threshold, limiting flowdown, exempting COTS suppliers, and in various other ways discussed throughout this notice.

• How to limit the compliance costs for small businesses. The SBA Office of Advocacy noted that small business Federal contractors operate on very thin profit margins and the types of technology systems necessary here require capital outlays that cannot be easily recouped by passing the cost to the client and are costly to the small business owner. Although the E-Verify system does require the employer to have access to some equipment such as a computer, Internet access, a printer, and either a scanner, photo copier, or a digital camera, the Councils believe that this equipment is not prohibitively expensive. Almost all small businesses doing business with the Government would already have such equipment or be able to readily acquire it. The equipment for a small business to implement E-Verify need not be particularly sophisticated or complex. The Councils have made every effort to limit the cost of compliance.

• How to limit appropriately the burden of compliance on subcontractors. The SBA Office of Advocacy is concerned that there is disproportionality in the compliance cost burden on small business subcontractors because there are fewer avenues and fewer contracts among which the small businesses can spread the cost of doing business. The final rule adds a number of exemptions that will ease the burden on small business and large business contractors; for example, contractors will have the option of verifying all existing employees, not just those performing directly on the contract. This eliminates the need to develop a system to identify employees assigned to the contract.

• Whether to require E-Verify participation as a preaward eligibility requirement rather than as a postaward contract performance requirement. The rule is distinct from the existing E-Verify program, in that it would require E-Verify queries to be performed on certain existing employees of a contractor, and the Councils believe that the obligations created by the rule should be codified as a postaward contract performance requirement.

• Whether the use of E-Verify should be required for existing employees of the contractor who are assigned to work under the Government contract or should be limited only to the new hires of the contractor. Executive Order 12989, as amended, instructs Federal contracting agencies to contract with employers that agree to use E-Verify to confirm the work eligibility of their existing employees assigned to work on Federal contracts. The Councils decided that requiring employment eligibility confirmation of all workers assigned to a new Government contract was most consistent with Executive Order 12989 and with the Federal Government's own obligation to use E-Verify when hiring Federal employees, and it would most effectively ensure that the Federal Government does not indirectly exploit an illegal labor force.

• Whether to require contractors to use E-Verify only for new hires that would be assigned to work under a Government contract and exclude all other new hires of the contractor from the E-Verify requirement. Executive Order 12989, as amended, instructs Federal contracting agencies to contract with employers that agree to use E-Verify for all new hires of the contractor. The Councils decided that requiring contractors to use the E-Verify program as part of standard hiring practices would simplify employment verification, and conforms with the requirements of Executive Order 12989 and with a principal goal of the rule—to ensure that the Federal Government does business with companies that do not employ unauthorized aliens.

• Whether the use of E-Verify should be required for all prime contracts or only for those contracts that do not call for COTS items or items that would be COTS items but for minor modifications, as defined at FAR Part 2 (containing the definition of a commercial item). Because COTS suppliers, by definition, do not specialize in serving the Federal Government, and because the Government might lose access to COTS suppliers if they determine the cost of complying with the rule outweighs their gains from Government business, the Councils decided not to require the use of E-Verify for COTS items and items that would be COTS items but for minor modifications. As noted above, the Councils expanded the reach of this exception for COTS items in response to comments received on the proposed rule.

• Whether the requirements of the rule should flow down to all subcontracts or should be limited to subcontracts for services or construction. The Councils determined to apply the rule only to subcontracts for commercial or noncommercial services, including construction. It does not apply to subcontracts for material or to subcontracts less than $3,000.

G. Statutory and Regulatory Requirements

Executive Order 12866

Executive Order 12866, ''Regulatory Planning and Review,'' directs agencies and the Office of Management and Budget (OMB) to determine whether a regulatory action is ''significant'' and therefore subject to review by OMB and subject to the analyses directed by that Executive Order. 58 FR 51735, October 4, 1993, as amended. The Councils have determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), because there is significant public interest in issues pertaining to immigration and because this is an economically significant rule pursuant to this Executive Order. Accordingly, this final rule has been submitted to OMB for review.

This is a major rule under 5 U.S.C. 804.

A Regulatory Impact Analysis that more thoroughly explains the assumptions used to estimate the cost of this final rule is available in the docket as indicated under **ADDRESSES**. For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*. A summary of the cost and benefits of the final rule follows:

In the initial fiscal year the rule is expected to be effective (fiscal year 2009), the Councils estimate that there will be approximately 168,624 contractors and subcontractors that will be required to enroll in E-Verify due to this rule and that there will be an additional 3.8 million employees vetted through E-Verify. In the initial year, the cost of the final rule at 7% net present value is approximately $245.4 million, and, over the ten-year period of analysis (2009–2018), the cost of the final rule is approximately $1,105.4 million. In the initial year, the cost of the final rule at 3% net present value is approximately $254.9 million, and, over the ten-year period of analysis (2009–2018), the cost of the final rule is $1,336.5 million. Compliance costs from participating in the E-Verify program fall into the following general categories, and Table 1 below provides a summary of the costs:

• *Startup Costs:* Employers must register to use the E-Verify system and sign a Memorandum of Understanding with USCIS and SSA. Employers will also incur costs such as reviewing and updating USCIS Form I–9 (Employment Eligibility Verification) for existing employees and potentially a cost to modify an existing personnel or payroll system to be able to record the E-Verify status of their employees. A very small number of employers may need to purchase a computer, internet connection and printer for their hiring site if that hiring site does not already have internet access.

• *Training:* Employees who use the E-Verify system are required to take an on-line tutorial. While USCIS does not charge a fee for this training, employers will incur the opportunity cost of the time the employee spends on the training, as the employee's time could have been spent on other activities.

• *Employee Verification:* Employers will incur the opportunity cost of the time spent entering data into E-Verify and, if the employee receives a tentative nonconfirmation, employers would inform the employee and spend time closing out the case after resolution of the tentative nonconfirmation. In addition, the employer would incur lost productivity when an employee needs to be away from work to visit SSA to correct his/her information. As estimated, the employee would bear the cost of driving to SSA.

• *Employee Replacement (Turnover) Cost:* There may be a small percentage of workers who are authorized to work in the U.S. and who receive a tentative nonconfirmation but do not take the steps necessary to resolve it (despite the strong economic incentives to do so). The Councils cannot predict why an authorized employee would not work diligently to resolve the tentative nonconfirmation, given the incentives to do so, but we believe the economic analysis should reasonably account for such a possibility. Assuming that a small number of authorized employees would not resolve their tentative nonconfirmations, and would either resign or be terminated, is simply a conservative analytical assumption in light of the fact that there is no law compelling employees to resolve their tentative nonconfirmations; thus, employers may incur some additional costs due to having to replace a small number of authorized employees. To the extent that the accompanying E-Verify rulemaking results in the termination or resignation of a worker authorized to work in the U.S., those associated employee replacement costs would be considered to be a cost of the rule. However, the termination and replacement costs of unauthorized workers are not counted as a direct cost of this rule because current immigration law prohibits employers from hiring or continuing to employ aliens whom they know are not authorized to work in the U.S. The termination and replacement of unauthorized employees will impose a burden on employers, but INA section 274A(a), 8 U.S.C. 1324a(a), expressly prohibits employers from hiring or continuing to employ an alien whom they know is not authorized to work in the United States. Accordingly, costs that result from employers' knowledge of their workers' illegal status are attributable to the Immigration and Nationality Act, not to the FAR rule.

• *Federal Government Cost:* The Government will incur operating costs from each query that an employer executes and will also incur costs from resolving tentative nonconfirmations.

TABLE 1—10 YEAR COST OF FINAL RULE

[7% present value]

Year	Employer			Employee	Government	Total
	Startup costs	Authorized employee replacement cost	Verification cost	Verification cost	Verification cost	
2009	$188,138,945	$15,041,464	$37,836,372	$2,436,863	$1,928,888	$245,382,532
2010	72,368,319	7,798,427	19,616,690	1,263,415	998,560	102,045,411
2011	71,015,802	7,652,663	19,250,187	1,239,831	979,895	100,138,378
2012	69,688,407	7,509,622	18,890,355	1,216,654	961,579	98,266,617
2013	69,443,845	7,369,253	18,537,018	1,193,865	943,606	97,487,587
2014	68,145,775	7,231,511	18,190,724	1,171,588	925,973	95,665,570
2015	66,872,076	7,096,345	17,850,716	1,149,689	908,670	93,877,497
2016	65,621,976	6,963,703	17,516,996	1,128,187	891,691	92,122,553
2017	65,041,291	6,833,541	17,189,537	1,107,092	875,028	91,046,490
2018	63,825,632	6,705,812	16,868,275	1,086,406	858,677	89,344,803
Total	800,162,068	80,202,341	201,746,869	12,993,591	10,272,566	1,105,377,436

Because unauthorized workers are at risk of being apprehended in immigration enforcement actions, contractors who hire them will necessarily have a more unstable workforce than contractors who do not hire unauthorized workers. Given the vulnerabilities in the I–9 system, many employers that do not knowingly employ illegal aliens nevertheless have unauthorized workers, undetected, on their workforce.

This rule will promote economy and efficiency in Government procurement. Stability and dependability are important elements of economy and efficiency. A contractor with a less stable workforce will be less likely to produce goods and services economically and efficiently than will a contractor with a more stable workforce. Because of the Executive Branch's obligation to enforce the immigration laws, including the detection and removal of illegal aliens identified through worksite enforcement, contractors that employ illegal aliens cannot rely on the continuing availability and service of those illegal workers. Such contractors inevitably will have a less stable and less dependable workforce than contractors that do not employ such persons. Where a contractor assigns illegal aliens to work on Federal contracts, the enforcement of Federal immigration laws imposes a direct risk of disruption, delay, and increased expense in Federal contracting. Such contractors are less dependable procurement sources, even if the contractors did not knowingly hire or knowingly continue to employ unauthorized workers.

Contractors that use E-Verify to confirm the employment eligibility of the workforce are much less likely to face immigration enforcement actions and are generally more efficient and dependable procurement sources than contractors that do not use that system to verify the work eligibility of their workforce. Rigorous employment verification through E-Verify will also help contractors confirm the identity of the persons working on Federal contracts, enhancing national security at less expense to the Government than it would cost for contractors to obtain more rigorous security clearances that may not be otherwise required by their contracts. This is likely to be particularly beneficial where contractors operate at sensitive national infrastructure sites.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995) (PRA), all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any information collection requests in a final rule. It is estimated that this rule will increase the information collection burden hours already approved for the E-Verify Program. The OMB control number for the currently approved E-Verify Program Information Collection Request is 1615–0092.

Although the E-Verify Program has a currently approved Paperwork Reduction Act clearance, we are seeking OMB approval on the proposed amendments to the current OMB approved collection. The purpose of this notice is to allow 60 days for public comments on the amendments to the E-Verify Program collection of information, not on the amendments to the FAR rule. Comments on the amendments to the E-Verify Program should be submitted no later than January 13, 2009. This process is conducted in accordance with 5 CFR 1320.10.

When submitting comments on the information collection, they should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of Information Collection for the E-Verify System (OMB Control Number 1615–0092):

a. *Type of information collection:* Revision of currently approved information collection.

b. *Title of Form/Collection:* E-Verify Program.

c. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No form number. OMB Control Number 1615–0092; U.S. Citizenship and Immigration Services.

d. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary respondents are business or other for-profit entities, small business, or other organizations. The E-Verify Program allows employers to electronically verify the eligibility status of newly hired employees. Certain Federal contractors and subcontractors will also be required to perform queries on existing employees assigned to the contract.

e. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

Implementation: 125,015 at 0.86 hours per response.

Training: 521,134 at 2.26 hours per response.

ID/IQ Contracts: 3,333 at 2.00 hours per response.

Initial Query: 4,094,955 at 0.12 hours per response.

Secondary Query: 195,329 at 1.94 hours per response.

For implementation, it is estimated that the number of responses per respondent will be 17. For all others, the number of responses per respondent will be one.

f. *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 3,882,482 burden hours.

All comments regarding this information collection should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, Attention: Chief, 202–272–8377.

List of Subjects in 48 CFR Parts 2, 22, and 52

Government procurement.

Dated: November 6, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2), in the definition ''United States'', by redesignating paragraphs (6) through (8) as paragraphs (7) through (9), respectively, and adding a new paragraph (6) to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

United States * * *

(6) For use in Subpart 22.18, see the definition at 2.1801.

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 3. Amend section 22.102–1 by removing from the end of paragraph (g) the word ''and''; removing the period from the end of paragraph (h) and adding ''; and'' in its place; and adding paragraph (i) to read as follows:

22.102–1 Policy.

* * * * *

(i) Eligibility for employment under United States immigration laws.

■ 4. Add Subpart 22.18 to read as follows:

Subpart 22.18—Employment Eligibility Verification

Sec.

22.1800 Scope.

22.1801 Definitions.

22.1802 Policy.

22.1803 Contract clause.

22.1800 Scope.

This subpart prescribes policies and procedures requiring contractors to utilize the Department of Homeland Security (DHS), United States Citizenship and Immigration Service's employment eligibility verification program (E-Verify) as the means for verifying employment eligibility of certain employees.

22.1801 Definitions.

As used in this subpart—

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply that is—

(i) A commercial item (as defined in paragraph (1) of the definition at 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products. Per 46 CFR 525.1 (c)(2), ''bulk cargo'' means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

Employee assigned to the contract means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

Subcontract means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

United States, as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

22.1802 Policy.

(a) Statutes and Executive orders require employers to abide by the immigration laws of the United States and to employ in the United States only individuals who are eligible to work in the United States. The E-Verify program provides an Internet-based means of verifying employment eligibility of workers employed in the United States, but is not a substitute for any other employment eligibility verification requirements.

(b) Contracting officers shall include in solicitations and contracts, as prescribed at 22.1803, requirements that Federal contractors must—

(1) Enroll as Federal contractors in E-Verify;

(2) Use E-Verify to verify employment eligibility of all new hires working in the United States, except that the contractor may choose to verify only new hires assigned to the contract if the contractor is—

(i) An institution of higher education (as defined at 20 U.S.C. 1001(a));

(ii) A State or local government or the government of a Federally recognized Indian tribe; or

(iii) A surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond;

(3) Use E-Verify to verify employment eligibility of all employees assigned to the contract; and

(4) Include these requirements, as required by the clause at 52.222–54, in subcontracts for—

(i) Commercial or noncommercial services, except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item; and

(ii) Construction.

(c) Contractors may elect to verify employment eligibility of all existing employees working in the United States who were hired after November 6, 1986, instead of just those employees assigned to the contract. The contractor is not required to verify employment eligibility of—

(1) Employees who hold an active security clearance of confidential, secret, or top secret; or

(2) Employees for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD)–12.

(d) In exceptional cases, the head of the contracting activity may waive the E-Verify requirement for a contract or subcontract or a class of contracts or subcontracts, either temporarily or for the period of performance. This waiver authority may not be delegated.

(e) DHS and the Social Security Administration (SSA) may terminate a contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS or SSA terminates a contractor's MOU, the terminating agency must refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222–54. If the contractor is suspended or debarred as a result of the MOU termination, the contractor is not eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must reenroll in E-Verify.

22.1803 Contract clause.

Insert the clause at 52.222–54, Employment Eligibility Verification, in all solicitations and contracts that exceed the simplified acquisition threshold, except those that—

(a) Are only for work that will be performed outside the United States;

(b) Are for a period of performance of less than 120 days; or

(c) Are only for—

(1) Commercially available off-the-shelf items;

(2) Items that would be COTS items, but for minor modifications (as defined at paragraph (3)(ii) of the definition of ''commercial item'' at 2.101);

(3) Items that would be COTS items if they were not bulk cargo; or

(4) Commercial services that are—

(i) Part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications);

(ii) Performed by the COTS provider; and

(iii) Are normally provided for that COTS item.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (b)(26) through (b)(41) as paragraphs (b)(27) through (b)(42), respectively, and adding a new paragraph (b)(26); and

■ c. Redesignating paragraph (e)(1)(xi) as paragraph (e)(1)(xii), and adding a new paragraph (e)(1)(xi) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Jan 2009)

* * * * *

(b) * * *

___ (26) 52.222–54, Employment Eligibility Verification (Jan 2009). (Executive Order 12989). (Not applicable to the acquisition of commercially available off-the-shelf items or certain other types of commercial items as prescribed in 22.1803.)

* * * * *

(e)(1) * * *

(xi) 52.222–54, Employment Eligibility Verification (Jan 2009).

* * * * *

(End of clause)

■ 5. Add section 52.222–54 to read as follows:

52.222–54 Employment Eligibility Verification.

As prescribed in 22.1803 and 12.301(d)(3), insert the following clause:

Employment Eligibility Verification (Jan 2009)

(a) *Definitions.* As used in this clause—

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply that is—

(i) A commercial item (as defined in paragraph (1) of the definition at 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products. Per 46 CFR 525.1(c)(2), ''bulk cargo'' means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

Employee assigned to the contract means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

Subcontract means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

United States, as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

(b) *Enrollment and verification requirements.* (1) If the Contractor is not enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall—

(i) *Enroll.* Enroll as a Federal Contractor in the E-Verify program within 30 calendar days of contract award;

(ii) *Verify all new employees.* Within 90 calendar days of enrollment in the E-Verify program, begin to use E-Verify to initiate verification of employment eligibility of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); and

(iii) *Verify employees assigned to the contract.* For each employee assigned to the contract, initiate verification within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(2) If the Contractor is enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall use E-Verify to initiate verification of employment eligibility of—

(i) *All new employees.* (A) *Enrolled 90 calendar days or more.* The Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); or

(B) *Enrolled less than 90 calendar days.* Within 90 calendar days after enrollment as a Federal Contractor in E-Verify, the Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); or

(ii) *Employees assigned to the contract.* For each employee assigned to the contract, the Contractor shall initiate verification within 90 calendar days after date of contract award or within 30 days after assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(3) If the Contractor is an institution of higher education (as defined at 20 U.S.C. 1001(a)); a State or local government or the government of a Federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond, the Contractor may choose to verify only employees assigned to the contract, whether existing employees or new hires. The Contractor shall follow the applicable verification requirements at (b)(1) or (b)(2), respectively, except that any requirement for verification of new employees applies only to new employees assigned to the contract.

(4) *Option to verify employment eligibility of all employees.* The Contractor may elect to verify all existing employees hired after November 6, 1986, rather than just those employees assigned to the contract. The Contractor shall initiate verification for each existing employee working in the United States who was hired after November 6, 1986, within 180 calendar days of—

(i) Enrollment in the E-Verify program; or

(ii) Notification to E-Verify Operations of the Contractor's decision to exercise this option, using the contact information provided in the E-Verify program Memorandum of Understanding (MOU).

(5) The Contractor shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.

(i) The Department of Homeland Security (DHS) or the Social Security Administration (SSA) may terminate the Contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. In such case, the Contractor will be referred to a suspension or debarment official.

(ii) During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the Contractor is excused from its obligations under paragraph (b) of this clause. If the suspension or debarment official determines not to suspend or debar the Contractor, then the Contractor must reenroll in E-Verify.

(c) *Web site.* Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security Web site: *http://www.dhs.gov/E-Verify.*

(d) *Individuals previously verified.* The Contractor is not required by this clause to perform additional employment verification using E-Verify for any employee—

(1) Whose employment eligibility was previously verified by the Contractor through the E-Verify program;

(2) Who has been granted and holds an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual; or

(3) Who has undergone a completed background investigation and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD)–12, Policy for a Common Identification Standard for Federal Employees and Contractors.

(e) *Subcontracts.* The Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for identification of the parties), in each subcontract that—

(1) *Is for*—(i) Commercial or noncommercial services (except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item); or

(ii) Construction;

(2) Has a value of more than $3,000; and

(3) Includes work performed in the United States.

(End of clause)

[FR Doc. E8–26904 Filed 11–13–08; 8:45 am]

BILLING CODE 6820–EP–P ?≤

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2008–0003, Sequence 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–29; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the

Office of Communications

U.S. Citizenship and Immigration Services

USCIS Update

June 3, 2009

Rule Requiring Federal Contractors to Use E-Verify System Delayed

WASHINGTON — Implementation of the final rule requiring federal contractors and subcontractors to begin using U.S. Citizenship and Immigration Services' (USCIS) E-Verify system has been delayed until Sept. 8, 2009.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (collectively known as the Federal Acquisitions Regulatory Councils) will publish an amendment in the *Federal Register* on June 5, 2009, postponing the applicability of the final rule until Sept. 8, 2009. The rule was first published on Nov. 14, 2008 requiring federal contractors and subcontractors to agree to electronically verify the employment eligibility of their employees.

For more information on E-Verify, visit www.uscis.gov/everify.

– USCIS –

www.uscis.gov

Frequently Asked Questions: Federal Contractors and E-Verify

BEFORE YOUR COMPANY ENROLLS IN E-VERIFY

What is E-Verify, how does it work, and why do federal contractors have to enroll in E-Verify?

E-Verify is an Internet-based system operated by the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) that allows employers to verify the employment eligibility of their employees, regardless of citizenship. Based on the information provided by the employee on his or her Form I-9, E-Verify checks this information electronically against records contained in DHS and Social Security Administration (SSA) databases.

On June 6, 2008, the President issued Executive Order 13465 "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System," providing that "Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the federal contract." The Federal Acquisition Regulation (FAR) was therefore amended to require federal contractors to use E-Verify, which is the system designated to implement the Executive Order.

As a current or prospective federal contractor, am I required by the final rule to enroll in E-Verify now?

The final rule applies to solicitations issued and contracts awarded after the applicability date of the final rule in accordance with FAR 1.108(d). The final rule will become applicable to contractors on September 8, 2009. All employers, including federal contractors, may enroll in E-Verify at any time without waiting for the applicability date. Under the final rule, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract.

If you wish to enroll in E-Verify before the applicability date of this rule you may do so now. Enrolling now may help you become familiar with the system and may make it easier for you to use E-Verify if and when you are awarded a federal contract. Verification of employees through E-Verify is limited to new hires only, unless you are a federal contractor who has been awarded a contract on or after September 8, 2009.

If you have already enrolled in E-Verify and you are awarded a federal contract after September 8, 2009, you will need to update your company profile through the "Maintain Company" page once the contract has been awarded. Once you designate your organization as a federal contractor, all E-Verify users at your company will need to take a federal contractor tutorial that explains the new policies and features that are unique to federal contractors.

My company was just awarded a federal contract and the rule is now in effect. When is my company required to enroll in E-Verify?

When a contractor wins the bid on a federal contract that contains the FAR E-Verify clause, the contractor and any covered subcontractors on the project are required to enroll in the E-Verify program within 30 calendar days of the contract or subcontract award date.

Usage of E-Verify also applies to indefinite-delivery/indefinite-quantity contracts modified after the September 8, 2009 effective date of the rule on a bilateral basis in accordance with FAR 1.108(d)(3) to include the clause for future orders. The FAR rule provides that if the remaining period of performance extends at least six months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial, then the contract should be modified to include the clause.

How do I enroll my company in E-Verify?

Before you can start using E-Verify, you need to enroll your company in the program. When you enroll your company, you will be asked to provide basic contact information for your company and agree to follow the rules of the program. At the end of the enrollment process, you will be required to sign a Memorandum of Understanding (MOU) that provides the terms of agreement between your company and DHS.

You can register your company at the Employer Registration Link in the Related Links of this page.

During the E-Verify company enrollment process, you will be asked "Which category best describes your organization?" If you have been awarded a federal contract after September 8, 2009, you should select "federal contractor" from the drop-down box. Once you have indicated that you are a federal contractor, the system will then prompt you to identify the federal contractor category (e.g., institutions of higher education; state and local governments and governments of federally recognized Indian tribes; and certain sureties) that best describes your organization along with what groups of your current employees you plan to verify (i.e., current employees assigned to the federal contract or your entire workforce).

Once you have completed the enrollment process, USCIS will review your information and activate your account. After the account is activated, you will receive an email with your login instructions, user ID, and password.

The proposed FAR rule would require federal contractors to use E-Verify for both new hires and existing employees who work on a new federal contract. Does the federal government use E-Verify (or otherwise verify work authorization) for both new hires and existing employees?

Yes. Federal agencies verify employment eligibility of new and existing employees. In most instances, the federal government goes well beyond an E-Verify check to confirm work eligibility as part of a variety of suitability and other background checks that are required to be performed on federal employees. These background checks may include, but are not limited to:

- FBI fingerprint and name check;
- Checks against local law enforcement databases;
- Written inquiries to educational institutions, previous employers, and neighbors;
- Credit check;
- Checks to verify name, SSN, date of birth, and citizenship; and
- Checks against other federal and private data sources.

For all new hires, federal agencies are required to use E-Verify to verify their employment eligibility. Additionally, many new hires also subsequently undergo background investigations and an FBI fingerprint and name check.

For both new and existing employees, federal agencies are required by Homeland Security Presidential Directive – 12, "Policy for a Common Identification Standard for Federal Employees and Contractors" to follow certain

credentialing standards prior to issuing personal identity verification cards. These standards include conducting a background investigation which includes verification of name, DOB, and SSN (among other data points) against federal and private data sources. This includes a check against Social Security Administration (SSA) records to validate social security numbers. Additionally, these standards require verification of work authorization for non-U.S. citizens against federal immigration databases.

How much will it cost my company to enroll in E-Verify?

Nothing; E-Verify is free. It is the best means available for determining employment eligibility of new hires and the validity of their Social Security Numbers.

My company is required to use E-Verify as a federal contractor for the first time. How do I proceed?

If your company has not yet enrolled in E-Verify, then you have 30 days from the date of contract award to enroll and 90 days from the date you enroll with E-Verify to initiate verification queries for employees already on your staff who will be working on the contract and to begin using the system to verify newly hired employees. After this 90-day phase-in period, you will be required to initiate verification of each newly hired employee within 3 business days after their start date. To meet this three-day requirement, employers may initiate verification of a newly hired employee before their start date if the employee has accepted the job offer and filled out the Form I-9. Please note that pre-screening of job applicants is not allowed; the system may be used for new hires only after the employee has been offered the job and has accepted. Please also remember that you must continue to use E-Verify for the life of the contract for all your new hires, whether or not they are employees assigned to the contract, unless certain exceptions apply.

My company enrolled in E-Verify, but did not enroll us as a federal contractor. Does my company need to re-enroll to comply with this rule?

No. You do not need to enroll again, but you will need to update your company profile through the Maintain Company page. Please log in to E-Verify, go to the Maintain Company page, and select the option indicating you are a federal contractor. Once you designate your organization as a federal contractor, all users (including yourself) will need to take a brief federal contract tutorial that explains the new policies and features that are unique to federal contractors. When the employer changes its profile to indicate "federal contractor" it will not be able to proceed with processing cases in E-Verify until it as taken the refresher tutorial.

My company has already been using E-Verify for more than 90 days. When must we begin verifying existing employees assigned to work on a federal contract that contains the FAR E-Verify clause?

If your company has been enrolled in E-Verify for more than 90 days, then you are required to continue to initiate verification of newly hired employees within three business days of their start date, but you have 90 days from the contract award date to begin using E-Verify for each employee already on your staff who are assigned to the contract. Your transition to using the system as a federal contractor does not allow you to stop using E-Verify for your new hires on the standard three-day schedule. The 90-day window in the FAR rule to start using E-Verify for new hires applies to new E-Verify users and is intended to provide additional implementation time.

Please remember that you are required to continue using E-Verify throughout the duration of your federal contract for all new hires, whether or not they are employees assigned to the contract, unless your company falls under one of the exceptions to this policy.

My company's federal contract has ended. May we continue to use E-Verify?

Yes. Your company may continue to use E-Verify but you should update your company profile through the Maintain Company page. Additionally, you will no longer be able to run existing employees through E-Verify.

My company's Federal contract has ended. Do we need to notify USCIS if we no longer want to participate in E-Verify?

Yes. Federal contractors who no longer wish to participate in E-Verify after a contract has ended can terminate their participation by selecting the "request termination" link in the E-Verify system. If your company fails to do so then the terms of the MOU remain in place.

FEDERAL CONTRACTS AFFECTED BY THE RULE

Types of Federal Contracts Affected

What is the E-Verify clause?

The rule requires the insertion of the E-Verify clause into applicable federal contracts, committing Government contractors to use E-Verify for their new hires and all employees (existing and new) assigned to any given federal contract.

What is the acquisition threshold for this rule?

The rule requires the insertion of the E-Verify clause for prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold ($100,000).

Does the rule apply to subcontracts?

The rule only covers subcontractors if a prime contract includes the clause. For subcontracts that flow from those prime contracts, the rule extends the E-Verify requirement to subcontracts for services or for construction with a value over $3,000.

Does the rule extend to contracts outside the United States?

The rule applies only to employees working in the United States, which is currently defined to include the fifty States and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

Does the rule apply to existing indefinite-delivery/indefinite-quantity contracts?

Existing indefinite-delivery/indefinite-quantity contracts should be modified by Contracting Officers on a bilateral basis in accordance with FAR 1.108(d)(3), to include the clause for future orders if the remaining period of performance extends at least six months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.

Types of Contracts Exempted

What types of prime contracts are exempt from the rule?

The rule exempts:

- Contracts that include only commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services;
- Contracts of less than the simplified acquisition threshold ($100,000);
- Contracts less than 120 days; and
- Contracts where all work is performed outside the United States.

What is considered to be a COTS item?

A COTS item is a commercial item that is sold in substantial quantities in the commercial marketplace and is offered to the government in the same form that it is available in the commercial marketplace, or with minor modifications.

Are contracts for agricultural and food products exempt from the rule?

Nearly all food and agricultural products fall within the definition of "commercially available off-the-shelf (COTS)" items. Federal contracts for COTS items are exempt from the rule. Federal contracts for food and agricultural products shipped as bulk cargo, but that otherwise would be considered COTS items, such as grains, oils and produce are also exempt. Subcontracts that only provide supplies, such as food, are exempt from the rule.

EMPLOYEES AFFECTED BY THE RULE

Employees Required to be Verified Using E-Verify

As a federal contractor, which employees may I verify through the E-Verify system?

As a federal contractor participant in E-Verify, you are required to use E-Verify for:

- All new employees, following completion of the Employment Eligibility Verification Form I-9 (Form I-9); and
- All existing employees who are classified as "employees assigned to the contract."

Employees whom you have already verified through E-Verify should not be re-verified. However, an employee's previous employment authorization through E-Verify from another employer does not satisfy your obligation to use E-Verify once you have hired them.

Those who have an active federal agency HSPD-12 credential or who have been granted and hold an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual do not need to be verified.

Under the rule, only those employers that win a contract or subcontract that includes the E-Verify clause may run existing employees through E-Verify. A federal contractor must verify their new hires and the employees who are assigned to the contract, and may elect to also verify their entire workforce.

There are some exceptions to the requirement to use E-Verify for all new hires. The exceptions apply to institutions of higher learning, state and local governments, governments of federally recognized Indian tribes and for sureties performing under a takeover agreement with a federal agency. Under the rule, such entities may choose to only use E-Verify on new and existing employees assigned to the covered federal contract.

What is an "employee assigned to the federal contract"?

The rule defines an "employee assigned to the federal contract" as any employee hired after November 6, 1986, who is directly performing work in the United States under a contract that includes the clause committing the contractor to use E-Verify. An employee is not considered to be directly performing work under the contract if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties under the contract.

My employee is working on a contract for a minimal amount of time. Is he or she subject to E-Verify?

Yes. The rule does not exempt employees based on the intermittent nature of the work or the length of time spent performing the work.

One of my employees was run through E-Verify by a previous employer. Do I need to run this employee through E-Verify again?

Yes. Under the rule, federal contractors are required to enter the worker's identity and employment eligibility information into the E-Verify system following completion of the Form I-9 at the time of hire.

One of my employees was previously run through E-Verify by my company. Do I need to run this employee through E-Verify again?

No. Once an employee has been run through E-Verify they should not be re-verified through E-Verify by the same employer.

Employees or Entities with Exceptions to E-Verify

Must I verify all new employees? What are the exceptions to this requirement?

The rule requires most federal contractors to use E-Verify for all new employees, regardless whether the employees are assigned to a federal contract.

Federal contractors who are state and local governments, governments of federally recognized Native American tribes, and sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond need only use E-Verify for employees assigned to a covered federal contract.

What employees are not considered to be directly performing work under a contract and therefore excluded?

Those employees who normally perform support work, such as indirect or overhead functions, and do not perform any substantial duties applicable to the contract, would be excluded.

My employee has been previously confirmed as work authorized through E-Verify but is moving to another

contract. Do I need to run him or her through E-Verify again?

No. Once an employee has been run through E-Verify and employment authorization has been confirmed, the employee should not be reverified through E-Verify again by the same employer.

Are there any exceptions to verify employees with certain credentials and security clearances?

Yes. The federal contractor is not required to perform employment verification using E-Verify for any employee who has been granted and holds an active federal agency HSPD-12 compliant credential or a U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual. The employer still must complete the Form I-9 at the time of hire for such employees.

Can my subcontractor verify under my MOU?

No. Each employer must enter into its own MOU with DHS and SSA.

Option to Verify Entire Workforce

May I verify my entire workforce?

Yes. Federal contractors and subcontractors have the option of verifying their entire workforce, both new hires and existing employees – including those not assigned to a federal contract. If your company elects to do this, you must notify DHS by updating your company profile through the Maintain Company page if you are a current participant, or during enrollment if you are a new participant. A federal contractor that chooses to exercise this option must initiate an E-Verify query for each employee in the contractor's entire work force within 180 days of updating its company profile.

The final rule instructs me that I must notify the Department of Homeland Security if I plan to verify my entire workforce. How do I do this?

If your company plans to verify its entire workforce, you must notify the Department of Homeland Security (DHS) by updating your company profile through the "Maintain Company" page.

If your company is already enrolled in E-Verify and plans to verify its entire workforce, your program administrator must notify the Department of Homeland Security (DHS) by updating your company profile through the Maintain Company page if you are a current participant, or during enrollment if you are a new participant.

Once you have indicated you are a federal contractor, the system will then prompt you to identify the federal contractor category that best describes your organization. You will then have the option to select "all new hires and existing employees" indicating that you wish to verify your entire workforce through E-Verify. A federal contractor that chooses to exercise this option must initiate verifications for the contractor's entire work force within 180 days of updating their company profile.

Social Security Numbers

Is the employee required to provide his or her SSN on the Form I-9?

Yes. The employee must provide his or her SSN to an E-Verify employer if the employee has one. If the employee has applied for and is waiting to receive an SSN, the employer should make a notation on their Form I-9 and proceed with E-Verify upon receipt of the SSN.

Additional Information for All Users

May I use E-Verify prior to making a job offer to a job applicant?

No. All users, including federal contractors, are prohibited from using E-Verify prior to a job offer and acceptance by the applicant. By signing the MOU to participate in E-Verify, all employers agree not to use E-Verify for pre-employment screening of job applicants, support for any unlawful employment practice, or any other use not authorized by the MOU. Should the employer use E-Verify procedures for any purpose other than as authorized by the MOU, the employer may be subject to appropriate legal action and termination of its access to the E-Verify systems.

Does participation in E-Verify provide safe harbor from work site enforcement?

No. However, using E-Verify creates a rebuttable presumption that your company has not knowingly hired an unauthorized alien. Participation in the program does not provide a "safe harbor" from worksite enforcement, however.

If my company participates in E-Verify, are we required to notify applicants of our participation?

As an employer participating in E-Verify, you are required to post the notice provided by DHS indicating your company's participation in the E-Verify program as well as the anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices at the Department of Justice. The posting must take place in a prominent place that is clearly visible to prospective employees and all employees who are to be verified through the system. Once you are enrolled, and able to log into the E-Verify online system, these notices can be found in the "On-line Resources" section.

Where can I find additional resources?

The Federal Contractor User Manual and Tutorial contain instructions and other related materials on E-Verify procedures and requirements.

Once your company enrolls in E-Verify and is able to log in to the system, (See the Related Link on this page) these items are available under the "Online Resources." In addition, you may also call E-Verify Customer Support at 1-888-464-4218.

For more information about unfair employment practices and verifying the employment eligibility of your employees, you may contact the Office of Special Counsel for Immigration Related Unfair Employment Practices, Civil Rights Division, United States Department of Justice, at 1-800-255-7688 or through the Related Link on this page.

Related Files

- Frequently Asked Questions (125KB PDF)

41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2008–D037.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 203

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR part 203 is amended as follows:

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 1. The authority citation for 48 CFR part 203 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

■ 2. Section 203.170 is amended by revising paragraph (a) to read as follows:

203.170 Business practices.

* * * * *

(a) Senior leaders shall not perform multiple roles in source selection for a major weapon system or major service acquisition. Departments and agencies shall certify every 2 years that no senior leader has performed multiple roles in the acquisition of a major weapon system or major service. Completed certifications shall be forwarded to the Director, Defense Procurement, in accordance with the procedures at PGI 203.170.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203, 209, and 252

RIN 0750–AG07

Defense Federal Acquisition Regulation Supplement; Senior DoD Officials Seeking Employment With Defense Contractors (DFARS Case 2008–D007)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 847 of the National Defense Authorization Act for Fiscal Year 2008. Section 847 addresses requirements for senior DoD officials to obtain a post-employment ethics opinion before accepting a position from a DoD contractor within two years after leaving DoD service.

DATES: *Effective date:* January 15, 2009.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before March 16, 2009, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008–D007, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: dfars@osd.mil.* Include DFARS Case 2008–D007 in the subject line of the message.
- *Fax:* 703–602–7887.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Angie Sawyer, OUSD(AT&L)DPAP(DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.
- *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Angie Sawyer, 703–602–8484.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). Section 847 requires that a DoD official, who has participated personally and substantially in a DoD acquisition exceeding $10 million or who has held a key acquisition position, must obtain a written opinion from a DoD ethics counselor regarding the activities that the official may undertake on behalf of a DoD contractor within two years after leaving DoD service. In addition, Section 847 prohibits a DoD contractor from providing compensation to such a DoD official without first determining that the official has received or appropriately requested a post-employment ethics opinion.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the requirement to verify that a prospective employee has received or requested the appropriate DoD ethics opinion should involve minimal effort on the part of a contractor. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008–D007.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). Section 847 requires that DoD officials that have participated personally and substantially in a DoD acquisition exceeding $10 million, or that have held certain key acquisition positions, must obtain a written opinion from the appropriate DoD ethics counselor before accepting compensation from a DoD contractor within two years after leaving DoD service. In addition, Section 847 prohibits a DoD contractor from providing compensation to such a DoD official without first determining that the official has received or appropriately requested a post-employment ethics opinion. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 203, 209, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 203, 209, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 203, 209, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Section 203.104–4 is added to read as follows:

203.104–4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

(d)(3) For purposes of FAR 3.104–4(d)(3) only, DoD follows the notification procedures in FAR 27.404–5(a). However, FAR 27.404–5(a)(1) does not apply to DoD.

203.104–5 [Removed]

■ 3. Section 203.104–5 is removed.

■ 4. Sections 203.171 through 203.171–4 are added to read as follows:

203.171 Senior DoD officials seeking employment with defense contractors.

203.171–1 Scope.

This section implements Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181).

203.171–2 Definition.

Covered DoD official as used in this section, is defined in the clause at 252.203–7000, Requirements Relating to Compensation of Former DoD Officials.

203.171–3 Policy.

(a) A DoD official covered by the requirements of Section 847 of Public Law 110–181 (a ''covered DoD official'') who, within 2 years after leaving DoD service, expects to receive compensation from a DoD contractor, shall, prior to accepting such compensation, request a written opinion from the appropriate DoD ethics counselor regarding the applicability of post-employment restrictions to activities that the official may undertake on behalf of a contractor.

(b) A DoD contractor may not knowingly provide compensation to a covered DoD official within 2 years after the official leaves DoD service unless the contractor first determines that the official has received, or has requested at least 30 days prior to receiving compensation from the contractor, the post-employment ethics opinion described in paragraph (a) of this section.

(c) If a DoD contractor knowingly fails to comply with the requirements of the clause at 252.203–7000, administrative and contractual actions may be taken, including cancellation of a procurement, rescission of a contract, or initiation of suspension or debarment proceedings.

203.171–4 Contract clause.

Use the clause at 252.203–7000, Requirements Relating to Compensation of Former DoD Officials, in all solicitations and contracts.

PART 209—CONTRACTOR QUALIFICATIONS

■ 5. Section 209.406–2 is amended as follows:

■ a. By redesignating paragraph (a) as paragraph (1); and

■ b. By adding paragraph (2) to read as follows:

209.406–2 Causes for debarment.

* * * * *

(2) Any contractor that knowingly provides compensation to a former DoD official in violation of Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) may face suspension and debarment proceedings in accordance with 41 U.S.C. 423(e)(3)(A)(iii).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Section 252.203–7000 is added to read as follows:

252.203–7000 Requirements Relating to Compensation of Former DoD Officials.

As prescribed in 203.171–4, use the following clause:

REQUIREMENTS RELATING TO COMPENSATION OF FORMER DOD OFFICIALS (JAN 2009)

(a) *Definition. Covered DoD official,* as used in this clause, means an individual that—

(1) Leaves or left DoD service on or after January 28, 2008; and

(2)(i) Participated personally and substantially in an acquisition as defined in 41 U.S.C. 403(16) with a value in excess of $10 million, and serves or served—

(A) In an Executive Schedule position under subchapter II of chapter 53 of Title 5, United States Code;

(B) In a position in the Senior Executive Service under subchapter VIII of chapter 53 of Title 5, United States Code; or

(C) In a general or flag officer position compensated at a rate of pay for grade O–7 or above under section 201 of Title 37, United States Code; or

(ii) Serves or served in DoD in one of the following positions: Program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of $10 million.

(b) The Contractor shall not knowingly provide compensation to a covered DoD official within 2 years after the official leaves DoD service, without first determining that the official has sought and received, or has not received after 30 days of seeking, a written opinion from the appropriate DoD ethics counselor regarding the applicability of post-employment restrictions to the activities that the official is expected to undertake on behalf of the Contractor.

(c) Failure by the Contractor to comply with paragraph (b) of this clause may subject the Contractor to rescission of this contract, suspension, or debarment in accordance with 41 U.S.C. 423(e)(3).

(End of clause)

■ 7. Section 252.212–7001 is amended as follows:

■ a. By revising the clause date to read ''(JAN 2009)'';

■ b. By redesignating paragraphs (b)(1) through (21) as paragraphs (b)(2) through (22) respectively;

■ c. By adding a new paragraph (b)(1);

■ d. In newly designated paragraph (b)(5) by removing ''(JUN 2005)'' and adding in its place ''(JAN 2009)''; and

■ e. In newly designated paragraph (b)(13)(i) by removing ''(MAR 2007)'' and adding in its place ''(JAN 2009)''. The new paragraph (b)(1) reads as follows:

252.212–7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

* * * * *

(b) * * *

(1) _____252.203–7000, Requirements Relating to Compensation

of Former DoD Officials (JAN 2009) (Section 847 of Pub. L. 110–181).

* * * * *

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750–AG09

Defense Federal Acquisition Regulation Supplement; Whistleblower Protections for Contractor Employees (DFARS Case 2008–D012)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 846 of the National Defense Authorization Act for Fiscal Year 2008 and Section 842 of the National Defense Authorization Act for Fiscal Year 2009. These laws address protections for contractor employees who disclose information to Government officials with regard to waste or mismanagement, danger to public health or safety, or violation of law related to a DoD contract.

DATES: *Effective date:* January 15, 2009.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before March 16, 2009, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008–D012, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: dfars@osd.mil.* Include DFARS Case 2008–D012 in the subject line of the message.
- *Fax:* 703–602–7887.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Angie Sawyer, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.
- *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Angie Sawyer, 703–602–8484.

SUPPLEMENTARY INFORMATION:

A. Background

10 U.S.C. 2409 and 41 U.S.C. 251 *et seq.* prohibit Government contractors from discharging, demoting, or otherwise discriminating against employees as a reprisal for disclosing to Government officials information relating to a substantial violation of law related to a contract. 10 U.S.C. 2409 and 41 U.S.C. 251 *et seq.* are implemented in Subpart 3.9 of the Federal Acquisition Regulation. Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) and Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) amended 10 U.S.C. 2409 to establish protections for DoD contractor employees that differ from those specified in 41 U.S.C. 251 *et seq.* and the Federal Acquisition Regulation. Therefore, this interim rule adds a new DFARS subpart to address DoD requirements related to whistleblower protections. The differences between the FAR and the new DFARS policy include: Expansion of the types of information to which the protections apply; expansion of the categories of Government officials to whom information may be disclosed without reprisal; establishment of time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishment of a de novo right of action in federal district court for contractor employees who have exhausted their administrative remedies under 10 U.S.C. 2409; and addition of a contract clause requiring contractors to inform employees in writing of their whistleblower rights and protections.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Although the rule contains a new requirement for contractors to inform employees in writing of their whistleblower rights and protections, compliance with this requirement is not expected to have a significant cost or administrative impact on contractors. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008–D012.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) and Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). These laws address whistleblower protections for DoD contractor employees and require DoD to ensure that DoD contractors inform their employees in writing of whistleblower rights and protections. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 203 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 203 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Subpart 203.9 is added to read as follows:

Subpart 203.9—Whistleblower Protections for Contractor Employees

Sec.

One Hundred Eleventh Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the sixth day of January, two thousand and nine

An Act

Making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes.

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 "American Recovery and Reinvestment Act of 2009".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SEC. 3. PURPOSES AND PRINCIPLES.

(a) STATEMENT OF PURPOSES.—The purposes of this Act include the following:

(1) To preserve and create jobs and promote economic recovery.

(2) To assist those most impacted by the recession.

(3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.

(4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.

(5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

(b) GENERAL PRINCIPLES CONCERNING USE OF FUNDS.—The President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the purposes specified in subsection (a), including commencing expenditures and activities as quickly as possible consistent with prudent management.

SEC. 4. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 5. EMERGENCY DESIGNATIONS.

(a) IN GENERAL.—Each amount in this Act is designated as an emergency requirement and necessary to meet emergency needs pursuant to section 204(a) of S. Con. Res. 21 (110th Congress) and section 301(b)(2) of S. Con. Res. 70 (110th Congress), the concurrent resolutions on the budget for fiscal years 2008 and 2009.

(b) PAY-AS-YOU-GO.—All applicable provisions in this Act are designated as an emergency for purposes of pay-as-you-go principles.

DIVISION A—APPROPRIATIONS PROVISIONS

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2009, and for other purposes, namely:

TITLE I—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES

DEPARTMENT OF AGRICULTURE

AGRICULTURE BUILDINGS AND FACILITIES AND RENTAL PAYMENTS

For an additional amount for "Agriculture Buildings and Facilities and Rental Payments", $24,000,000, for necessary construction, repair, and improvement activities.

OFFICE OF INSPECTOR GENERAL

For an additional amount for "Office of Inspector General", $22,500,000, to remain available until September 30, 2013, for

oversight and audit of programs, grants, and activities funded by this Act and administered by the Department of Agriculture.

AGRICULTURAL RESEARCH SERVICE

BUILDINGS AND FACILITIES

For an additional amount for "Buildings and Facilities", $176,000,000, for work on deferred maintenance at Agricultural Research Service facilities: *Provided*, That priority in the use of such funds shall be given to critical deferred maintenance, to projects that can be completed, and to activities that can commence promptly following enactment of this Act.

FARM SERVICE AGENCY

SALARIES AND EXPENSES

For an additional amount for "Farm Service Agency, Salaries and Expenses," $50,000,000, for the purpose of maintaining and modernizing the information technology system.

NATURAL RESOURCES CONSERVATION SERVICE

WATERSHED AND FLOOD PREVENTION OPERATIONS

For an additional amount for "Watershed and Flood Prevention Operations", $290,000,000, of which $145,000,000 is for necessary expenses to purchase and restore floodplain easements as authorized by section 403 of the Agricultural Credit Act of 1978 (16 U.S.C. 2203) (except that no more than $30,000,000 of the amount provided for the purchase of floodplain easements may be obligated for projects in any one State): *Provided*, That such funds shall be allocated to projects that can be fully funded and completed with the funds appropriated in this Act, and to activities that can commence promptly following enactment of this Act.

WATERSHED REHABILITATION PROGRAM

For an additional amount for "Watershed Rehabilitation Program", $50,000,000: *Provided,* That such funds shall be allocated to projects that can be fully funded and completed with the funds appropriated in this Act, and to activities that can commence promptly following enactment of this Act.

RURAL HOUSING SERVICE

RURAL HOUSING INSURANCE FUND PROGRAM ACCOUNT

For an additional amount for gross obligations for the principal amount of direct and guaranteed loans as authorized by title V of the Housing Act of 1949, to be available from funds in the rural housing insurance fund, as follows: $1,000,000,000 for section 502 direct loans; and $10,472,000,000 for section 502 unsubsidized guaranteed loans.

For an additional amount for the cost of direct and guaranteed loans, including the cost of modifying loans, as defined in section 502 of the Congressional Budget Act of 1974, as follows: $67,000,000

for section 502 direct loans; and $133,000,000 for section 502 unsubsidized guaranteed loans.

RURAL COMMUNITY FACILITIES PROGRAM ACCOUNT

For an additional amount for the cost of direct loans and grants for rural community facilities programs as authorized by section 306 and described in section 381E(d)(1) of the Consolidated Farm and Rural Development Act, $130,000,000.

RURAL BUSINESS—COOPERATIVE SERVICE

RURAL BUSINESS PROGRAM ACCOUNT

For an additional amount for the cost of guaranteed loans and grants as authorized by sections 310B(a)(2)(A) and 310B(c) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1932), $150,000,000.

RURAL UTILITIES SERVICE

RURAL WATER AND WASTE DISPOSAL PROGRAM ACCOUNT

For an additional amount for the cost of direct loans and grants for the rural water, waste water, and waste disposal programs authorized by sections 306 and 310B and described in section 381E(d)(2) of the Consolidated Farm and Rural Development Act, $1,380,000,000.

DISTANCE LEARNING, TELEMEDICINE, AND BROADBAND PROGRAM

For an additional amount for the cost of broadband loans and loan guarantees, as authorized by the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) and for grants (including for technical assistance), $2,500,000,000: *Provided*, That the cost of direct and guaranteed loans shall be as defined in section 502 of the Congressional Budget Act of 1974: *Provided further*, That, notwithstanding title VI of the Rural Electrification Act of 1936, this amount is available for grants, loans and loan guarantees for broadband infrastructure in any area of the United States: *Provided further*, That at least 75 percent of the area to be served by a project receiving funds from such grants, loans or loan guarantees shall be in a rural area without sufficient access to high speed broadband service to facilitate rural economic development, as determined by the Secretary of Agriculture: *Provided further*, That priority for awarding such funds shall be given to project applications for broadband systems that will deliver end users a choice of more than one service provider: *Provided further*, That priority for awarding funds made available under this paragraph shall be given to projects that provide service to the highest proportion of rural residents that do not have access to broadband service: *Provided further*, That priority shall be given for project applications from borrowers or former borrowers under title II of the Rural Electrification Act of 1936 and for project applications that include such borrowers or former borrowers: *Provided further*, That priority for awarding such funds shall be given to project applications that demonstrate that, if the application is approved, all project elements will be fully funded: *Provided further*, That priority for awarding

such funds shall be given to project applications for activities that can be completed if the requested funds are provided: *Provided further*, That priority for awarding such funds shall be given to activities that can commence promptly following approval: *Provided further*, That no area of a project funded with amounts made available under this paragraph may receive funding to provide broadband service under the Broadband Technology Opportunities Program: *Provided further*, That the Secretary shall submit a report on planned spending and actual obligations describing the use of these funds not later than 90 days after the date of enactment of this Act, and quarterly thereafter until all funds are obligated, to the Committees on Appropriations of the House of Representatives and the Senate.

FOOD AND NUTRITION SERVICE CHILD NUTRITION PROGRAMS

For an additional amount for the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et. seq.), except section 21, and the Child Nutrition Act of 1966 (42 U.S.C. 1771 et. seq.), except sections 17 and 21, $100,000,000, to carry out a grant program for National School Lunch Program equipment assistance: *Provided,* That such funds shall be provided to States administering a school lunch program in a manner proportional with each States' administrative expense allocation: *Provided further,* That the States shall provide competitive grants to school food authorities based upon the need for equipment assistance in participating schools with priority given to school in which not less than 50 percent of the students are eligible for free or reduced price meals under the Richard B. Russell National School Lunch Act.

SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC)

For an additional amount for the special supplemental nutrition program as authorized by section 17 of the Child Nutrition Act of 1966 (42 U.S.C. 1786), $500,000,000, of which $400,000,000 shall be placed in reserve to be allocated as the Secretary deems necessary, notwithstanding section 17(i) of such Act, to support participation should cost or participation exceed budget estimates, and of which $100,000,000 shall be for the purposes specified in section 17(h)(10)(B)(ii): *Provided,* That up to one percent of the funding provided for the purposes specified in section 17(h)(10)(B)(ii) may be reserved by the Secretary for Federal administrative activities in support of those purposes.

COMMODITY ASSISTANCE PROGRAM

For an additional amount for the emergency food assistance program as authorized by section 27(a) of the Food and Nutrition Act of 2008 (7 U.S.C. 2036(a)) and section 204(a)(1) of the Emergency Food Assistance Act of 1983 (7 U.S.C. 7508(a)(1)), $150,000,000: *Provided,* That of the funds made available, the Secretary may use up to $50,000,000 for costs associated with the distribution of commodities, of which up to $25,000,000 shall be made available in fiscal year 2009.

GENERAL PROVISIONS—THIS TITLE

SEC. 101. TEMPORARY INCREASE IN BENEFITS UNDER THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM. (a) MAXIMUM BENEFIT INCREASE.—

(1) IN GENERAL.—Beginning the first month that begins not less than 25 days after the date of enactment of this Act, the value of benefits determined under section 8(a) of the Food and Nutrition Act of 2008 and consolidated block grants for Puerto Rico and American Samoa determined under section 19(a) of such Act shall be calculated using 113.6 percent of the June 2008 value of the thrifty food plan as specified under section 3(o) of such Act.

(2) TERMINATION.—

(A) The authority provided by this subsection shall terminate after September 30, 2009.

(B) Notwithstanding subparagraph (A), the Secretary of Agriculture may not reduce the value of the maximum allotments, minimum allotments or consolidated block grants for Puerto Rico and American Samoa below the level in effect for fiscal year 2009 as a result of paragraph (1).

(b) REQUIREMENTS FOR THE SECRETARY.—In carrying out this section, the Secretary shall—

(1) consider the benefit increases described in subsection (a) to be a "mass change";

(2) require a simple process for States to notify households of the increase in benefits;

(3) consider section 16(c)(3)(A) of the Food and Nutrition Act of 2008 (7 U.S.C. 2025(c)(3)(A)) to apply to any errors in the implementation of this section, without regard to the 120-day limit described in that section;

(4) disregard the additional amount of benefits that a household receives as a result of this section in determining the amount of overissuances under section 13 of the Food and Nutrition Act of 2008 (7 U.S.C. 2022); and

(5) set the tolerance level for excluding small errors for the purposes of section 16(c) of the Food and Nutrition Act of 2008 (7 U.S.C. 2025(c)) at $50 through September 30, 2009.

(c) ADMINISTRATIVE EXPENSES.—

(1) IN GENERAL.—For the costs of State administrative expenses associated with carrying out this section and administering the supplemental nutrition assistance program established under the Food and Nutrition Act of 2008 (7 U.S.C. 2011 et seq.), the Secretary shall make available $145,000,000 in fiscal year 2009 and $150,000,000 in fiscal year 2010, of which $4,500,000 is for necessary expenses of the Food and Nutrition Service for management and oversight of the program and for monitoring the integrity and evaluating the effects of the payments made under this section.

(2) TIMING FOR FISCAL YEAR 2009.—Not later than 60 days after the date of enactment of this Act, the Secretary shall make available to States amounts for fiscal year 2009 under paragraph (1).

(3) ALLOCATION OF FUNDS.—Except as provided for management and oversight, funds described in paragraph (1) shall

be made available as grants to State agencies for each fiscal year as follows:

(A) 75 percent of the amounts available for each fiscal year shall be allocated to States based on the share of each State of households that participate in the supplemental nutrition assistance program as reported to the Department of Agriculture for the most recent 12-month period for which data are available, adjusted by the Secretary (as of the date of enactment) for participation in disaster programs under section 5(h) of the Food and Nutrition Act of 2008 (7 U.S.C. 2014(h)); and

(B) 25 percent of the amounts available for each fiscal year shall be allocated to States based on the increase in the number of households that participate in the supplemental nutrition assistance program as reported to the Department of Agriculture over the most recent 12-month period for which data are available, adjusted by the Secretary (as of the date of enactment) for participation in disaster programs under section 5(h) of the Food and Nutrition Act of 2008 (7 U.S.C. 2014(h)).

(d) FOOD DISTRIBUTION PROGRAM ON INDIAN RESERVATIONS.—For the costs relating to facility improvements and equipment upgrades associated with the Food Distribution Program on Indian Reservations, as established under section 4(b) of the Food and Nutrition Act of 2008 (7 U.S.C. 2013(b)), the Secretary shall make available $5,000,000: *Provided,* That administrative cost-sharing requirements are not applicable to funds provided in accordance with this provision.

(e) TREATMENT OF JOBLESS WORKERS.—

(1) REMAINDER OF FISCAL YEAR 2009 THROUGH FISCAL YEAR 2010.—Beginning with the first month that begins not less than 25 days after the date of enactment of this Act and for each subsequent month through September 30, 2010, eligibility for supplemental nutrition assistance program benefits shall not be limited under section 6(o)(2) of the Food and Nutrition Act of 2008 unless an individual does not comply with the requirements of a program offered by the State agency that meets the standards of subparagraphs (B) or (C) of that paragraph.

(2) FISCAL YEAR 2011 AND THEREAFTER.—Beginning on October 1, 2010, for the purposes of section 6(o) of the Food and Nutrition Act of 2008 (7 U.S.C. 2015(o)), a State agency shall disregard any period during which an individual received benefits under the supplemental nutrition assistance program prior to October 1, 2010.

(f) FUNDING.—There are appropriated to the Secretary out of funds of the Treasury not otherwise appropriated such sums as are necessary to carry out this section.

SEC. 102. AGRICULTURAL DISASTER ASSISTANCE TRANSITION. (a) FEDERAL CROP INSURANCE ACT. Section 531(g) of the Federal Crop Insurance Act (7 U.S.C. 1531(g)) is amended by adding at the end the following:

"(7) 2008 TRANSITION ASSISTANCE.—

"(A) IN GENERAL.—Eligible producers on a farm described in subparagraph (A) of paragraph (4) that failed to timely pay the appropriate fee described in that subparagraph shall be eligible for assistance under this section

in accordance with subparagraph (B) if the eligible producers on the farm—

"(i) pay the appropriate fee described in paragraph (4)(A) not later than 90 days after the date of enactment of this paragraph; and

"(ii)(I) in the case of each insurable commodity of the eligible producers on the farm, excluding grazing land, agree to obtain a policy or plan of insurance under subtitle A (excluding a crop insurance pilot program under that subtitle) for the next insurance year for which crop insurance is available to the eligible producers on the farm at a level of coverage equal to 70 percent or more of the recorded or appraised average yield indemnified at 100 percent of the expected market price, or an equivalent coverage; and

"(II) in the case of each noninsurable commodity of the eligible producers on the farm, agree to file the required paperwork, and pay the administrative fee by the applicable State filing deadline, for the noninsured crop assistance program for the next year for which a policy is available.

"(B) AMOUNT OF ASSISTANCE.—Eligible producers on a farm that meet the requirements of subparagraph (A) shall be eligible to receive assistance under this section as if the eligible producers on the farm—

"(i) in the case of each insurable commodity of the eligible producers on the farm, had obtained a policy or plan of insurance for the 2008 crop year at a level of coverage not to exceed 70 percent or more of the recorded or appraised average yield indemnified at 100 percent of the expected market price, or an equivalent coverage; and

"(ii) in the case of each noninsurable commodity of the eligible producers on the farm, had filed the required paperwork, and paid the administrative fee by the applicable State filing deadline, for the noninsured crop assistance program for the 2008 crop year, except that in determining the level of coverage, the Secretary shall use 70 percent of the applicable yield.

"(C) EQUITABLE RELIEF.—Except as provided in subparagraph (D), eligible producers on a farm that met the requirements of paragraph (1) before the deadline described in paragraph (4)(A) and are eligible to receive, a disaster assistance payment under this section for a production loss during the 2008 crop year shall be eligible to receive an amount equal to the greater of—

"(i) the amount that would have been calculated under subparagraph (B) if the eligible producers on the farm had paid the appropriate fee under that subparagraph; or

"(ii) the amount that would have been calculated under subparagraph (A) of subsection (b)(3) if—

"(I) in clause (i) of that subparagraph, '120 percent' is substituted for '115 percent'; and

"(II) in clause (ii) of that subparagraph, '125' is substituted for '120 percent'.

"(D) LIMITATION.—For amounts made available under this paragraph, the Secretary may make such adjustments as are necessary to ensure that no producer receives a payment under this paragraph for an amount in excess of the assistance received by a similarly situated producer that had purchased the same or higher level of crop insurance prior to the date of enactment of this paragraph.

"(E) AUTHORITY OF THE SECRETARY.—The Secretary may provide such additional assistance as the Secretary considers appropriate to provide equitable treatment for eligible producers on a farm that suffered production losses in the 2008 crop year that result in multiyear production losses, as determined by the Secretary.

"(F) LACK OF ACCESS.—Notwithstanding any other provision of this section, the Secretary may provide assistance under this section to eligible producers on a farm that—

"(i) suffered a production loss due to a natural cause during the 2008 crop year; and

"(ii) as determined by the Secretary—

"(I)(aa) except as provided in item (bb), lack access to a policy or plan of insurance under subtitle A; or

"(bb) do not qualify for a written agreement because 1 or more farming practices, which the Secretary has determined are good farming practices, of the eligible producers on the farm differ significantly from the farming practices used by producers of the same crop in other regions of the United States; and

"(II) are not eligible for the noninsured crop disaster assistance program established by section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333).".

(b) TRADE ACT OF 1974.—Section 901(g) of the Trade Act of 1974 (19 U.S.C. 2497(g)) is amended by adding at the end the following:

"(7) 2008 TRANSITION ASSISTANCE.—

"(A) IN GENERAL.—Eligible producers on a farm described in subparagraph (A) of paragraph (4) that failed to timely pay the appropriate fee described in that subparagraph shall be eligible for assistance under this section in accordance with subparagraph (B) if the eligible producers on the farm—

"(i) pay the appropriate fee described in paragraph (4)(A) not later than 90 days after the date of enactment of this paragraph; and

"(ii)(I) in the case of each insurable commodity of the eligible producers on the farm, excluding grazing land, agree to obtain a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.) (excluding a crop insurance pilot program under that Act) for the next insurance year for which crop insurance is available to the eligible producers on the farm at a level of coverage equal to 70 percent or more of the recorded or appraised average yield

indemnified at 100 percent of the expected market price, or an equivalent coverage; and

"(II) in the case of each noninsurable commodity of the eligible producers on the farm, agree to file the required paperwork, and pay the administrative fee by the applicable State filing deadline, for the noninsured crop assistance program for the next year for which a policy is available.

"(B) AMOUNT OF ASSISTANCE.—Eligible producers on a farm that meet the requirements of subparagraph (A) shall be eligible to receive assistance under this section as if the eligible producers on the farm—

"(i) in the case of each insurable commodity of the eligible producers on the farm, had obtained a policy or plan of insurance for the 2008 crop year at a level of coverage not to exceed 70 percent or more of the recorded or appraised average yield indemnified at 100 percent of the expected market price, or an equivalent coverage; and

"(ii) in the case of each noninsurable commodity of the eligible producers on the farm, had filed the required paperwork, and paid the administrative fee by the applicable State filing deadline, for the noninsured crop assistance program for the 2008 crop year, except that in determining the level of coverage, the Secretary shall use 70 percent of the applicable yield.

"(C) EQUITABLE RELIEF.—Except as provided in subparagraph (D), eligible producers on a farm that met the requirements of paragraph (1) before the deadline described in paragraph (4)(A) and are eligible to receive, a disaster assistance payment under this section for a production loss during the 2008 crop year shall be eligible to receive an amount equal to the greater of—

"(i) the amount that would have been calculated under subparagraph (B) if the eligible producers on the farm had paid the appropriate fee under that subparagraph; or

"(ii) the amount that would have been calculated under subparagraph (A) of subsection (b)(3) if—

"(I) in clause (i) of that subparagraph, '120 percent' is substituted for '115 percent'; and

"(II) in clause (ii) of that subparagraph, '125' is substituted for '120 percent'.

"(D) LIMITATION.—For amounts made available under this paragraph, the Secretary may make such adjustments as are necessary to ensure that no producer receives a payment under this paragraph for an amount in excess of the assistance received by a similarly situated producer that had purchased the same or higher level of crop insurance prior to the date of enactment of this paragraph.

"(E) AUTHORITY OF THE SECRETARY.—The Secretary may provide such additional assistance as the Secretary considers appropriate to provide equitable treatment for eligible producers on a farm that suffered production losses in the 2008 crop year that result in multiyear production losses, as determined by the Secretary.

"(F) LACK OF ACCESS.—Notwithstanding any other provision of this section, the Secretary may provide assistance under this section to eligible producers on a farm that—

"(i) suffered a production loss due to a natural cause during the 2008 crop year; and

"(ii) as determined by the Secretary—

"(I)(aa) except as provided in item (bb), lack access to a policy or plan of insurance under subtitle A; or

"(bb) do not qualify for a written agreement because 1 or more farming practices, which the Secretary has determined are good farming practices, of the eligible producers on the farm differ significantly from the farming practices used by producers of the same crop in other regions of the United States; and

"(II) are not eligible for the noninsured crop disaster assistance program established by section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333).".

(c) FARM OPERATING LOANS.—

(1) IN GENERAL.—For the principal amount of direct farm operating loans under section 311 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1941), $173,367,000.

(2) DIRECT FARM OPERATING LOANS.—For the cost of direct farm operating loans, including the cost of modifying loans, as defined in section 502 of the Congressional Budget Act of 1974 (2 U.S.C. 661a), $20,440,000.

(d) 2008 AQUACULTURE ASSISTANCE.—

(1) DEFINITIONS.—In this subsection:

(A) ELIGIBLE AQUACULTURE PRODUCER.—The term "eligible aquaculture producer" means an aquaculture producer that during the 2008 calendar year, as determined by the Secretary—

(i) produced an aquaculture species for which feed costs represented a substantial percentage of the input costs of the aquaculture operation; and

(ii) experienced a substantial price increase of feed costs above the previous 5-year average.

(B) SECRETARY.—The term "Secretary" means the Secretary of Agriculture.

(2) GRANT PROGRAM.—

(A) IN GENERAL.—Of the funds of the Commodity Credit Corporation, the Secretary shall use not more than $50,000,000, to remain available until September 30, 2010, to carry out a program of grants to States to assist eligible aquaculture producers for losses associated with high feed input costs during the 2008 calendar year.

(B) NOTIFICATION.—Not later than 60 days after the date of enactment of this Act, the Secretary shall notify the State department of agriculture (or similar entity) in each State of the availability of funds to assist eligible aquaculture producers, including such terms as determined by the Secretary to be necessary for the equitable treatment of eligible aquaculture producers.

(C) PROVISION OF GRANTS.—

(i) IN GENERAL.—The Secretary shall make grants to States under this subsection on a pro rata basis based on the amount of aquaculture feed used in each State during the 2007 calendar year, as determined by the Secretary.

(ii) TIMING.—Not later than 120 days after the date of enactment of this Act, the Secretary shall make grants to States to provide assistance under this subsection.

(D) REQUIREMENTS.—The Secretary shall make grants under this subsection only to States that demonstrate to the satisfaction of the Secretary that the State will—

(i) use grant funds to assist eligible aquaculture producers;

(ii) provide assistance to eligible aquaculture producers not later than 60 days after the date on which the State receives grant funds; and

(iii) not later than 30 days after the date on which the State provides assistance to eligible aquaculture producers, submit to the Secretary a report that describes—

(I) the manner in which the State provided assistance;

(II) the amounts of assistance provided per species of aquaculture; and

(III) the process by which the State determined the levels of assistance to eligible aquaculture producers.

(3) REDUCTION IN PAYMENTS.—An eligible aquaculture producer that receives assistance under this subsection shall not be eligible to receive any other assistance under the supplemental agricultural disaster assistance program established under section 531 of the Federal Crop Insurance Act (7 U.S.C. 1531) and section 901 of the Trade Act of 1974 (19 U.S.C. 2497) for any losses in 2008 relating to the same species of aquaculture.

(4) REPORT TO CONGRESS.—Not later than 180 days after the date of enactment of this Act, the Secretary shall submit to the appropriate committees of Congress a report that—

(A) describes in detail the manner in which this subsection has been carried out; and

(B) includes the information reported to the Secretary under paragraph (2)(D)(iii).

SEC. 103. For fiscal years 2009 and 2010, in the case of each program established or amended by the Food, Conservation, and Energy Act of 2008 (Public Law 110–246), other than by title I of such Act, that is authorized or required to be carried out using funds of the Commodity Credit Corporation—

(1) such funds shall be available for the purpose of covering salaries and related administrative expenses, including technical assistance, associated with the implementation of the program, without regard to the limitation on the total amount of allotments and fund transfers contained in section 11 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714i); and

(2) the use of such funds for such purpose shall not be considered to be a fund transfer or allotment for purposes

of applying the limitation on the total amount of allotments and fund transfers contained in such section.

SEC. 104. In addition to other available funds, of the funds made available to the Rural Development mission area in this title, not more than 3 percent of the funds can be used for administrative costs to carry out loan, loan guarantee and grant activities funded in this title, which shall be transferred to and merged with the appropriation for "Rural Development, Salaries and Expenses": *Provided,* That of this amount $1,750,000 shall be committed to agency projects associated with maintaining the compliance, safety, and soundness of the portfolio of loans guaranteed through the section 502 guaranteed loan program.

SEC. 105. Of the amounts appropriated in this title to the "Rural Housing Service, Rural Community Facilities Program Account", the "Rural Business-Cooperative Service, Rural Business Program Account", and the ″Rural Utilities Service, Rural Water and Waste Disposal Program Account", at least 10 percent shall be allocated for assistance in persistent poverty counties: *Provided,* That for the purposes of this section, the term "persistent poverty counties" means any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1980, 1990, and 2000 decennial censuses.

TITLE II—COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES

DEPARTMENT OF COMMERCE

ECONOMIC DEVELOPMENT ADMINISTRATION

ECONOMIC DEVELOPMENT ASSISTANCE PROGRAMS

For an additional amount for "Economic Development Assistance Programs", $150,000,000: *Provided,* That $50,000,000 shall be for economic adjustment assistance as authorized by section 209 of the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3149): *Provided further,* That in allocating the funds provided in the previous proviso, the Secretary of Commerce shall give priority consideration to areas of the Nation that have experienced sudden and severe economic dislocation and job loss due to corporate restructuring: *Provided further*, That not to exceed 2 percent of the funds provided under this heading may be transferred to and merged with the appropriation for "Salaries and Expenses" for purposes of program administration and oversight: *Provided further*, That up to $50,000,000 of the funds provided under this heading may be transferred to federally authorized regional economic development commissions.

BUREAU OF THE CENSUS

PERIODIC CENSUSES AND PROGRAMS

For an additional amount for "Periodic Censuses and Programs", $1,000,000,000.

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM

For an amount for "Broadband Technology Opportunities Program", $4,700,000,000: *Provided,* That of the funds provided under this heading, not less than $4,350,000,000 shall be expended pursuant to division B of this Act, of which: not less than $200,000,000 shall be available for competitive grants for expanding public computer center capacity, including at community colleges and public libraries; not less than $250,000,000 shall be available for competitive grants for innovative programs to encourage sustainable adoption of broadband service; and $10,000,000 shall be transferred to "Department of Commerce, Office of Inspector General" for the purposes of audits and oversight of funds provided under this heading and such funds shall remain available until expended: *Provided further,* That of the funds provided under this heading, up to $350,000,000 may be expended pursuant to Public Law 110–385 (47 U.S.C. 1301 note) and for the purposes of developing and maintaining a broadband inventory map pursuant to division B of this Act: *Provided further,* That of the funds provided under this heading, amounts deemed necessary and appropriate by the Secretary of Commerce, in consultation with the Federal Communications Commission (FCC), may be transferred to the FCC for the purposes of developing a national broadband plan or for carrying out any other FCC responsibilities pursuant to division B of this Act, and only if the Committees on Appropriations of the House and the Senate are notified not less than 15 days in advance of the transfer of such funds: *Provided further,* That not more than 3 percent of funds provided under this heading may be used for administrative costs, and this limitation shall apply to funds which may be transferred to the FCC.

DIGITAL-TO-ANALOG CONVERTER BOX PROGRAM

For an amount for "Digital-to-Analog Converter Box Program", $650,000,000, for additional coupons and related activities under the program implemented under section 3005 of the Digital Television Transition and Public Safety Act of 2005: *Provided,* That of the amounts provided under this heading, $90,000,000 may be for education and outreach, including grants to organizations for programs to educate vulnerable populations, including senior citizens, minority communities, people with disabilities, low-income individuals, and people living in rural areas, about the transition and to provide one-on-one assistance to vulnerable populations, including help with converter box installation: *Provided further,* That the amounts provided in the previous proviso may be transferred to the Federal Communications Commission (FCC) if deemed necessary and appropriate by the Secretary of Commerce in consultation with the FCC, and only if the Committees on Appropriations of the House and the Senate are notified not less than 5 days in advance of transfer of such funds.

NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY

SCIENTIFIC AND TECHNICAL RESEARCH AND SERVICES

For an additional amount for "Scientific and Technical Research and Services", $220,000,000.

CONSTRUCTION OF RESEARCH FACILITIES

For an additional amount for "Construction of Research Facilities", $360,000,000, of which $180,000,000 shall be for a competitive construction grant program for research science buildings.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

OPERATIONS, RESEARCH, AND FACILITIES

For an additional amount for "Operations, Research, and Facilities", $230,000,000.

PROCUREMENT, ACQUISITION AND CONSTRUCTION

For an additional amount for "Procurement, Acquisition and Construction", $600,000,000.

OFFICE OF INSPECTOR GENERAL

For an additional amount for "Office of Inspector General", $6,000,000, to remain available until September 30, 2013.

DEPARTMENT OF JUSTICE

GENERAL ADMINISTRATION

OFFICE OF INSPECTOR GENERAL

For an additional amount for "Office of Inspector General", $2,000,000, to remain available until September 30, 2013.

STATE AND LOCAL LAW ENFORCEMENT ACTIVITIES

OFFICE ON VIOLENCE AGAINST WOMEN

VIOLENCE AGAINST WOMEN PREVENTION AND PROSECUTION PROGRAMS

For an additional amount for "Violence Against Women Prevention and Prosecution Programs", $225,000,000 for grants to combat violence against women, as authorized by part T of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796gg et seq.): *Provided,* That, $50,000,000 shall be for transitional housing assistance grants for victims of domestic violence, stalking or sexual assault as authorized by section 40299 of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322).

OFFICE OF JUSTICE PROGRAMS

STATE AND LOCAL LAW ENFORCEMENT ASSISTANCE

For an additional amount for "State and Local Law Enforcement Assistance", $2,000,000,000, for the Edward Byrne Memorial Justice Assistance Grant program as authorized by subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Acts of 1968 ("1968 Act"), (except that section 1001(c), and the special rules for Puerto Rico under section 505(g), of the 1968 Act, shall not apply for purposes of this Act).

For an additional amount for "State and Local Law Enforcement Assistance", $225,000,000, for competitive grants to improve the functioning of the criminal justice system, to assist victims of crime (other than compensation), and youth mentoring grants.

For an additional amount for "State and Local Law Enforcement Assistance", $40,000,000, for competitive grants to provide assistance and equipment to local law enforcement along the Southern border and in High-Intensity Drug Trafficking Areas to combat criminal narcotics activity stemming from the Southern border, of which $10,000,000 shall be transferred to "Bureau of Alcohol, Tobacco, Firearms and Explosives, Salaries and Expenses" for the ATF Project Gunrunner.

For an additional amount for "State and Local Law Enforcement Assistance", $225,000,000, for assistance to Indian tribes, notwithstanding Public Law 108–199, division B, title I, section 112(a)(1) (118 Stat. 62), which shall be available for grants under section 20109 of subtitle A of title II of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322).

For an additional amount for "State and Local Law Enforcement Assistance", $100,000,000, to be distributed by the Office for Victims of Crime in accordance with section 1402(d)(4) of the Victims of Crime Act of 1984 (Public Law 98–473).

For an additional amount for "State and Local Law Enforcement Assistance", $125,000,000, for assistance to law enforcement in rural States and rural areas, to prevent and combat crime, especially drug-related crime.

For an additional amount for "State and Local Law Enforcement Assistance", $50,000,000, for Internet Crimes Against Children (ICAC) initiatives.

COMMUNITY ORIENTED POLICING SERVICES

For an additional amount for "Community Oriented Policing Services", for grants under section 1701 of title I of the 1968 Omnibus Crime Control and Safe Streets Act (42 U.S.C. 3796dd) for hiring and rehiring of additional career law enforcement officers under part Q of such title, notwithstanding subsection (i) of such section, $1,000,000,000.

SALARIES AND EXPENSES

For an additional amount, not elsewhere specified in this title, for management and administration and oversight of programs within the Office on Violence Against Women, the Office of Justice Programs, and the Community Oriented Policing Services Office, $10,000,000.

SCIENCE

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

SCIENCE

For an additional amount for "Science", $400,000,000.

AERONAUTICS

For an additional amount for "Aeronautics", $150,000,000.

EXPLORATION

For an additional amount for "Exploration", $400,000,000.

CROSS AGENCY SUPPORT

For an additional amount for "Cross Agency Support", $50,000,000.

OFFICE OF INSPECTOR GENERAL

For an additional amount for "Office of Inspector General", $2,000,000, to remain available until September 30, 2013.

NATIONAL SCIENCE FOUNDATION

RESEARCH AND RELATED ACTIVITIES

For an additional amount for "Research and Related Activities", $2,500,000,000: *Provided*, That $300,000,000 shall be available solely for the Major Research Instrumentation program and $200,000,000 shall be for activities authorized by title II of Public Law 100–570 for academic research facilities modernization.

EDUCATION AND HUMAN RESOURCES

For an additional amount for "Education and Human Resources", $100,000,000.

MAJOR RESEARCH EQUIPMENT AND FACILITIES CONSTRUCTION

For an additional amount for "Major Research Equipment and Facilities Construction", $400,000,000.

OFFICE OF INSPECTOR GENERAL

For an additional amount for "Office of Inspector General", $2,000,000, to remain available until September 30, 2013.

GENERAL PROVISION—THIS TITLE

SEC. 201. Sections 1701(g) and 1704(c) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796dd(g) and 3796dd–3(c)) shall not apply with respect to funds appropriated in this or any other Act making appropriations for fiscal year 2009 or 2010 for Community Oriented Policing Services authorized under part Q of such Act of 1968.

TITLE III—DEPARTMENT OF DEFENSE

OPERATION AND MAINTENANCE

OPERATION AND MAINTENANCE, ARMY

For an additional amount for "Operation and Maintenance, Army", $1,474,525,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, NAVY

For an additional amount for "Operation and Maintenance, Navy", $657,051,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, MARINE CORPS

For an additional amount for "Operation and Maintenance, Marine Corps", $113,865,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, AIR FORCE

For an additional amount for "Operation and Maintenance, Air Force", $1,095,959,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, ARMY RESERVE

For an additional amount for "Operation and Maintenance, Army Reserve", $98,269,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, NAVY RESERVE

For an additional amount for "Operation and Maintenance, Navy Reserve", $55,083,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, MARINE CORPS RESERVE

For an additional amount for "Operation and Maintenance, Marine Corps Reserve", $39,909,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, AIR FORCE RESERVE

For an additional amount for "Operation and Maintenance, Air Force Reserve", $13,187,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, ARMY NATIONAL GUARD

For an additional amount for "Operation and Maintenance, Army National Guard", $266,304,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

OPERATION AND MAINTENANCE, AIR NATIONAL GUARD

For an additional amount for "Operation and Maintenance, Air National Guard", $25,848,000, to remain available for obligation until September 30, 2010, to improve, repair and modernize Department of Defense facilities, restore and modernize real property to include barracks, and invest in the energy efficiency of Department of Defense facilities.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, ARMY

For an additional amount for "Research, Development, Test and Evaluation, Army", $75,000,000, to remain available for obligation until September 30, 2010.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, NAVY

For an additional amount for "Research, Development, Test and Evaluation, Navy", $75,000,000, to remain available for obligation until September 30, 2010.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, AIR FORCE

For an additional amount for "Research, Development, Test and Evaluation, Air Force", $75,000,000, to remain available for obligation until September 30, 2010.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, DEFENSE-WIDE

For an additional amount for "Research, Development, Test and Evaluation, Defense-Wide", $75,000,000, to remain available for obligation until September 30, 2010.

OTHER DEPARTMENT OF DEFENSE PROGRAMS

DEFENSE HEALTH PROGRAM

For an additional amount for "Defense Health Program", $400,000,000 for operation and maintenance, to remain available for obligation until September 30, 2010, to improve, repair and modernize military medical facilities, and invest in the energy efficiency of military medical facilities.

OFFICE OF THE INSPECTOR GENERAL

For an additional amount for "Office of the Inspector General", $15,000,000 for operation and maintenance, to remain available for obligation until September 30, 2011.

TITLE IV—ENERGY AND WATER DEVELOPMENT

DEPARTMENT OF DEFENSE—CIVIL

DEPARTMENT OF THE ARMY

CORPS OF ENGINEERS—CIVIL

INVESTIGATIONS

For an additional amount for "Investigations", $25,000,000: *Provided,* That funds provided under this heading in this title shall only be used for programs, projects or activities that heretofore or hereafter receive funds provided in Acts making appropriations available for Energy and Water Development: *Provided further,* That funds provided under this heading in this title shall be used for programs, projects or activities or elements of programs, projects or activities that can be completed within the funds made available in that account and that will not require new budget authority to complete: *Provided further,* That for projects that are being completed with funds appropriated in this Act that would otherwise be expired for obligation, expired funds appropriated in this Act may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any: *Provided further,* That the Secretary of the Army shall submit a quarterly report to the Committees on Appropriations of the House of Representatives and the Senate detailing the allocation, obligation and expenditures of these funds, beginning not later than 45 days after enactment of this Act: *Provided further,* That the Secretary shall have unlimited reprogramming authority for these funds provided under this heading.

CONSTRUCTION

For an additional amount for "Construction", $2,000,000,000: *Provided,* That not less than $200,000,000 of the funds provided

shall be for water-related environmental infrastructure assistance: *Provided further,* That section 102 of Public Law 109–103 (33 U.S.C. 2221) shall not apply to funds provided in this title: *Provided further,* That notwithstanding any other provision of law, funds provided in this paragraph shall not be cost shared with the Inland Waterways Trust Fund as authorized in Public Law 99–662: *Provided further,* That funds provided under this heading in this title shall only be used for programs, projects or activities that heretofore or hereafter receive funds provided in Acts making appropriations available for Energy and Water Development: *Provided further,* That funds provided under this heading in this title shall be used for programs, projects or activities or elements of programs, projects or activities that can be completed within the funds made available in that account and that will not require new budget authority to complete: *Provided further,* That the limitation concerning total project costs in section 902 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 2280), shall not apply during fiscal year 2009 to any project that received funds provided in this title: *Provided further,* That funds appropriated under this heading may be used by the Secretary of the Army, acting through the Chief of Engineers, to undertake work authorized to be carried out in accordance with section 14 of the Flood Control Act of 1946 (33 U.S.C. 701r); section 205 of the Flood Control Act of 1948 (33 U.S.C. 701s); section 206 of the Water Resources Development Act of 1996 (33 U.S.C. 2330); or section 1135 of the Water Resources Development Act of 1986 (33 U.S.C. 2309a), notwithstanding the program cost limitations set forth in those sections: *Provided further,* That for projects that are being completed with funds appropriated in this Act that would otherwise be expired for obligation, expired funds appropriated in this Act may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any: *Provided further,* That the Secretary of the Army shall submit a quarterly report to the Committees on Appropriations of the House of Representatives and the Senate detailing the allocation, obligation and expenditures of these funds, beginning not later than 45 days after enactment of this Act: *Provided further,* That the Secretary shall have unlimited reprogramming authority for these funds provided under this heading.

MISSISSIPPI RIVER AND TRIBUTARIES

For an additional amount for "Mississippi River and Tributaries", $375,000,000: *Provided,* That funds provided under this heading in this title shall only be used for programs, projects or activities that heretofore or hereafter receive funds provided in Acts making appropriations available for Energy and Water Development: *Provided further,* That funds provided under this heading in this title shall be used for programs, projects or activities or elements of programs, projects or activities that can be completed within the funds made available in that account and that will not require new budget authority to complete: *Provided further,* That the limitation concerning total project costs in section 902 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 2280), shall not apply during fiscal year 2009 to any project that received funds provided in this title: *Provided further,* That for projects that are being completed with funds appropriated

in this Act that would otherwise be expired for obligation, expired funds appropriated in this Act may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any: *Provided further,* That the Secretary of the Army shall submit a quarterly report to the Committees on Appropriations of the House of Representatives and the Senate detailing the allocation, obligation and expenditures of these funds, beginning not later than 45 days after enactment of this Act: *Provided further,* That the Secretary shall have unlimited reprogramming authority for these funds provided under this heading.

OPERATION AND MAINTENANCE

For an additional amount for "Operation and Maintenance", $2,075,000,000: *Provided,* That funds provided under this heading in this title shall only be used for programs, projects or activities that heretofore or hereafter receive funds provided in Acts making appropriations available for Energy and Water Development: *Provided further,* That funds provided under this heading in this title shall be used for programs, projects or activities or elements of programs, projects or activities that can be completed within the funds made available in that account and that will not require new budget authority to complete: *Provided further,* That section 9006 of Public Law 110–114 shall not apply to funds provided in this title: *Provided further,* That for projects that are being completed with funds appropriated in this Act that would otherwise be expired for obligation, expired funds appropriated in this Act may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any: *Provided further,* That the Secretary of the Army shall submit a quarterly report to the Committees on Appropriations of the House of Representatives and the Senate detailing the allocation, obligation and expenditures of these funds, beginning not later than 45 days after enactment of this Act: *Provided further,* That the Secretary shall have unlimited reprogramming authority for these funds provided under this heading.

REGULATORY PROGRAM

For an additional amount for "Regulatory Program", $25,000,000.

FORMERLY UTILIZED SITES REMEDIAL ACTION PROGRAM

For an additional amount for "Formerly Utilized Sites Remedial Action Program", $100,000,000: *Provided,* That funds provided under this heading in this title shall be used for programs, projects or activities or elements of programs, projects or activities that can be completed within the funds made available in that account and that will not require new budget authority to complete: *Provided further,* That for projects that are being completed with funds appropriated in this Act that would otherwise be expired for obligation, expired funds appropriated in this Act may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any: *Provided further,* That the Secretary of the Army shall submit a quarterly report to the Committees on Appropriations

of the House of Representatives and the Senate detailing the allocation, obligation and expenditures of these funds, beginning not later than 45 days after enactment of this Act: *Provided further,* That the Secretary shall have unlimited reprogramming authority for these funds provided under this heading.

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

water and related resources

For an additional amount for "Water and Related Resources", $1,000,000,000: *Provided,* That of the amount appropriated under this heading, not less than $126,000,000 shall be used for water reclamation and reuse projects authorized under title XVI of Public Law 102–575: *Provided further,* That funds provided in this Act shall be used for elements of projects, programs or activities that can be completed within these funding amounts and not create budgetary obligations in future fiscal years: *Provided further,* That $50,000,000 of the funds provided under this heading may be transferred to the Department of the Interior for programs, projects and activities authorized by the Central Utah Project Completion Act (titles II–V of Public Law 102–575): *Provided further,* That $50,000,000 of the funds provided under this heading may be used for programs, projects, and activities authorized by the California Bay-Delta Restoration Act (Public Law 108–361): *Provided further,* That not less than $60,000,000 of the funds provided under this heading shall be used for rural water projects and shall be expended primarily on water intake and treatment facilities of such projects: *Provided further,* That not less than $10,000,000 of the funds provided under this heading shall be used for a bureau-wide inspection of canals program in urbanized areas: *Provided further,* That the costs of extraordinary maintenance and replacement activities carried out with funds provided in this Act shall be repaid pursuant to existing authority, except the length of repayment period shall be as determined by the Commissioner, but in no case shall the repayment period exceed 50 years and the repayment shall include interest, at a rate determined by the Secretary of the Treasury as of the beginning of the fiscal year in which the work is commenced, on the basis of average market yields on outstanding marketable obligations of the United States with the remaining periods of maturity comparable to the applicable reimbursement period of the project adjusted to the nearest one-eighth of 1 percent on the unamortized balance of any portion of the loan: *Provided further,* That for projects that are being completed with funds appropriated in this Act that would otherwise be expired for obligation, expired funds appropriated in this Act may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any: *Provided further,* That the Secretary of the Interior shall submit a quarterly report to the Committees on Appropriations of the House of Representatives and the Senate detailing the allocation, obligation and expenditures of these funds, beginning not later than 45 days after enactment of this Act: *Provided further,* That the Secretary shall have unlimited reprogramming authority for these funds provided under this heading.

DEPARTMENT OF ENERGY

ENERGY PROGRAMS

Energy Efficiency and Renewable Energy

For an additional amount for "Energy Efficiency and Renewable Energy", $16,800,000,000: *Provided,* That $3,200,000,000 shall be available for Energy Efficiency and Conservation Block Grants for implementation of programs authorized under subtitle E of title V of the Energy Independence and Security Act of 2007 (42 U.S.C. 17151 et seq.), of which $2,800,000,000 is available through the formula in subtitle E: *Provided further,* That the Secretary may use the most recent and accurate population data available to satisfy the requirements of section 543(b) of the Energy Independence and Security Act of 2007: *Provided further,* That the remaining $400,000,000 shall be awarded on a competitive basis: *Provided further,* That $5,000,000,000 shall be for the Weatherization Assistance Program under part A of title IV of the Energy Conservation and Production Act (42 U.S.C. 6861 et seq.): *Provided further,* That $3,100,000,000 shall be for the State Energy Program authorized under part D of title III of the Energy Policy and Conservation Act (42 U.S.C. 6321): *Provided further,* That $2,000,000,000 shall be available for grants for the manufacturing of advanced batteries and components and the Secretary shall provide facility funding awards under this section to manufacturers of advanced battery systems and vehicle batteries that are produced in the United States, including advanced lithium ion batteries, hybrid electrical systems, component manufacturers, and software designers: *Provided further,* That notwithstanding section 3304 of title 5, United States Code, and without regard to the provisions of sections 3309 through 3318 of such title 5, the Secretary of Energy, upon a determination that there is a severe shortage of candidates or a critical hiring need for particular positions, may from within the funds provided, recruit and directly appoint highly qualified individuals into the competitive service: *Provided further,* That such authority shall not apply to positions in the Excepted Service or the Senior Executive Service: *Provided further,* That any action authorized herein shall be consistent with the merit principles of section 2301 of such title 5, and the Department shall comply with the public notice requirements of section 3327 of such title 5.

Electricity Delivery and Energy Reliability

For an additional amount for "Electricity Delivery and Energy Reliability," $4,500,000,000: *Provided*, That funds shall be available for expenses necessary for electricity delivery and energy reliability activities to modernize the electric grid, to include demand responsive equipment, enhance security and reliability of the energy infrastructure, energy storage research, development, demonstration and deployment, and facilitate recovery from disruptions to the energy supply, and for implementation of programs authorized under title XIII of the Energy Independence and Security Act of 2007 (42 U.S.C. 17381 et seq.): *Provided further,* That $100,000,000 shall be available for worker training activities: *Provided further,* That notwithstanding section 3304 of title 5, United States Code, and without regard to the provisions of sections 3309 through 3318

of such title 5, the Secretary of Energy, upon a determination that there is a severe shortage of candidates or a critical hiring need for particular positions, may from within the funds provided, recruit and directly appoint highly qualified individuals into the competitive service: *Provided further,* That such authority shall not apply to positions in the Excepted Service or the Senior Executive Service: *Provided further,* That any action authorized herein shall be consistent with the merit principles of section 2301 of such title 5, and the Department shall comply with the public notice requirements of section 3327 of such title 5: *Provided further,* That for the purpose of facilitating the development of regional transmission plans, the Office of Electricity Delivery and Energy Reliability within the Department of Energy is provided $80,000,000 within the available funds to conduct a resource assessment and an analysis of future demand and transmission requirements after consultation with the Federal Energy Regulatory Commission: *Provided further,* That the Office of Electricity Delivery and Energy Reliability in coordination with the Federal Energy Regulatory Commission will provide technical assistance to the North American Electric Reliability Corporation, the regional reliability entities, the States, and other transmission owners and operators for the formation of interconnection-based transmission plans for the Eastern and Western Interconnections and ERCOT: *Provided further,* That such assistance may include modeling, support to regions and States for the development of coordinated State electricity policies, programs, laws, and regulations: *Provided further,* That $10,000,000 is provided to implement section 1305 of Public Law 110–140: *Provided further*, That the Secretary of Energy may use or transfer amounts provided under this heading to carry out new authority for transmission improvements, if such authority is enacted in any subsequent Act, consistent with existing fiscal management practices and procedures.

FOSSIL ENERGY RESEARCH AND DEVELOPMENT

For an additional amount for "Fossil Energy Research and Development", $3,400,000,000.

NON-DEFENSE ENVIRONMENTAL CLEANUP

For an additional amount for "Non-Defense Environmental Cleanup", $483,000,000.

URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND

For an additional amount for "Uranium Enrichment Decontamination and Decommissioning Fund", $390,000,000, of which $70,000,000 shall be available in accordance with title X, subtitle A of the Energy Policy Act of 1992.

SCIENCE

For an additional amount for "Science", $1,600,000,000.

ADVANCED RESEARCH PROJECTS AGENCY—ENERGY

For the Advanced Research Projects Agency—Energy, $400,000,000, as authorized under section 5012 of the America COMPETES Act (42 U.S.C. 16538).

TITLE 17—INNOVATIVE TECHNOLOGY LOAN GUARANTEE PROGRAM

For an additional amount for the cost of guaranteed loans authorized by section 1705 of the Energy Policy Act of 2005, $6,000,000,000, available until expended, to pay the costs of guarantees made under this section: *Provided,* That of the amount provided for title XVII, $25,000,000 shall be used for administrative expenses in carrying out the guaranteed loan program: *Provided further,* That of the amounts provided for title XVII, $10,000,000 shall be transferred to and available for administrative expenses for the Advanced Technology Vehicles Manufacturing Loan Program.

OFFICE OF THE INSPECTOR GENERAL

For necessary expenses of the Office of the Inspector General in carrying out the provisions of the Inspector General Act of 1978, as amended, $15,000,000, to remain available until September 30, 2012.

ENVIRONMENTAL AND OTHER DEFENSE ACTIVITIES

DEFENSE ENVIRONMENTAL CLEANUP

For an additional amount for "Defense Environmental Cleanup," $5,127,000,000.

CONSTRUCTION, REHABILITATION, OPERATION, AND MAINTENANCE, WESTERN AREA POWER ADMINISTRATION

For carrying out the functions authorized by title III, section 302(a)(1)(E) of the Act of August 4, 1977 (42 U.S.C. 7152), and other related activities including conservation and renewable resources programs as authorized, $10,000,000, to remain available until expended: *Provided,* That the Administrator shall establish such personnel staffing levels as he deems necessary to economically and efficiently complete the activities pursued under the authority granted by section 402 of this Act: *Provided further,* That this appropriation is non-reimbursable.

GENERAL PROVISIONS—THIS TITLE

SEC. 401. BONNEVILLE POWER ADMINISTRATION BORROWING AUTHORITY. For the purposes of providing funds to assist in financing the construction, acquisition, and replacement of the transmission system of the Bonneville Power Administration and to implement the authority of the Administrator of the Bonneville Power Administration under the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839 et seq.), an additional $3,250,000,000 in borrowing authority is made available under the Federal Columbia River Transmission System Act (16 U.S.C. 838 et seq.), to remain outstanding at any time.

SEC. 402. WESTERN AREA POWER ADMINISTRATION BORROWING AUTHORITY. The Hoover Power Plant Act of 1984 (Public Law 98–381) is amended by adding at the end the following:

"TITLE III—BORROWING AUTHORITY

"SEC. 301. WESTERN AREA POWER ADMINISTRATION BORROWING AUTHORITY.

"(a) DEFINITIONS.—In this section:

"(1) ADMINISTRATOR.—The term 'Administrator' means the Administrator of the Western Area Power Administration.

"(2) SECRETARY.—The term 'Secretary' means the Secretary of the Treasury.

"(b) AUTHORITY.—

"(1) IN GENERAL.—Notwithstanding any other provision of law, subject to paragraphs (2) through (5)—

"(A) the Western Area Power Administration may borrow funds from the Treasury; and

"(B) the Secretary shall, without further appropriation and without fiscal year limitation, loan to the Western Area Power Administration, on such terms as may be fixed by the Administrator and the Secretary, such sums (not to exceed, in the aggregate (including deferred interest), $3,250,000,000 in outstanding repayable balances at any one time) as, in the judgment of the Administrator, are from time to time required for the purpose of—

"(i) constructing, financing, facilitating, planning, operating, maintaining, or studying construction of new or upgraded electric power transmission lines and related facilities with at least one terminus within the area served by the Western Area Power Administration; and

"(ii) delivering or facilitating the delivery of power generated by renewable energy resources constructed or reasonably expected to be constructed after the date of enactment of this section.

"(2) INTEREST.—The rate of interest to be charged in connection with any loan made pursuant to this subsection shall be fixed by the Secretary, taking into consideration market yields on outstanding marketable obligations of the United States of comparable maturities as of the date of the loan.

"(3) REFINANCING.—The Western Area Power Administration may refinance loans taken pursuant to this section within the Treasury.

"(4) PARTICIPATION.—The Administrator may permit other entities to participate in the financing, construction and ownership projects financed under this section.

"(5) CONGRESSIONAL REVIEW OF DISBURSEMENT.—Effective upon the date of enactment of this section, the Administrator shall have the authority to have utilized $1,750,000,000 at any one time. If the Administrator seeks to borrow funds above $1,750,000,000, the funds will be disbursed unless there is enacted, within 90 calendar days of the first such request, a joint resolution that rescinds the remainder of the balance of the borrowing authority provided in this section.

"(c) TRANSMISSION LINE AND RELATED FACILITY PROJECTS.—

"(1) IN GENERAL.—For repayment purposes, each transmission line and related facility project in which the Western Area Power Administration participates pursuant to this section shall be treated as separate and distinct from—

"(A) each other such project; and

"(B) all other Western Area Power Administration power and transmission facilities.

"(2) PROCEEDS.—The Western Area Power Administration shall apply the proceeds from the use of the transmission capacity from an individual project under this section to the repayment of the principal and interest of the loan from the Treasury attributable to that project, after reserving such funds as the Western Area Power Administration determines are necessary—

"(A) to pay for any ancillary services that are provided; and

"(B) to meet the costs of operating and maintaining the new project from which the revenues are derived.

"(3) SOURCE OF REVENUE.—Revenue from the use of projects under this section shall be the only source of revenue for—

"(A) repayment of the associated loan for the project; and

"(B) payment of expenses for ancillary services and operation and maintenance.

"(4) LIMITATION ON AUTHORITY.—Nothing in this section confers on the Administrator any additional authority or obligation to provide ancillary services to users of transmission facilities developed under this section.

"(5) TREATMENT OF CERTAIN REVENUES.—Revenue from ancillary services provided by existing Federal power systems to users of transmission projects funded pursuant to this section shall be treated as revenue to the existing power system that provided the ancillary services.

"(d) CERTIFICATION.—

"(1) IN GENERAL.—For each project in which the Western Area Power Administration participates pursuant to this section, the Administrator shall certify, prior to committing funds for any such project, that—

"(A) the project is in the public interest;

"(B) the project will not adversely impact system reliability or operations, or other statutory obligations; and

"(C) it is reasonable to expect that the proceeds from the project shall be adequate to make repayment of the loan.

"(2) FORGIVENESS OF BALANCES.—

"(A) IN GENERAL.—If, at the end of the useful life of a project, there is a remaining balance owed to the Treasury under this section, the balance shall be forgiven.

"(B) UNCONSTRUCTED PROJECTS.—Funds expended to study projects that are considered pursuant to this section but that are not constructed shall be forgiven.

"(C) NOTIFICATION.—The Administrator shall notify the Secretary of such amounts as are to be forgiven under this paragraph.

"(e) PUBLIC PROCESSES.—

"(1) POLICIES AND PRACTICES.—Prior to requesting any loans under this section, the Administrator shall use a public

process to develop practices and policies that implement the authority granted by this section.

"(2) REQUESTS FOR INTEREST.—In the course of selecting potential projects to be funded under this section, the Administrator shall seek Requests For Interest from entities interested in identifying potential projects through one or more notices published in the Federal Register."

SEC. 403. SET-ASIDE FOR MANAGEMENT AND OVERSIGHT. Up to 0.5 percent of each amount appropriated in this title may be used for the expenses of management and oversight of the programs, grants, and activities funded by such appropriation, and may be transferred by the head of the Federal department or agency involved to any other appropriate account within the department or agency for that purpose: *Provided*, That the Secretary will provide a report to the Committees on Appropriations of the House of Representatives and the Senate 30 days prior to the transfer: *Provided further*, That funds set aside under this section shall remain available for obligation until September 30, 2012.

SEC. 404. TECHNICAL CORRECTIONS TO THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007. (a) Section 543(a) of the Energy Independence and Security Act of 2007 (42 U.S.C. 17153(a)) is amended—

(1) by redesignating paragraphs (2) through (4) as paragraphs (3) through (5), respectively; and

(2) by striking paragraph (1) and inserting the following:

"(1) 34 percent to eligible units of local government—alternative 1, in accordance with subsection (b);

"(2) 34 percent to eligible units of local government—alternative 2, in accordance with subsection (b);".

(b) Section 543(b) of the Energy Independence and Security Act of 2007 (42 U.S.C. 17153(b)) is amended by striking "subsection (a)(1)" and inserting "subsection (a)(1) or (2)".

(c) Section 548(a)(1) of the Energy Independence and Security Act of 2007 (42 U.S.C. 17158(a)(1)) is amending by striking "; provided" and all that follows through "541(3)(B)".

SEC. 405. AMENDMENTS TO TITLE XIII OF THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007. Title XIII of the Energy Independence and Security Act of 2007 (42 U.S.C. 17381 and following) is amended as follows:

(1) By amending subparagraph (A) of section 1304(b)(3) to read as follows:

"(A) IN GENERAL.—In carrying out the initiative, the Secretary shall provide financial support to smart grid demonstration projects in urban, suburban, tribal, and rural areas, including areas where electric system assets are controlled by nonprofit entities and areas where electric system assets are controlled by investor-owned utilities.".

(2) By amending subparagraph (C) of section 1304(b)(3) to read as follows:

"(C) FEDERAL SHARE OF COST OF TECHNOLOGY INVESTMENTS.—The Secretary shall provide to an electric utility described in subparagraph (B) or to other parties financial assistance for use in paying an amount equal to not more than 50 percent of the cost of qualifying advanced grid technology investments made by the electric utility or other party to carry out a demonstration project.".

(3) By inserting after section 1304(b)(3)(D) the following new subparagraphs:

"(E) AVAILABILITY OF DATA.—The Secretary shall establish and maintain a smart grid information clearinghouse in a timely manner which will make data from smart grid demonstration projects and other sources available to the public. As a condition of receiving financial assistance under this subsection, a utility or other participant in a smart grid demonstration project shall provide such information as the Secretary may require to become available through the smart grid information clearinghouse in the form and within the timeframes as directed by the Secretary. The Secretary shall assure that business proprietary information and individual customer information is not included in the information made available through the clearinghouse.

"(F) OPEN PROTOCOLS AND STANDARDS.—The Secretary shall require as a condition of receiving funding under this subsection that demonstration projects utilize open protocols and standards (including Internet-based protocols and standards) if available and appropriate.".

(4) By amending paragraph (2) of section 1304(c) to read as follows:

"(2) to carry out subsection (b), such sums as may be necessary.".

(5) By amending subsection (a) of section 1306 by striking "reimbursement of one-fifth (20 percent)" and inserting "grants of up to one-half (50 percent)".

(6) By striking the last sentence of subsection (b)(9) of section 1306.

(7) By striking "are eligible for" in subsection (c)(1) of section 1306 and inserting "utilize".

(8) By amending subsection (e) of section 1306 to read as follows:

"(e) PROCEDURES AND RULES.—(1) The Secretary shall, within 60 days after the enactment of the American Recovery and Reinvestment Act of 2009, by means of a notice of intent and subsequent solicitation of grant proposals—

"(A) establish procedures by which applicants can obtain grants of not more than one-half of their documented costs;

"(B) require as a condition of receiving funding under this subsection that demonstration projects utilize open protocols and standards (including Internet-based protocols and standards) if available and appropriate;

"(C) establish procedures to ensure that there is no duplication or multiple payment for the same investment or costs, that the grant goes to the party making the actual expenditures for the qualifying Smart Grid investments, and that the grants made have a significant effect in encouraging and facilitating the development of a smart grid;

"(D) establish procedures to ensure there will be public records of grants made, recipients, and qualifying Smart Grid investments which have received grants; and

"(E) establish procedures to provide advance payment of moneys up to the full amount of the grant award.

"(2) The Secretary shall have discretion and exercise reasonable judgment to deny grants for investments that do not qualify.".

SEC. 406. RENEWABLE ENERGY AND ELECTRIC POWER TRANSMISSION LOAN GUARANTEE PROGRAM. (a) AMENDMENT.—Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511 et seq.) is amended by adding the following at the end:

"SEC. 1705. TEMPORARY PROGRAM FOR RAPID DEPLOYMENT OF RENEWABLE ENERGY AND ELECTRIC POWER TRANSMISSION PROJECTS.

"(a) IN GENERAL.—Notwithstanding section 1703, the Secretary may make guarantees under this section only for the following categories of projects that commence construction not later than September 30, 2011:

"(1) Renewable energy systems, including incremental hydropower, that generate electricity or thermal energy, and facilities that manufacture related components.

"(2) Electric power transmission systems, including upgrading and reconductoring projects.

"(3) Leading edge biofuel projects that will use technologies performing at the pilot or demonstration scale that the Secretary determines are likely to become commercial technologies and will produce transportation fuels that substantially reduce life-cycle greenhouse gas emissions compared to other transportation fuels.

"(b) FACTORS RELATING TO ELECTRIC POWER TRANSMISSION SYSTEMS.—In determining to make guarantees to projects described in subsection (a)(2), the Secretary may consider the following factors:

"(1) The viability of the project without guarantees.

"(2) The availability of other Federal and State incentives.

"(3) The importance of the project in meeting reliability needs.

"(4) The effect of the project in meeting a State or region's environment (including climate change) and energy goals.

"(c) WAGE RATE REQUIREMENTS.—The Secretary shall require that each recipient of support under this section provide reasonable assurance that all laborers and mechanics employed in the performance of the project for which the assistance is provided, including those employed by contractors or subcontractors, will be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of part A of subtitle II of title 40, United States Code (commonly referred to as the 'Davis-Bacon Act').

"(d) LIMITATION.—Funding under this section for projects described in subsection (a)(3) shall not exceed $500,000,000.

"(e) SUNSET.—The authority to enter into guarantees under this section shall expire on September 30, 2011.".

(b) TABLE OF CONTENTS AMENDMENT.—The table of contents for the Energy Policy Act of 2005 is amended by inserting after the item relating to section 1704 the following new item:

"Sec. 1705. Temporary program for rapid deployment of renewable energy and electric power transmission projects.".

SEC. 407. WEATHERIZATION ASSISTANCE PROGRAM AMENDMENTS. (a) INCOME LEVEL.—Section 412(7) of the Energy Conservation and Production Act (42 U.S.C. 6862(7)) is amended by striking "150 percent" both places it appears and inserting "200 percent".

(b) ASSISTANCE LEVEL PER DWELLING UNIT.—Section 415(c)(1) of the Energy Conservation and Production Act (42 U.S.C. 6865(c)(1)) is amended by striking "$2,500" and inserting "$6,500".

(c) EFFECTIVE USE OF FUNDS.—In providing funds made available by this Act for the Weatherization Assistance Program, the Secretary may encourage States to give priority to using such funds for the most cost-effective efficiency activities, which may include insulation of attics, if, in the Secretary's view, such use of funds would increase the effectiveness of the program.

(d) TRAINING AND TECHNICAL ASSISTANCE.—Section 416 of the Energy Conservation and Production Act (42 U.S.C. 6866) is amended by striking "10 percent" and by inserting "up to 20 percent".

(e) ASSISTANCE FOR PREVIOUSLY WEATHERIZED DWELLING UNITS.—Section 415(c)(2) of the Energy Conservation and Production Act (42 U.S.C. 6865(c)(2)) is amended by striking "September 30, 1979" and inserting "September 30, 1994".

SEC. 408. TECHNICAL CORRECTIONS TO PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978. (a) Section 111(d) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2621(d)) is amended by redesignating paragraph (16) relating to consideration of smart grid investments (added by section 1307(a) of Public Law 110–140) as paragraph (18) and by redesignating paragraph (17) relating to smart grid information (added by section 1308(a) of Public Law 110–140) as paragraph (19).

(b) Subsections (b) and (d) of section 112 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622) are each amended by striking "(17) through (18)" in each place it appears and inserting "(16) through (19)".

SEC. 409. RENEWABLE ELECTRICITY TRANSMISSION STUDY. In completing the 2009 National Electric Transmission Congestion Study, the Secretary of Energy shall include—

(1) an analysis of the significant potential sources of renewable energy that are constrained in accessing appropriate market areas by lack of adequate transmission capacity;

(2) an analysis of the reasons for failure to develop the adequate transmission capacity;

(3) recommendations for achieving adequate transmission capacity;

(4) an analysis of the extent to which legal challenges filed at the State and Federal level are delaying the construction of transmission necessary to access renewable energy; and

(5) an explanation of assumptions and projections made in the Study, including—

(A) assumptions and projections relating to energy efficiency improvements in each load center;

(B) assumptions and projections regarding the location and type of projected new generation capacity; and

(C) assumptions and projections regarding projected deployment of distributed generation infrastructure.

SEC. 410. ADDITIONAL STATE ENERGY GRANTS. (a) IN GENERAL.—Amounts appropriated under the heading "Department of Energy—Energy Programs—Energy Efficiency and Renewable Energy" in this title shall be available to the Secretary of Energy for making additional grants under part D of title III of the Energy Policy and Conservation Act (42 U.S.C. 6321 et seq.). The Secretary shall make grants under this section in excess of the base allocation established for a State under regulations issued pursuant to the

authorization provided in section 365(f) of such Act only if the governor of the recipient State notifies the Secretary of Energy in writing that the governor has obtained necessary assurances that each of the following will occur:

(1) The applicable State regulatory authority will seek to implement, in appropriate proceedings for each electric and gas utility, with respect to which the State regulatory authority has ratemaking authority, a general policy that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and that provide timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable efficiency savings, in a way that sustains or enhances utility customers' incentives to use energy more efficiently.

(2) The State, or the applicable units of local government that have authority to adopt building codes, will implement the following:

(A) A building energy code (or codes) for residential buildings that meets or exceeds the most recently published International Energy Conservation Code, or achieves equivalent or greater energy savings.

(B) A building energy code (or codes) for commercial buildings throughout the State that meets or exceeds the ANSI/ASHRAE/IESNA Standard 90.1–2007, or achieves equivalent or greater energy savings.

(C) A plan for the jurisdiction achieving compliance with the building energy code or codes described in subparagraphs (A) and (B) within 8 years of the date of enactment of this Act in at least 90 percent of new and renovated residential and commercial building space. Such plan shall include active training and enforcement programs and measurement of the rate of compliance each year.

(3) The State will to the extent practicable prioritize the grants toward funding energy efficiency and renewable energy programs, including—

(A) the expansion of existing energy efficiency programs approved by the State or the appropriate regulatory authority, including energy efficiency retrofits of buildings and industrial facilities, that are funded—

(i) by the State; or

(ii) through rates under the oversight of the applicable regulatory authority, to the extent applicable;

(B) the expansion of existing programs, approved by the State or the appropriate regulatory authority, to support renewable energy projects and deployment activities, including programs operated by entities which have the authority and capability to manage and distribute grants, loans, performance incentives, and other forms of financial assistance; and

(C) cooperation and joint activities between States to advance more efficient and effective use of this funding to support the priorities described in this paragraph.

(b) STATE MATCH.—The State cost share requirement under the item relating to "Department of Energy; Energy Conservation" in title II of the Department of the Interior and Related Agencies

Appropriations Act, 1985 (42 U.S.C. 6323a; 98 Stat. 1861) shall not apply to assistance provided under this section.

(c) EQUIPMENT AND MATERIALS FOR ENERGY EFFICIENCY MEASURES AND RENEWABLE ENERGY MEASURES.—No limitation on the percentage of funding that may be used for the purchase and installation of equipment and materials for energy efficiency measures and renewable energy measures under grants provided under part D of title III of the Energy Policy and Conservation Act (42 U.S.C. 6321 et seq.) shall apply to assistance provided under this section.

TITLE V—FINANCIAL SERVICES AND GENERAL GOVERNMENT

DEPARTMENT OF THE TREASURY

TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION

SALARIES AND EXPENSES

For an additional amount for necessary expenses of the Treasury Inspector General for Tax Administration in carrying out the Inspector General Act of 1978, $7,000,000, to remain available until September 30, 2013, for oversight and audits of the administration of the making work pay tax credit and economic recovery payments under the American Recovery and Reinvestment Act of 2009.

COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS FUND PROGRAM ACCOUNT

For an additional amount for "Community Development Financial Institutions Fund Program Account", $100,000,000, to remain available until September 30, 2010, for qualified applicants under the fiscal year 2009 funding round of the Community Development Financial Institutions Program, of which up to $8,000,000 may be for financial assistance, technical assistance, training and outreach programs designed to benefit Native American, Native Hawaiian, and Alaskan Native communities and provided primarily through qualified community development lender organizations with experience and expertise in community development banking and lending in Indian country, Native American organizations, tribes and tribal organizations and other suitable providers and up to $2,000,000 may be used for administrative expenses: *Provided,* That for the purpose of the fiscal year 2009 funding round, the following statutory provisions are hereby waived: 12 U.S.C. 4707(e) and 12 U.S.C. 4707(d): *Provided further,* That no awardee, together with its subsidiaries and affiliates, may be awarded more than 5 percent of the aggregate funds available during fiscal year 2009 from the Community Development Financial Institutions Program: *Provided further,* That no later than 60 days after the date of enactment of this Act, the Department of the Treasury shall submit to the Committees on Appropriations of the House of Representatives and the Senate a detailed expenditure plan for funds provided under this heading.

INTERNAL REVENUE SERVICE

HEALTH INSURANCE TAX CREDIT ADMINISTRATION

For an additional amount to implement the health insurance tax credit under the TAA Health Coverage Improvement Act of 2009, $80,000,000, to remain available until September 30, 2010.

GENERAL SERVICES ADMINISTRATION

REAL PROPERTY ACTIVITIES

FEDERAL BUILDINGS FUND

LIMITATIONS ON AVAILABILITY OF REVENUE

(INCLUDING TRANSFER OF FUNDS)

For an additional amount to be deposited in the Federal Buildings Fund, $5,550,000,000, to carry out the purposes of the Fund, of which not less than $750,000,000 shall be available for Federal buildings and United States courthouses, not less than $300,000,000 shall be available for border stations and land ports of entry, and not less than $4,500,000,000 shall be available for measures necessary to convert GSA facilities to High-Performance Green Buildings, as defined in section 401 of Public Law 110–140: *Provided,* That not to exceed $108,000,000 of the amounts provided under this heading may be expended for rental of space, related to leasing of temporary space in connection with projects funded under this heading: *Provided further,* That not to exceed $127,000,000 of the amounts provided under this heading may be expended for building operations, for the administrative costs of completing projects funded under this heading: *Provided further,* That not to exceed $3,000,000 of the funds provided shall be for on-the-job pre-apprenticeship and apprenticeship training programs registered with the Department of Labor, for the construction, repair, and alteration of Federal buildings: *Provided further,* That not less than $5,000,000,000 of the funds provided under this heading shall be obligated by September 30, 2010, and the remainder of the funds provided under this heading shall be obligated not later than September 30, 2011: *Provided further,* That the Administrator of General Services is authorized to initiate design, construction, repair, alteration, and other projects through existing authorities of the Administrator: *Provided further,* That the General Services Administration shall submit a detailed plan, by project, regarding the use of funds made available in this Act to the Committees on Appropriations of the House of Representatives and the Senate within 45 days of enactment of this Act, and shall provide notification to the Committees within 15 days prior to any changes regarding the use of these funds: *Provided further*, That, hereafter, the Administrator shall report to the Committees on the obligation of these funds on a quarterly basis beginning on June 30, 2009: *Provided further*, That of the amounts provided, $4,000,000 shall be transferred to and merged with "Government-Wide Policy", for the Office of Federal High-Performance Green Buildings as authorized in the Energy Independence and Security Act of 2007 (Public Law 110–140): *Provided further,* That amounts provided under this heading that are savings or cannot be used for the activity for which originally obligated may

be deobligated and, notwithstanding any other provision of law, reobligated for the purposes identified in the plan required under this heading not less than 15 days after notification has been provided to the Committees on Appropriations of the House of Representatives and the Senate.

ENERGY-EFFICIENT FEDERAL MOTOR VEHICLE FLEET PROCUREMENT

For capital expenditures and necessary expenses of acquiring motor vehicles with higher fuel economy, including: hybrid vehicles; electric vehicles; and commercially-available, plug-in hybrid vehicles, $300,000,000, to remain available until September 30, 2011: *Provided*, That none of these funds may be obligated until the Administrator of General Services submits to the Committees on Appropriations of the House of Representatives and the Senate, within 90 days after enactment of this Act, a plan for expenditure of the funds that details the current inventory of the Federal fleet owned by the General Services Administration, as well as other Federal agencies, and the strategy to expend these funds to replace a portion of the Federal fleet with the goal of substantially increasing energy efficiency over the current status, including increasing fuel efficiency and reducing emissions: *Provided further*, That, hereafter, the Administrator shall report to the Committees on the obligation of these funds on a quarterly basis beginning on September 30, 2009.

OFFICE OF INSPECTOR GENERAL

For an additional amount for the Office of the Inspector General, to remain available until September 30, 2013, for oversight and audit of programs, grants, and projects funded under this title, $7,000,000.

RECOVERY ACT ACCOUNTABILITY AND TRANSPARENCY BOARD

For necessary expenses of the Recovery Act Accountability and Transparency Board to carry out the provisions of title XV of this Act, $84,000,000, to remain available until September 30, 2011.

SMALL BUSINESS ADMINISTRATION

SALARIES AND EXPENSES

For an additional amount, to remain available until September 30, 2010, $69,000,000, of which $24,000,000 is for marketing, management, and technical assistance under section 7(m) of the Small Business Act (15 U.S.C. 636(m)(4)) by intermediaries that make microloans under the microloan program, and of which $20,000,000 is for improving, streamlining, and automating information technology systems related to lender processes and lender oversight: *Provided,* That no later than 60 days after the date of enactment of this Act, the Small Business Administration shall submit to the Committees on Appropriations of the House of Representatives and the Senate a detailed expenditure plan for funds provided under the heading "Small Business Administration" in this Act.

OFFICE OF INSPECTOR GENERAL

For an additional amount for the Office of Inspector General in carrying out the provisions of the Inspector General Act of 1978, $10,000,000, to remain available until September 30, 2013, for oversight and audit of programs, grants, and projects funded under this title.

SURETY BOND GUARANTEES REVOLVING FUND

For additional capital for the Surety Bond Guarantees Revolving Fund, authorized by the Small Business Investment Act of 1958, $15,000,000, to remain available until expended.

BUSINESS LOANS PROGRAM ACCOUNT

For an additional amount for the cost of direct loans, $6,000,000, to remain available until September 30, 2010, and for an additional amount for the cost of guaranteed loans, $630,000,000, to remain available until September 30, 2010: *Provided,* That of the amount for the cost of guaranteed loans, $375,000,000 shall be for reimbursements, loan subsidies and loan modifications for loans to small business concerns authorized in section 501 of this title; and $255,000,000 shall be for loan subsidies and loan modifications for loans to small business concerns authorized in section 506 of this title: *Provided further,* That such costs, including the cost of modifying such loans, shall be as defined in section 502 of the Congressional Budget Act of 1974.

ADMINISTRATIVE PROVISIONS—SMALL BUSINESS ADMINISTRATION

SEC. 501. FEE REDUCTIONS. (a) ADMINISTRATIVE PROVISIONS SMALL BUSINESS ADMINISTRATION.—Until September 30, 2010, and to the extent that the cost of such elimination or reduction of fees is offset by appropriations, with respect to each loan guaranteed under section 7(a) of the Small Business Act (15 U.S.C. 636(a)) and section 502 of this title, for which the application is approved on or after the date of enactment of this Act, the Administrator shall—

(1) in lieu of the fee otherwise applicable under section 7(a)(23)(A) of the Small Business Act (15 U.S.C. 636(a)(23)(A)), collect no fee or reduce fees to the maximum extent possible; and

(2) in lieu of the fee otherwise applicable under section 7(a)(18)(A) of the Small Business Act (15 U.S.C. 636(a)(18)(A)), collect no fee or reduce fees to the maximum extent possible.

(b) TEMPORARY FEE ELIMINATION FOR THE 504 LOAN PROGRAM.—

(1) IN GENERAL.—Until September 30, 2010, and to the extent the cost of such elimination in fees is offset by appropriations, with respect to each project or loan guaranteed by the Administrator pursuant to title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 et seq.) for which an application is approved or pending approval on or after the date of enactment of this Act—

(A) the Administrator shall, in lieu of the fee otherwise applicable under section 503(d)(2) of the Small Business Investment Act of 1958 (15 U.S.C. 697(d)(2)), collect no fee;

(B) a development company shall, in lieu of the processing fee under section 120.971(a)(1) of title 13, Code of Federal Regulations (relating to fees paid by borrowers), or any successor thereto, collect no fee.

(2) REIMBURSEMENT FOR WAIVED FEES.—

(A) IN GENERAL.—To the extent that the cost of such payments is offset by appropriations, the Administrator shall reimburse each development company that does not collect a processing fee pursuant to paragraph (1)(B).

(B) AMOUNT.—The payment to a development company under subparagraph (A) shall be in an amount equal to 1.5 percent of the net debenture proceeds for which the development company does not collect a processing fee pursuant to paragraph (1)(B).

(c) APPLICATION OF FEE ELIMINATIONS.—

(1) To the extent that amounts are made available to the Administrator for the purpose of fee eliminations or reductions under subsection (a), the Administrator shall—

(A) first use any amounts provided to eliminate or reduce fees paid by small business borrowers under clauses (i) through (iii) of paragraph (18)(A), to the maximum extent possible; and

(B) then use any amounts provided to eliminate or reduce fees under paragraph (23)(A) paid by small business lenders with assets less than $1,000,000,000 as of the date of enactment; and

(C) then use any remaining amounts appropriated under this title to reduce fees paid by small business lenders other than those with assets less than $1,000,000,000.

(2) The Administrator shall eliminate fees under subsections (a) and (b) until the amount provided for such purposes, as applicable, under the heading "Business Loans Program Account" under the heading "Small Business Administration" under this Act are expended.

SEC. 502. ECONOMIC STIMULUS LENDING PROGRAM FOR SMALL BUSINESSES. (a) PURPOSE.—The purpose of this section is to permit the Small Business Administration to guarantee up to 90 percent of qualifying small business loans made by eligible lenders.

(b) DEFINITIONS.—For purposes of this section:

(1) The term "Administrator" means the Administrator of the Small Business Administration.

(2) The term "qualifying small business loan" means any loan to a small business concern pursuant to section 7(a) of the Small Business Act (15 U.S.C. 636) or title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 and following) except for such loans made under section 7(a)(31).

(3) The term "small business concern" has the same meaning as provided by section 3 of the Small Business Act (15 U.S.C. 632).

(c) QUALIFIED BORROWERS.—

(1) ALIENS UNLAWFULLY PRESENT IN THE UNITED STATES.—A loan guarantee may not be made under this section for a loan made to a concern if an individual who is an alien unlawfully present in the United States—

(A) has an ownership interest in that concern; or

(B) has an ownership interest in another concern that itself has an ownership interest in that concern.

(2) FIRMS IN VIOLATION OF IMMIGRATION LAWS.—No loan guarantee may be made under this section for a loan to any entity found, based on a determination by the Secretary of Homeland Security or the Attorney General to have engaged in a pattern or practice of hiring, recruiting or referring for a fee, for employment in the United States an alien knowing the person is an unauthorized alien.

(d) CRIMINAL BACKGROUND CHECKS.—Prior to the approval of any loan guarantee under this section, the Administrator may verify the applicant's criminal background, or lack thereof, through the best available means, including, if possible, use of the National Crime Information Center computer system at the Federal Bureau of Investigation.

(e) APPLICATION OF OTHER LAW.—Nothing in this section shall be construed to exempt any activity of the Administrator under this section from the Federal Credit Reform Act of 1990 (title V of the Congressional Budget and Impoundment Control Act of 1974; 2 U.S.C. 661 and following).

(f) SUNSET.—Loan guarantees may not be issued under this section after the date 12 months after the date of enactment of this Act.

(g) SMALL BUSINESS ACT PROVISIONS.—The provisions of the Small Business Act applicable to loan guarantees under section 7 of that Act and regulations promulgated thereunder as of the date of enactment of this Act shall apply to loan guarantees under this section except as otherwise provided in this section.

(h) AUTHORIZATION.—There are authorized to be appropriated such sums as may be necessary to carry out this section.

SEC. 503. ESTABLISHMENT OF SBA SECONDARY MARKET GUARANTEE AUTHORITY. (a) PURPOSE.—The purpose of this section is to provide the Administrator with the authority to establish the SBA Secondary Market Guarantee Authority within the SBA to provide a Federal guarantee for pools of first lien 504 loans that are to be sold to third-party investors.

(b) DEFINITIONS.—For purposes of this section:

(1) The term "Administrator" means the Administrator of the Small Business Administration.

(2) The term "first lien position 504 loan" means the first mortgage position, non-federally guaranteed loans made by private sector lenders made under title V of the Small Business Investment Act.

(c) ESTABLISHMENT OF AUTHORITY.—

(1) ORGANIZATION.—

(A) The Administrator shall establish a Secondary Market Guarantee Authority within the Small Business Administration.

(B) The Administrator shall appoint a Director of the Authority who shall report to the Administrator.

(C) The Administrator is authorized to hire such personnel as are necessary to operate the Authority and may contract such operations of the Authority as necessary to qualified third party companies or individuals.

(D) The Administrator is authorized to contract with private sector fiduciary and custom dial agents as necessary to operate the Authority.

(2) GUARANTEE PROCESS.—

(A) The Administrator shall establish, by rule, a process in which private sector entities may apply to the Administration for a Federal guarantee on pools of first lien position 504 loans that are to be sold to third-party investors.

(B) The Administrator is authorized to contract with private sector fiduciary and custom dial agents as necessary to operate the Authority.

(3) RESPONSIBILITIES.—

(A) The Administrator shall establish, by rule, a process in which private sector entities may apply to the SBA for a Federal guarantee on pools of first lien position 504 loans that are to be sold to third-party investors.

(B) The rule under this section shall provide for a process for the Administrator to consider and make decisions regarding whether to extend a Federal guarantee referred to in clause (i). Such rule shall also provide that:

(i) The seller of the pools purchasing a guarantee under this section retains not less than 5 percent of the dollar amount of the pools to be sold to third-party investors.

(ii) The Administrator shall charge fees, upfront or annual, at a specified percentage of the loan amount that is at such a rate that the cost of the program under the Federal Credit Reform Act of 1990 (title V of the Congressional Budget and Impoundment Control Act of 1974; 2 U.S.C. 661) shall be equal to zero.

(iii) The Administrator may guarantee not more than $3,000,000,000 of pools under this authority.

(C) The Administrator shall establish documents, legal covenants, and other required documentation to protect the interests of the United States.

(D) The Administrator shall establish a process to receive and disburse funds to entities under the authority established in this section.

(d) LIMITATIONS.—

(1) The Administrator shall ensure that entities purchasing a guarantee under this section are using such guarantee for the purpose of selling 504 first lien position pools to third-party investors.

(2) If the Administrator finds that any such guarantee was used for a purpose other than that specified in paragraph (1), the Administrator shall—

(A) prohibit the purchaser of the guarantee or its affiliates (within the meaning of the regulations under 13 CFR 121.103) from using the authority of this section in the future; and

(B) take any other actions the Administrator, in consultation with the Attorney General of the United States deems appropriate.

(e) OVERSIGHT.—The Administrator shall submit a report to Congress not later than the third business day of each month setting forth each of the following:

(1) The aggregate amount of guarantees extended under this section during the preceding month.

(2) The aggregate amount of guarantees outstanding.

(3) Defaults and payments on defaults made under this section.

(4) The identity of each purchaser of a guarantee found by the Administrator to have misused guarantees under this section.

(5) Any other information the Administrator deems necessary to fully inform Congress of undue risk to the United States associated with the issuance of guarantees under this section.

(f) DURATION OF PROGRAM.—The authority of this section shall terminate on the date 2 years after the date of enactment of this section.

(g) FUNDING.—Such sums as necessary are authorized to be appropriated to carry out the provisions of this section.

(h) BUDGET TREATMENT.—Nothing in this section shall be construed to exempt any activity of the Administrator under this section from the Federal Credit Reform Act of 1990 (title V of the Congressional Budget and Impoundment Control Act of 1974; 2 U.S.C. 661 and following).

(i) EMERGENCY RULEMAKING AUTHORITY.—The Administrator shall issue regulations under this section within 15 days after the date of enactment of this section. The notice requirements of section 553(b) of title 5, United States Code shall not apply to the promulgation of such regulations.

SEC. 504. STIMULUS FOR COMMUNITY DEVELOPMENT LENDING. (a) LOW INTEREST REFINANCING UNDER THE LOCAL DEVELOPMENT BUSINESS LOAN PROGRAM.—Section 502 of the Small Business Investment Act of 1958 (15 U.S.C. 696) is amended by adding at the end the following:

"(7) PERMISSIBLE DEBT REFINANCING.—

"(A) IN GENERAL.—Any financing approved under this title may include a limited amount of debt refinancing.

"(B) EXPANSIONS.—If the project involves expansion of a small business concern, any amount of existing indebtedness that does not exceed 50 percent of the project cost of the expansion may be refinanced and added to the expansion cost, if—

"(i) the proceeds of the indebtedness were used to acquire land, including a building situated thereon, to construct a building thereon, or to purchase equipment;

"(ii) the existing indebtedness is collateralized by fixed assets;

"(iii) the existing indebtedness was incurred for the benefit of the small business concern;

"(iv) the financing under this title will be used only for refinancing existing indebtedness or costs relating to the project financed under this title;

"(v) the financing under this title will provide a substantial benefit to the borrower when prepayment penalties, financing fees, and other financing costs are accounted for;

"(vi) the borrower has been current on all payments due on the existing debt for not less than 1 year preceding the date of refinancing; and

"(vii) the financing under section 504 will provide better terms or rate of interest than the existing indebtedness at the time of refinancing.".

(b) JOB CREATION GOALS.—Section 501(e)(1) and section 501(e)(2) of the Small Business Investment Act (15 U.S.C. 695) are each amended by striking "$50,000" and inserting "$65,000".

SEC. 505. INCREASING SMALL BUSINESS INVESTMENT. (a) SIMPLIFIED MAXIMUM LEVERAGE LIMITS.—Section 303(b) of the Small Business Investment Act of 1958 (15 U.S.C. 683(b)) is amended as follows:

(1) By striking so much of paragraph (2) as precedes subparagraphs (C) and (D) and inserting the following:

"(2) MAXIMUM LEVERAGE.—

"(A) IN GENERAL.—The maximum amount of outstanding leverage made available to any one company licensed under section 301(c) of this Act may not exceed the lesser of—

"(i) 300 percent of such company's private capital; or

"(ii) $150,000,000.

"(B) MULTIPLE LICENSES UNDER COMMON CONTROL.—The maximum amount of outstanding leverage made available to two or more companies licensed under section 301(c) of this Act that are commonly controlled (as determined by the Administrator) and not under capital impairment may not exceed $225,000,000.";

(2) By amending paragraph (2)(C) by inserting "(i)" before "In calculating" and adding the following at the end thereof:

"(ii) The maximum amount of outstanding leverage made available to—

"(I) any 1 company described in clause (iii) may not exceed the lesser of 300 percent of private capital of the company, or $175,000,000; and

"(II) 2 or more companies described in clause (iii) that are under common control (as determined by the Administrator) may not exceed $250,000,000.

"(iii) A company described in this clause is a company licensed under section 301(c) in the first fiscal year after the date of enactment of this clause or any fiscal year thereafter that certifies in writing that not less than 50 percent of the dollar amount of investments of that company shall be made in companies that are located in a low-income geographic area (as that term is defined in section 351).".

(3) By striking paragraph (4).

(b) SIMPLIFIED AGGREGATE INVESTMENT LIMITATIONS.—Section 306(a) of the Small Business Investment Act of 1958 (15 U.S.C. 686(a)) is amended to read as follows:

"(a) PERCENTAGE LIMITATION ON PRIVATE CAPITAL.—If any small business investment company has obtained financing from the Administrator and such financing remains outstanding, the aggregate amount of securities acquired and for which commitments may be issued by such company under the provisions of this title

for any single enterprise shall not, without the approval of the Administrator, exceed 10 percent of the sum of—

"(1) the private capital of such company; and

"(2) the total amount of leverage projected by the company in the company's business plan that was approved by the Administrator at the time of the grant of the company's license.".

(c) INVESTMENTS IN SMALLER ENTERPRISES.—Section 303(d) of the Small Business Investment Act of 1958 (15 U.S.C. 683(d)) is amended to read as follows:

"(d) INVESTMENTS IN SMALLER ENTERPRISES.—The Administrator shall require each licensee, as a condition of approval of an application for leverage, to certify in writing that not less than 25 percent of the aggregate dollar amount of financings of that licensee shall be provided to smaller enterprises.".

SEC. 506. BUSINESS STABILIZATION PROGRAM. (a) IN GENERAL.—Subject to the availability of appropriations, the Administrator of the Small Business Administration shall carry out a program to provide loans on a deferred basis to viable (as such term is determined pursuant to regulation by the Administrator of the Small Business Administration) small business concerns that have a qualifying small business loan and are experiencing immediate financial hardship.

(b) ELIGIBLE BORROWER.—A small business concern as defined under section 3 of the Small Business Act (15 U.S.C. 632).

(c) QUALIFYING SMALL BUSINESS LOAN.—A loan made to a small business concern that meets the eligibility standards in section 7(a) of the Small Business Act (15 U.S.C. 636(a)) but shall not include loans guarantees (or loan guarantee commitments made) by the Administrator prior to the date of enactment of this Act.

(d) LOAN SIZE.—Loans guaranteed under this section may not exceed $35,000.

(e) PURPOSE.—Loans guaranteed under this program shall be used to make periodic payment of principal and interest, either in full or in part, on an existing qualifying small business loan for a period of time not to exceed 6 months.

(f) LOAN TERMS.—Loans made under this section shall:

(1) carry a 100 percent guaranty; and

(2) have interest fully subsidized for the period of repayment.

(g) REPAYMENT.—Repayment for loans made under this section shall—

(1) be amortized over a period of time not to exceed 5 years; and

(2) not begin until 12 months after the final disbursement of funds is made.

(h) COLLATERAL.—The Administrator of the Small Business Administration may accept any available collateral, including subordinated liens, to secure loans made under this section.

(i) FEES.—The Administrator of the Small Business Administration is prohibited from charging any processing fees, origination fees, application fees, points, brokerage fees, bonus points, prepayment penalties, and other fees that could be charged to a loan applicant for loans under this section.

(j) SUNSET.—The Administrator of the Small Business Administration shall not issue loan guarantees under this section after September 30, 2010.

(k) EMERGENCY RULEMAKING AUTHORITY.—The Administrator of the Small Business Administration shall issue regulations under this section within 15 days after the date of enactment of this section. The notice requirements of section 553(b) of title 5, United States Code shall not apply to the promulgation of such regulations.

SEC. 507. GAO REPORT.

(a) REPORT.—Not later than 60 days after the enactment of this Act, the Comptroller General of the United States shall report to the Congress on the actions of the Administrator in implementing the authorities established in the administrative provisions of this title.

(b) INCLUDED ITEM.—The report under this section shall include a summary of the activity of the Administrator under this title and an analysis of whether he is accomplishing the purpose of increasing liquidity in the secondary market for Small Business Administration loans.

SEC. 508. SURETY BONDS.

(a) MAXIMUM BOND AMOUNT.—Section 411(a)(1) of the Small Business Investment Act of 1958 (15 U.S.C. 694b(a)(1)) is amended—

(1) by inserting "(A)" after "(1)";

(2) by striking "$2,000,000" and inserting "$5,000,000"; and

(3) by adding at the end the following:

"(B) The Administrator may guarantee a surety under subparagraph (A) for a total work order or contract amount that does not exceed $10,000,000, if a contracting officer of a Federal agency certifies that such a guarantee is necessary.".

(b) DENIAL OF LIABILITY—

Section 411 of the Small Business Investment Act of 1958 (15 U.S.C. 694b) is amended—

(1) by striking subsection (e) and inserting the following:

"(e) REIMBURSEMENT OF SURETY; CONDITIONS.—Pursuant to any such guarantee or agreement, the Administration shall reimburse the surety, as provided in subsection (c) of this section, except that the Administration shall be relieved of liability (in whole or in part within the discretion of the Administration) if—

(1) the surety obtained such guarantee or agreement, or applied for such reinbursement, by fraud or material misrepresentation,

(2) the total contract amount at the time of execution of the bond or bonds exceeds $5,000,000,

(3) the surety has breached a material term or condition of such guarantee agreement, or

(4) the surety has substantially violated the regulations promulgated by the Administration pursuant to subsection (d)."

(2) by adding at the end the following:

"(k) For bonds made or executed with the prior approval of the Administration, the Administration shall not deny liability to a surety based upon material information that was provided as part of the guaranty application.".

(c) SIZE STANDARDS.—Section 410 of the Small Business Investment Act of 1958 (15 U.S.C. 694a) is amended by adding at the end the following:

"(9) Notwithstanding any other provision of law or any rule, regulation, or order of the Administration, for purposes

of sections 410, 411, and 412 the term 'small business concern' means a business concern that meets the size standard for the primary industry in which such business concern, and the affiliates of such business concern, is engaged, as determined by the Administrator in accordance with the North American Industry Classification System.".

(d) STUDY—The Administrator of the Small Business Administration shall conduct a study of the current funding structure of the surety bond program carried out under part B (15 U.S.C. 694a et seq.) of title IV of the Small Business Investment Act of 1958. The study shall include--

(1) an assessment of whether the program's current funding framework and program fees are inhibiting the program's growth;

(2) an assessment of whether surety companies and small business concerns could benefit from an alternative funding structure; and

(e) REPORT—Not later than 180 days after the date of enactment of this Act, the Administrator shall submit to Congress a report on the results of the study required under subsection (d).

(f) SUNSET.—The amendments made by this section shall remain in effect until September 30, 2010.

SEC. 509. ESTABLISHMENT OF SBA SECONDARY MARKET LENDING AUTHORITY.

(a) PURPOSE.—The purpose of this section is to provide the Small Business Administration with the authority to establish a Secondary Market Lending Authority within the SBA to make loans to the systemically important SBA secondary market broker-dealers who operate the SBA secondary market.

(b) DEFINITIONS.—For purposes of this section:

(1) The term "Administrator" means the Administrator of the SBA.

(2) The term "SBA" means the Small Business Administration.

(3) The terms "Secondary Market Lending Authority" and "Authority" mean the office establishedunder subsection (c).

(4) The term "SBA secondary market" meansthe market for the purchase and sale of loans originated, underwritten, and closed under the Small Business Act.

(5) The term "Systemically Important Secondary Market Broker-Dealers" mean those entities designated under subsection (c)(1) as vital to the continued operation of the SBA secondary market by reason of their purchase and sale of the government guaranteed portion of loans, or pools of loans,originated, underwritten, and closed under the Small Business Act.

(c) RESPONSIBILITIES, AUTHORITIES, ORGANIZATION, AND LIMITATIONS.—

(1) DESIGNATION OF SYSTEMICALLY IMPORTANT SBA SECONDARY MARKET BROKER-DEALERS.—The Administrator shall establish a process to designate, in consultation with the Board of Governors of the Federal Reserve and the Secretary of the Treasury, Systemically Important Secondary Market Broker-Dealers.

(2) ESTABLISHMENT OF SBA SECONDARY MARKET LENDING AUTHORITY.—

(A) ORGANIZATION.—

(i) The Administrator shall establish within the SBA an office to provide loans to Systemically Important Secondary Market Broker-dealers to be used for the purpose of financing the inventory of the government guaranteed portion of loans, originated, underwritten, and closed under the Small Business Act or pools of such loans.

(ii) The Administrator shall appoint a Director of the Authority who shall report to the Administrator.

(iii) The Administrator is authorized to hire such personnel as are necessary to operate the Authority.

(iv) The Administrator may contract such Authority operations as he determines necessary to qualified third-party companies or individuals.

(v) The Administrator is authorized to contract with private sector fiduciary and custodial agents as necessary to operate the Authority.

(B) LOANS.—

(i) The Administrator shall establish by rule a process under which Systemically Important SBA Secondary Market Broker-Dealers designated under paragraph (1) may apply to the Administrator for loans under this section.

(ii) The rule under clause (i) shall provide a process for the Administrator to consider and make decisions regarding whether or not to extend a loan applied for under this section. Such rule shall include provisions to assure each of the following:

(I) That loans made under this section are for the sole purpose of financing the inventory of the govern ment guaranteed portion of loans, originated, underwritten, and closed under the Small Business Act or pools of such loans.

(II) That loans made under this section are fully collateralized to the satisfaction of the Administrator.

(III) That there is no limit to the frequency in which a borrower may borrow under this section unless the Administrator determines that doing so would create an undue risk of loss to the agency or the United States.

(IV) That there is no limit on the size of a loan, subject to the discretion of the Administrator.

(iii) Interest on loans under this section shall not exceed the Federal Funds target rate as established by the Federal Reserve Board of Governors plus 25 basis points.

(iv) The rule under this section shall provide for such loan documents, legal covenants, collateral requirements and other required documentation as necessary to protect the interests of the agency, the United States, and the taxpayer.

(v) The Administrator shall establish custodial accounts to safeguard any collateral pledged to the SBA in connection with a loan under this section.

(vi) The Administrator shall establish a process to disburse and receive funds to and from borrowers under this section.

(C) LIMITATIONS ON USE OF LOAN PROCEEDS BY SYSTEMICALLY IMPORTANT SECONDARY MARKET BROKER-DEALERS.—The Administrator shall ensure that borrowers under this section are using funds provided under this section only for the purpose specified in subparagraph (B)(ii)(I). If the Administrator finds that such funds were used for any other purpose, the Administrator shall—

(i) require immediate repayment of outstanding loans;

(ii) prohibit the borrower, its affiliates, or any future corporate manifestation of the borrower from using the Authority; and

(iii) take any other actions the Administrator, in consultation with the Attorney General of the United States, deemsappropriate.

(d) REPORT TO CONGRESS.—The Administrator shall submit a report to Congress not later than the third business day of each month containing a statement of each of the following:

(1) The aggregate loan amounts extended during the preceding month under this section.

(2) The aggregate loan amounts repaid under this section during the proceeding month.

(3) The aggregate loan amount outstanding under this section.

(4) The aggregate value of assets held as collateral under this section;

(5) The amount of any defaults or delinquencies on loans made under this section.

(6) The identity of any borrower found by the Administrator to misuse funds made available under this section.

(7) Any other information the Administrator deems necessary to fully inform Congress of undue risk of financial loss to the United States in connection with loans made under this section.

(e) DURATION.—The authority of this section shall remain in effect for a period of 2 years after the date of enactment of this section.

(f) FEES.—The Administrator shall charge fees, up front, annual, or both at a specified percentage of the loan amount that is at such a rate that the cost of the program under the Federal Credit Reform Act of 1990 ((title V of the Congressional Budget and Impoundment Control Act of 1974; 2 U.S.C. 661) shall be equal to zero.

(h) BUDGET TREATMENT.—Nothing in this section shall be construed to exempt any activity of the Administrator under this section from the Federal Credit Reform Act of 1990 (title V of the Congressional Budget and Im poundment Control Act of 1974; 2 U.S.C. 661 and following).

(i) EMERGENCY RULEMAKING AUTHORITY.—The Administrator shall promulgate regulations under this section within 30 days after the date of enactment of enactment of this section. In promulgating these regulations,the Administrator the notice requirements of section 553(b) of title 5 of the United States Code shall not apply.

TITLE VI—DEPARTMENT OF HOMELAND SECURITY

OFFICE OF THE UNDER SECRETARY FOR MANAGEMENT

For an additional amount for the "Office of the Under Secretary for Management", $200,000,000 for planning, design, construction costs, site security, information technology infrastructure, fixtures, and related costs to consolidate the Department of Homeland Security headquarters: *Provided,* That no later than 60 days after the date of enactment of this Act, the Secretary of Homeland Security, in consultation with the Administrator of General Services, shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for the expenditure of these funds.

OFFICE OF INSPECTOR GENERAL

For an additional amount for the "Office of Inspector General", $5,000,000, to remain available until September 30, 2012, for oversight and audit of programs, grants, and projects funded under this title.

U.S. CUSTOMS AND BORDER PROTECTION

SALARIES AND EXPENSES

For an additional amount for "Salaries and Expenses", $160,000,000, of which $100,000,000 shall be for the procurement and deployment of non-intrusive inspection systems; and of which $60,000,000 shall be for procurement and deployment of tactical communications equipment and radios: *Provided,* That no later than 45 days after the date of enactment of this Act, the Secretary of Homeland Security shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for expenditure of these funds.

BORDER SECURITY FENCING, INFRASTRUCTURE, AND TECHNOLOGY

For an additional amount for "Border Security Fencing, Infrastructure, and Technology", $100,000,000 for expedited development and deployment of border security technology on the Southwest border: *Provided,* That no later than 45 days after the date of enactment of this Act, the Secretary of Homeland Security shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for expenditure of these funds.

CONSTRUCTION

For an additional amount for "Construction", $420,000,000 solely for planning, management, design, alteration, and construction of U.S. Customs and Border Protection owned land border ports of entry: *Provided,* That no later than 45 days after the date of enactment of this Act, the Secretary of Homeland Security shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for expenditure of these funds.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

AUTOMATION MODERNIZATION

For an additional amount for "Automation Modernization", $20,000,000 for the procurement and deployment of tactical communications equipment and radios: *Provided,* That no later than 45 days after the date of enactment of this Act, the Secretary of Homeland Security shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for expenditure of these funds.

TRANSPORTATION SECURITY ADMINISTRATION

AVIATION SECURITY

For an additional amount for "Aviation Security", $1,000,000,000 for procurement and installation of checked baggage explosives detection systems and checkpoint explosives detection equipment: *Provided,* That the Assistant Secretary of Homeland Security (Transportation Security Administration) shall prioritize the award of these funds to accelerate the installations at locations with completed design plans: *Provided further,* That no later than 45 days after the date of enactment of this Act, the Secretary of Homeland Security shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for the expenditure of these funds.

COAST GUARD

ACQUISITION, CONSTRUCTION, AND IMPROVEMENTS

For an additional amount for "Acquisition, Construction, and Improvements", $98,000,000 for shore facilities and aids to navigation facilities; for priority procurements due to materials and labor cost increases; and for costs to repair, renovate, assess, or improve vessels: *Provided,* That no later than 45 days after the date of enactment of this Act, the Secretary of Homeland Security shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for the expenditure of these funds.

ALTERATION OF BRIDGES

For an additional amount for "Alteration of Bridges", $142,000,000 for alteration or removal of obstructive bridges, as authorized by section 6 of the Truman-Hobbs Act (33 U.S.C. 516): *Provided*, That the Coast Guard shall award these funds to those bridges that are ready to proceed to construction: *Provided further,* That no later than 45 days after the date of enactment of this Act, the Secretary of Homeland Security shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for the expenditure of these funds.

FEDERAL EMERGENCY MANAGEMENT AGENCY

STATE AND LOCAL PROGRAMS

For an additional amount for grants, $300,000,000, to be allocated as follows:

(1) $150,000,000 for Public Transportation Security Assistance and Railroad Security Assistance under sections 1406 and 1513 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (Public Law 110–53; 6 U.S.C. 1135 and 1163).

(2) $150,000,000 for Port Security Grants in accordance with 46 U.S.C. 70107, notwithstanding 46 U.S.C. 70107(c).

FIREFIGHTER ASSISTANCE GRANTS

For an additional amount for competitive grants, $210,000,000 for modifying, upgrading, or constructing non-Federal fire stations: *Provided,* That up to 5 percent shall be for program administration: *Provided further,* That no grant shall exceed $15,000,000.

DISASTER ASSISTANCE DIRECT LOAN PROGRAM ACCOUNT

Notwithstanding section 417(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, the amount of any such loan issued pursuant to this section for major disasters occurring in calendar year 2008 may exceed $5,000,000, and may be equal to not more than 50 percent of the annual operating budget of the local government in any case in which that local government has suffered a loss of 25 percent or more in tax revenues: *Provided,* That the cost of modifying such loans shall be as defined in section 502 of the Congressional Budget Act of 1974 (2 U.S.C. 661a).

EMERGENCY FOOD AND SHELTER

For an additional amount to carry out the emergency food and shelter program pursuant to title III of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11331 et seq.), $100,000,000: *Provided,* That total administrative costs shall not exceed 3.5 percent of the total amount made available under this heading.

GENERAL PROVISIONS—THIS TITLE

SEC. 601. Notwithstanding any other provision of law, the President shall establish an arbitration panel under the Federal Emergency Management Agency public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region. The arbitration panel shall have sufficient authority regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b, 5172, or 5173) for a project the total amount of which is more than $500,000.

SEC. 602. The Administrator of the Federal Emergency Management Agency may not prohibit or restrict the use of funds designated under the hazard mitigation grant program for damage caused by Hurricanes Katrina and Rita if the homeowner who is an applicant for assistance under such program commenced work

otherwise eligible for hazard mitigation grant program assistance under section 404 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170c) without approval in writing from the Administrator.

SEC. 603. Subparagraph (E) of section 34(a)(1) of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2229a(a)(1)(E)) shall not apply with respect to funds appropriated in this or any other Act making appropriations for fiscal year 2009 or 2010 for grants under such section 34.

SEC. 604. (a) REQUIREMENT.—Except as provided in subsections (c) through (g), funds appropriated or otherwise available to the Department of Homeland Security may not be used for the procurement of an item described in subsection (b) if the item is not grown, reprocessed, reused, or produced in the United States.

(b) COVERED ITEMS.—An item referred to in subsection (a) is any of the following, if the item is directly related to the national security interests of the United States:

(1) An article or item of—

(A) clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof);

(B) tents, tarpaulins, covers, textile belts, bags, protective equipment (including but not limited to body armor), sleep systems, load carrying equipment (including but not limited to fieldpacks), textile marine equipment, parachutes, or bandages;

(C) cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or

(D) any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials.

(c) AVAILABILITY EXCEPTION.—Subsection (a) does not apply to the extent that the Secretary of Homeland Security determines that satisfactory quality and sufficient quantity of any such article or item described in subsection (b)(1) grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed at United States market prices. This section is not applicable to covered items that are, or include, materials determined to be non-available in accordance with Federal Acquisition Regulation 25.104 Nonavailable Articles.

(d) DE MINIMIS EXCEPTION.—Notwithstanding subsection (a), the Secretary of Homeland Security may accept delivery of an item covered by subsection (b) that contains non-compliant fibers if the total value of non-compliant fibers contained in the end item does not exceed 10 percent of the total purchase price of the end item.

(e) EXCEPTION FOR CERTAIN PROCUREMENTS OUTSIDE THE UNITED STATES.—Subsection (a) does not apply to the following:

(1) Procurements by vessels in foreign waters.

(2) Emergency procurements.

(f) EXCEPTION FOR SMALL PURCHASES.—Subsection (a) does not apply to purchases for amounts not greater than the simplified

acquisition threshold referred to in section 2304(g) of title 10, United States Code.

(g) APPLICABILITY TO CONTRACTS AND SUBCONTRACTS FOR PROCUREMENT OF COMMERCIAL ITEMS.—This section is applicable to contracts and subcontracts for the procurement of commercial items not withstanding section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430), with the exception of commercial items listed under subsections (b)(1)(C) and (b)(1)(D) above. For the purposes of this section, "commercial" shall be as defined in the Federal Acquisition Regulation—Part 2.

(h) GEOGRAPHIC COVERAGE.—In this section, the term "United States" includes the possessions of the United States.

(i) NOTIFICATION REQUIRED WITHIN 7 DAYS AFTER CONTRACT AWARD IF CERTAIN EXCEPTIONS APPLIED.—In the case of any contract for the procurement of an item described in subsection (b)(1), if the Secretary of Homeland Security applies an exception set forth in subsection (c) with respect to that contract, the Secretary shall, not later than 7 days after the award of the contract, post a notification that the exception has been applied on the Internet site maintained by the General Services Administration known as FedBizOps.gov (or any successor site).

(j) TRAINING DURING FISCAL YEAR 2009.—

(1) IN GENERAL.—The Secretary of Homeland Security shall ensure that each member of the acquisition workforce in the Department of Homeland Security who participates personally and substantially in the acquisition of textiles on a regular basis receives training during fiscal year 2009 on the requirements of this section and the regulations implementing this section.

(2) INCLUSION OF INFORMATION IN NEW TRAINING PROGRAMS.—The Secretary shall ensure that any training program for the acquisition workforce developed or implemented after the date of the enactment of this Act includes comprehensive information on the requirements described in paragraph (1).

(k) CONSISTENCY WITH INTERNATIONAL AGREEMENTS.— This section shall be applied in a manner consistent with United States obligations under international agreements.

(l) EFFECTIVE DATE.—This section applies with respect to contracts entered into by the Department of Homeland Security 180 days after the date of the enactment of this Act.

TITLE VII—INTERIOR, ENVIRONMENT, AND RELATED AGENCIES

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

MANAGEMENT OF LANDS AND RESOURCES

For an additional amount for "Management of Lands and Resources", for activities on all Bureau of Land Management lands including maintenance, rehabilitation, and restoration of facilities, property, trails and lands and for remediation of abandoned mines and wells, $125,000,000.

CONSTRUCTION

For an additional amount for "Construction", for activities on all Bureau of Land Management lands including construction, reconstruction, decommissioning and repair of roads, bridges, trails, property, and facilities and for energy efficient retrofits of existing facilities, $180,000,000.

WILDLAND FIRE MANAGEMENT

For an additional amount for "Wildland Fire Management", for hazardous fuels reduction, $15,000,000.

UNITED STATES FISH AND WILDLIFE SERVICE

RESOURCE MANAGEMENT

For an additional amount for "Resource Management", for deferred maintenance, construction, and capital improvement projects on national wildlife refuges and national fish hatcheries and for high priority habitat restoration projects, $165,000,000.

CONSTRUCTION

For an additional amount for "Construction", for construction, reconstruction, and repair of roads, bridges, property, and facilities and for energy efficient retrofits of existing facilities, $115,000,000.

NATIONAL PARK SERVICE

OPERATION OF THE NATIONAL PARK SYSTEM

For an additional amount for "Operation of the National Park System", for deferred maintenance of facilities and trails and for other critical repair and rehabilitation projects, $146,000,000.

HISTORIC PRESERVATION FUND

For an additional amount for "Historic Preservation Fund", for historic preservation projects at historically black colleges and universities as authorized by the Historic Preservation Fund Act of 1996 and the Omnibus Parks and Public Lands Act of 1996, $15,000,000: *Provided,* That any matching requirements otherwise required for such projects are waived.

CONSTRUCTION

For an additional amount for "Construction", for repair and restoration of roads; construction of facilities, including energy efficient retrofits of existing facilities; equipment replacement; preservation and repair of historical resources within the National Park System; cleanup of abandoned mine sites on park lands; and other critical infrastructure projects, $589,000,000.

UNITED STATES GEOLOGICAL SURVEY

SURVEYS, INVESTIGATIONS, AND RESEARCH

For an additional amount for "Surveys, Investigations, and Research", $140,000,000, for repair, construction and restoration of facilities; equipment replacement and upgrades including stream gages, and seismic and volcano monitoring systems; national map activities; and other critical deferred maintenance and improvement projects.

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For an additional amount for "Operation of Indian Programs", for workforce training programs and the housing improvement program, $40,000,000.

CONSTRUCTION

For an additional amount for "Construction", for repair and restoration of roads; replacement school construction; school improvements and repairs; and detention center maintenance and repairs, $450,000,000: *Provided,* That section 1606 of this Act shall not apply to tribal contracts entered into by the Bureau of Indian Affairs with this appropriation.

INDIAN GUARANTEED LOAN PROGRAM ACCOUNT

For an additional amount for "Indian Guaranteed Loan Program Account", $10,000,000.

OFFICE OF INSPECTOR GENERAL

SALARIES AND EXPENSES

For an additional amount for "Office of Inspector General", $15,000,000, to remain available until September 30, 2012.

ENVIROMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

For an additional amount for "Office of Inspector General", $20,000,000, to remain available until September 30, 2012.

HAZARDOUS SUBSTANCE SUPERFUND

For an additional amount for "Hazardous Substance Superfund", $600,000,000, which shall be for the Superfund Remedial program: *Provided,* That the Administrator of the Environmental Protection Agency (Administrator) may retain up to 3 percent of the funds appropriated herein for management and oversight purposes.

LEAKING UNDERGROUND STORAGE TANK TRUST FUND PROGRAM

For an additional amount for "Leaking Underground Storage Tank Trust Fund Program", $200,000,000, which shall be for cleanup activities authorized by section 9003(h) of the Solid Waste Disposal Act: *Provided,* That none of these funds shall be subject to cost share requirements under section 9003(h)(7)(B) of such Act: *Provided further,* That the Administrator may retain up to 1.5 percent of the funds appropriated herein for management and oversight purposes.

STATE AND TRIBAL ASSISTANCE GRANTS

(INCLUDING TRANSFERS OF FUNDS)

For an additional amount for "State and Tribal Assistance Grants", $6,400,000,000, which shall be allocated as follows:

(1) $4,000,000,000 shall be for capitalization grants for the Clean Water State Revolving Funds under title VI of the Federal Water Pollution Control Act and $2,000,000,000 shall be for capitalization grants under section 1452 of the Safe Drinking Water Act: *Provided,* That the Administrator may retain up to 1 percent of the funds appropriated herein for management and oversight purposes: *Provided further,* That funds appropriated herein shall not be subject to the matching or cost share requirements of sections 602(b)(2), 602(b)(3) or 202 of the Federal Water Pollution Control Act nor the matching requirements of section 1452(e) of the Safe Drinking Water Act: *Provided further,* That the Administrator shall reallocate funds appropriated herein for the Clean and Drinking Water State Revolving Funds (Revolving Funds) where projects are not under contract or construction within 12 months of the date of enactment of this Act: *Provided further,* That notwithstanding the priority rankings they would otherwise receive under each program, priority for funds appropriated herein shall be given to projects on a State priority list that are ready to proceed to construction within 12 months of the date of enactment of this Act: *Provided further,* That notwithstanding the requirements of section 603(d) of the Federal Water Pollution Control Act or section 1452(f) of the Safe Drinking Water Act, for the funds appropriated herein, each State shall use not less than 50 percent of the amount of its capitalization grants to provide additional subsidization to eligible recipients in the form of forgiveness of principal, negative interest loans or grants or any combination of these: *Provided further,* That, to the extent there are sufficient eligible project applications, not less than 20 percent of the funds appropriated herein for the Revolving Funds shall be for projects to address green infrastructure, water or energy efficiency improvements or other environmentally innovative activities: *Provided further,* That notwithstanding the limitation on amounts specified in section 518(c) of the Federal Water Pollution Control Act, up to 1.5 percent of the funds appropriated herein for the Clean Water State Revolving Funds may be reserved by the Administrator for tribal grants under section 518(c) of such Act: *Provided further,* That up to 4 percent of the funds appropriated herein for tribal set-asides under the Revolving Funds may be transferred to the Indian

Health Service to support management and oversight of tribal projects: *Provided further,* That none of the funds appropriated herein shall be available for the purchase of land or easements as authorized by section 603(c) of the Federal Water Pollution Control Act or for activities authorized by section 1452(k) of the Safe Drinking Water Act: *Provided further,* That notwithstanding section 603(d)(2) of the Federal Water Pollution Control Act and section 1452(f)(2) of the Safe Drinking Water Act, funds may be used to buy, refinance or restructure the debt obligations of eligible recipients only where such debt was incurred on or after October 1, 2008;

(2) $100,000,000 shall be to carry out Brownfields projects authorized by section 104(k) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980: *Provided,* That the Administrator may reserve up to 3.5 percent of the funds appropriated herein for management and oversight purposes: *Provided further,* That none of the funds appropriated herein shall be subject to cost share requirements under section 104(k)(9)(B)(iii) of such Act; and

(3) $300,000,000 shall be for Diesel Emission Reduction Act grants pursuant to title VII, subtitle G of the Energy Policy Act of 2005: *Provided,* That the Administrator may reserve up to 2 percent of the funds appropriated herein for management and oversight purposes: *Provided further,* That none of the funds appropriated herein for Diesel Emission Reduction Act grants shall be subject to the State Grant and Loan Program Matching Incentive provisions of section 793(c)(3) of such Act.

ADMINISTRATIVE PROVISION, ENVIRONMENTAL PROTECTION AGENCY

(INCLUDING TRANSFERS OF FUNDS)

Funds made available to the Environmental Protection Agency by this Act for management and oversight purposes shall remain available until September 30, 2011, and may be transferred to the "Environmental Programs and Management" account as needed.

DEPARTMENT OF AGRICULTURE

FOREST SERVICE

CAPITAL IMPROVEMENT AND MAINTENANCE

For an additional amount for "Capital Improvement and Maintenance", $650,000,000, for priority road, bridge and trail maintenance and decommissioning, including related watershed restoration and ecosystem enhancement projects; facilities improvement, maintenance and renovation; remediation of abandoned mine sites; and support costs necessary to carry out this work.

WILDLAND FIRE MANAGEMENT

For an additional amount for "Wildland Fire Management", $500,000,000, of which $250,000,000 is for hazardous fuels reduction, forest health protection, rehabilitation and hazard mitigation activities on Federal lands and of which $250,000,000 is for State and private forestry activities including hazardous fuels reduction,

forest health and ecosystem improvement activities on State and private lands using all authorities available to the Forest Service: *Provided,* That up to $50,000,000 of the total funding may be used to make wood-to-energy grants to promote increased utilization of biomass from Federal, State and private lands: *Provided further,* That funds provided for activities on State and private lands shall not be subject to matching or cost share requirements.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For an additional amount for "Indian Health Services", for health information technology activities, $85,000,000: *Provided,* That such funds may be used for both telehealth services development and related infrastructure requirements that are typically funded through the "Indian Health Facilities" account: *Provided further,* That notwithstanding any other provision of law, health information technology funds provided within this title shall be allocated at the discretion of the Director of the Indian Health Service.

INDIAN HEALTH FACILITIES

For an additional amount for "Indian Health Facilities", for facilities construction projects, deferred maintenance and improvement projects, the backlog of sanitation projects and the purchase of equipment, $415,000,000, of which $227,000,000 is provided within the health facilities construction activity for the completion of up to two facilities from the current priority list for which work has already been initiated: *Provided,* That for the purposes of this Act, spending caps included within the annual appropriation for "Indian Health Facilities" for the purchase of medical equipment shall not apply: *Provided further,* That section 1606 of this Act shall not apply to tribal contracts entered into by the Service with this appropriation.

OTHER RELATED AGENCIES

SMITHSONIAN INSTITUTION

FACILITIES CAPITAL

For an additional amount for "Facilities Capital", for repair and revitalization of existing facilities, $25,000,000.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

NATIONAL ENDOWMENT FOR THE ARTS

GRANTS AND ADMINISTRATION

For an additional amount for "Grants and Administration", $50,000,000, to be distributed in direct grants to fund arts projects and activities which preserve jobs in the non-profit arts sector threatened by declines in philanthropic and other support during

the current economic downturn: *Provided*, That 40 percent of such funds shall be distributed to State arts agencies and regional arts organizations in a manner similar to the agency's current practice and 60 percent of such funds shall be for competitively selected arts projects and activities according to sections 2 and 5(c) of the National Foundation on the Arts and Humanities Act of 1965 (20 U.S.C. 951, 954(c)): *Provided further,* That matching requirements under section 5(e) of such Act shall be waived.

GENERAL PROVISIONS—THIS TITLE

SEC. 701. (a) Within 30 days of enactment of this Act, each agency receiving funds under this title shall submit a general plan for the expenditure of such funds to the House and Senate Committees on Appropriations.

(b) Within 90 days of enactment of this Act, each agency receiving funds under this title shall submit to the Committees a report containing detailed project level information associated with the general plan submitted pursuant to subsection (a).

SEC. 702. In carrying out the work for which funds in this title are being made available, the Secretary of the Interior and the Secretary of Agriculture shall utilize, where practicable, the Public Lands Corps, Youth Conservation Corps, Student Conservation Association, Job Corps and other related partnerships with Federal, State, local, tribal or non-profit groups that serve young adults.

SEC. 703. Each agency receiving funds under this title may transfer up to 10 percent of the funds in any account to other appropriation accounts within the agency, if the head of the agency (1) determines that the transfer will enhance the efficiency or effectiveness of the use of the funds without changing the intended purpose; and (2) notifies the Committees on Appropriations of the House of Representatives and the Senate 10 days prior to the transfer.

TITLE VIII—DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES

DEPARTMENT OF LABOR

EMPLOYMENT AND TRAINING ADMINISTRATION

TRAINING AND EMPLOYMENT SERVICES

For an additional amount for "Training and Employment Services" for activities under the Workforce Investment Act of 1998 ("WIA"), $3,950,000,000, which shall be available for obligation on the date of enactment of this Act, as follows:

(1) $500,000,000 for grants to the States for adult employment and training activities, including supportive services and needs-related payments described in section 134(e)(2) and (3) of the WIA: *Provided,* That a priority use of these funds shall be services to individuals described in 134(d)(4)(E) of the WIA;

(2) $1,200,000,000 for grants to the States for youth activities, including summer employment for youth: *Provided,* That no portion of such funds shall be reserved to carry out section 127(b)(1)(A) of the WIA: *Provided further,* That for purposes

of section 127(b)(1)(C)(iv) of the WIA, funds available for youth activities shall be allotted as if the total amount available for youth activities in the fiscal year does not exceed $1,000,000,000: *Provided further,* That with respect to the youth activities provided with such funds, section 101(13)(A) of the WIA shall be applied by substituting "age 24" for "age 21": *Provided further,* That the work readiness performance indicator described in section 136(b)(2)(A)(ii)(I) of the WIA shall be the only measure of performance used to assess the effectiveness of summer employment for youth provided with such funds;

(3) $1,250,000,000 for grants to the States for dislocated worker employment and training activities;

(4) $200,000,000 for the dislocated workers assistance national reserve;

(5) $50,000,000 for YouthBuild activities: *Provided,* That for program years 2008 and 2009, the YouthBuild program may serve an individual who has dropped out of high school and re-enrolled in an alternative school, if that re-enrollment is part of a sequential service strategy; and

(6) $750,000,000 for a program of competitive grants for worker training and placement in high growth and emerging industry sectors: *Provided*, That $500,000,000 shall be for research, labor exchange and job training projects that prepare workers for careers in energy efficiency and renewable energy as described in section 171(e)(1)(B) of the WIA: *Provided further*, That in awarding grants from those funds not designated in the preceding proviso, the Secretary of Labor shall give priority to projects that prepare workers for careers in the health care sector:

Provided, That funds made available in this paragraph shall remain available through June 30, 2010: *Provided further,* That a local board may award a contract to an institution of higher education or other eligible training provider if the local board determines that it would facilitate the training of multiple individuals in high-demand occupations, if such contract does not limit customer choice.

COMMUNITY SERVICE EMPLOYMENT FOR OLDER AMERICANS

For an additional amount for "Community Service Employment for Older Americans" to carry out title V of the Older Americans Act of 1965, $120,000,000, which shall be available for obligation on the date of enactment of this Act and shall remain available through June 30, 2010: *Provided*, That funds shall be allotted within 30 days of such enactment to current grantees in proportion to their allotment in program year 2008: *Provided further,* That funds made available under this heading in this Act may, in accordance with section 517(c) of the Older Americans Act of 1965, be recaptured and reobligated.

STATE UNEMPLOYMENT INSURANCE AND EMPLOYMENT SERVICE OPERATIONS

For an additional amount for "State Unemployment Insurance and Employment Service Operations" for grants to States in accordance with section 6 of the Wagner-Peyser Act, $400,000,000, which may be expended from the Employment Security Administration Account in the Unemployment Trust Fund, and which shall be

available for obligation on the date of enactment of this Act: *Provided*, That such funds shall remain available to the States through September 30, 2010: *Provided further*, That $250,000,000 of such funds shall be used by States for reemployment services for unemployment insurance claimants (including the integrated Employment Service and Unemployment Insurance information technology required to identify and serve the needs of such claimants): *Provided further*, That the Secretary of Labor shall establish planning and reporting procedures necessary to provide oversight of funds used for reemployment services.

DEPARTMENTAL MANAGEMENT

SALARIES AND EXPENSES

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "Departmental Management", $80,000,000, for the enforcement of worker protection laws and regulations, oversight, and coordination activities related to the infrastructure and unemployment insurance investments in this Act: *Provided*, That the Secretary of Labor may transfer such sums as necessary to "Employment and Standards Administration", "Employee Benefits Security Administration", "Occupational Safety and Health Administration", and "Employment and Training Administration—Program Administration" for enforcement, oversight, and coordination activities: *Provided further,* That prior to obligating any funds proposed to be transferred from this account, the Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate an operating plan describing the planned uses of each amount proposed to be transferred.

OFFICE OF JOB CORPS

For an additional amount for "Office of Job Corps", $250,000,000, for construction, rehabilitation and acquisition of Job Corps Centers, which shall be available upon the date of enactment of this Act and remain available for obligation through June 30, 2010: *Provided*, That section 1552(a) of title 31, United States Code shall not apply if funds are used for a multi-year lease agreement that will result in construction activities that can commence within 120 days of enactment of this Act: *Provided further*, That notwithstanding section 3324(a) of title 31, United States Code, the funds used for an agreement under the preceding proviso may be used for advance, progress, and other payments: *Provided further*, That the Secretary of Labor may transfer up to 15 percent of such funds to meet the operational needs of such centers, which may include training for careers in the energy efficiency, renewable energy, and environmental protection industries: *Provided further*, That the Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate an operating plan describing the allocation of funds, and a report on the actual obligations, expenditures, and unobligated balances for each activity funded under this heading not later than September 30, 2009 and quarterly thereafter as long as funding provided under this heading is available for obligation or expenditure.

OFFICE OF INSPECTOR GENERAL

For an additional amount for the "Office of Inspector General", $6,000,000, which shall remain available through September 30, 2012, for salaries and expenses necessary for oversight and audit of programs, grants, and projects funded in this Act.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

HEALTH RESOURCES AND SERVICES

For an additional amount for "Health Resources and Services", $2,500,000,000 which shall be used as follows:

(1) $500,000,000 shall be for grants to health centers authorized under section 330 of the Public Health Service Act ("PHS Act");

(2) $1,500,000,000 shall be available for grants for construction, renovation and equipment, and for the acquisition of health information technology systems, for health centers including health center controlled networks receiving operating grants under section 330 of the PHS Act, notwithstanding the limitation in section 330(e)(3); and

(3) $500,000,000 to address health professions workforce shortages, of which $75,000,000 for the National Health Service Corps shall remain available through September 30, 2011: *Provided,* That funds may be used to provide scholarships, loan repayment, and grants to training programs for equipment as authorized in the PHS Act, and grants authorized in sections 330L, 747, 767 and 768 of the PHS Act: *Provided further,* That 20 percent of the funds allocated to the National Health Service Corps shall be used for field operations:

Provided, That up to 0.5 percent of funds provided in this paragraph may used for administration of such funds: *Provided further,* That the Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate an operating plan detailing activities to be supported and timelines for expenditure prior to making any Federal obligations of funds provided in this paragraph but not later than 90 days after the date of enactment of this Act: *Provided further,* That the Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate a report on the actual obligations, expenditures, and unobligated balances for each activity funded in this paragraph not later than November 1, 2009 and every 6 months thereafter as long as funding provided in this paragraph is available for obligation or expenditure.

National Institutes of Health

NATIONAL CENTER FOR RESEARCH RESOURCES

For an additional amount for "National Center for Research Resources", $1,300,000,000, of which $1,000,000,000 shall be for grants or contracts under section 481A of the Public Health Service Act to construct, renovate or repair existing non-Federal research facilities: *Provided*, That sections 481A(c)(1)(B)(ii), paragraphs (1), (3), and (4) of section 481A(e), and section 481B of such Act shall

not apply to the use of such funds: *Provided further*, That the references to "20 years" in subsections (c)(1)(B)(i) and (f) of section 481A of such Act are deemed to be references to "10 years" for purposes of using such funds: *Provided further*, That the National Center for Research Resources may also use $300,000,000 to provide, under the authority of section 301 and title IV of such Act, shared instrumentation and other capital research equipment to recipients of grants and contracts under section 481A of such Act and other appropriate entities: *Provided further*, That the Director of the Center shall provide to the Committees on Appropriations of the House of Representatives and the Senate an annual report indicating the number of institutions receiving awards of a grant or contract under section 481A of such Act, the proposed use of the funding, the average award size, a list of grant or contract recipients, and the amount of each award.

OFFICE OF THE DIRECTOR

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "Office of the Director", $8,200,000,000: *Provided,* That $7,400,000,000 shall be transferred to the Institutes and Centers of the National Institutes of Health ("NIH") and to the Common Fund established under section 402A(c)(1) of the Public Health Service Act in proportion to the appropriations otherwise made to such Institutes, Centers, and Common Fund for fiscal year 2009: *Provided further,* That these funds shall be used to support additional scientific research and shall be merged with and be available for the same purposes as the appropriation or fund to which transferred: *Provided further,* That this transfer authority is in addition to any other transfer authority available to the NIH: *Provided further,* That none of these funds may be transferred to "National Institutes of Health—Buildings and Facilities", the Center for Scientific Review, the Center for Information Technology, the Clinical Center, or the Global Fund for HIV/AIDS, Tuberculosis and Malaria: *Provided further,* That the funds provided in this Act to the NIH shall not be subject to the provisions of 15 U.S.C. 638(f)(1) and 15 U.S.C. 638(n)(1): *Provided further,* That $400,000,000 may be used to carry out section 215 of division G of Public Law 110–161.

BUILDINGS AND FACILITIES

For an additional amount for "Buildings and Facilities", $500,000,000, to fund high-priority repair, construction and improvement projects for National Institutes of Health facilities on the Bethesda, Maryland campus and other agency locations.

Agency for Healthcare Research and Quality

HEALTHCARE RESEARCH AND QUALITY

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "Healthcare Research and Quality" to carry out titles III and IX of the Public Health Service Act, part A of title XI of the Social Security Act, and section

1013 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, $700,000,000 for comparative effectiveness research: *Provided*, That of the amount appropriated in this paragraph, $400,000,000 shall be transferred to the Office of the Director of the National Institutes of Health ("Office of the Director") to conduct or support comparative effectiveness research under section 301 and title IV of the Public Health Service Act: *Provided further*, That funds transferred to the Office of the Director may be transferred to the Institutes and Centers of the National Institutes of Health and to the Common Fund established under section 402A(c)(1) of the Public Health Service Act: *Provided further*, That this transfer authority is in addition to any other transfer authority available to the National Institutes of Health: *Provided further*, That within the amount available in this paragraph for the Agency for Healthcare Research and Quality, not more than 1 percent shall be made available for additional full-time equivalents.

In addition, $400,000,000 shall be available for comparative effectiveness research to be allocated at the discretion of the Secretary of Health and Human Services ("Secretary"): *Provided*, That the funding appropriated in this paragraph shall be used to accelerate the development and dissemination of research assessing the comparative effectiveness of health care treatments and strategies, through efforts that: (1) conduct, support, or synthesize research that compares the clinical outcomes, effectiveness, and appropriateness of items, services, and procedures that are used to prevent, diagnose, or treat diseases, disorders, and other health conditions; and (2) encourage the development and use of clinical registries, clinical data networks, and other forms of electronic health data that can be used to generate or obtain outcomes data: *Provided further*, That the Secretary shall enter into a contract with the Institute of Medicine, for which no more than $1,500,000 shall be made available from funds provided in this paragraph, to produce and submit a report to the Congress and the Secretary by not later than June 30, 2009, that includes recommendations on the national priorities for comparative effectiveness research to be conducted or supported with the funds provided in this paragraph and that considers input from stakeholders: *Provided further*, That the Secretary shall consider any recommendations of the Federal Coordinating Council for Comparative Effectiveness Research established by section 804 of this Act and any recommendations included in the Institute of Medicine report pursuant to the preceding proviso in designating activities to receive funds provided in this paragraph and may make grants and contracts with appropriate entities, which may include agencies within the Department of Health and Human Services and other governmental agencies, as well as private sector entities, that have demonstrated experience and capacity to achieve the goals of comparative effectiveness research: *Provided further*, That the Secretary shall publish information on grants and contracts awarded with the funds provided under this heading within a reasonable time of the obligation of funds for such grants and contracts and shall disseminate research findings from such grants and contracts to clinicians, patients, and the general public, as appropriate: *Provided further*, That, to the extent feasible, the Secretary shall ensure that the recipients of the funds provided by this paragraph offer an opportunity for public comment on the research: *Provided further*, That research conducted with funds appropriated under this paragraph

shall be consistent with Departmental policies relating to the inclusion of women and minorities in research: *Provided further*, That the Secretary shall provide the Committees on Appropriations of the House of Representatives and the Senate, the Committee on Energy and Commerce and the Committee on Ways and Means of the House of Representatives, and the Committee on Health, Education, Labor, and Pensions and the Committee on Finance of the Senate with an annual report on the research conducted or supported through the funds provided under this heading: *Provided further*, That the Secretary, jointly with the Directors of the Agency for Healthcare Research and Quality and the National Institutes of Health, shall provide the Committees on Appropriations of the House of Representatives and the Senate a fiscal year 2009 operating plan for the funds appropriated under this heading prior to making any Federal obligations of such funds in fiscal year 2009, but not later than July 30, 2009, and a fiscal year 2010 operating plan for such funds prior to making any Federal obligations of such funds in fiscal year 2010, but not later than November 1, 2009, that detail the type of research being conducted or supported, including the priority conditions addressed; and specify the allocation of resources within the Department of Health and Human Services: *Provided further*, That the Secretary, jointly with the Directors of the Agency for Healthcare Research and Quality and the National Institutes of Health, shall provide to the Committees on Appropriations of the House of Representatives and the Senate a report on the actual obligations, expenditures, and unobligated balances for each activity funded under this heading not later than November 1, 2009, and every 6 months thereafter as long as funding provided under this heading is available for obligation or expenditure.

ADMINISTRATION FOR CHILDREN AND FAMILIES

PAYMENTS TO STATES FOR THE CHILD CARE AND DEVELOPMENT BLOCK GRANT

For an additional amount for "Payments to States for the Child Care and Development Block Grant", $2,000,000,000, which shall be used to supplement, not supplant State general revenue funds for child care assistance for low-income families: *Provided,* That, in addition to the amounts required to be reserved by the States under section 658G of the Child Care and Development Block Grant Act of 1990, $255,186,000 shall be reserved by the States for activities authorized under section 658G, of which $93,587,000 shall be for activities that improve the quality of infant and toddler care.

CHILDREN AND FAMILIES SERVICES PROGRAMS

For an additional amount for "Children and Families Services Programs", $3,150,000,000, which shall be used as follows:

(1) $1,000,000,000 for carrying out activities under the Head Start Act.

(2) $1,100,000,000 for expansion of Early Head Start programs, as described in section 645A of the Head Start Act: *Provided*, That of the funds provided in this paragraph, up to 10 percent shall be available for the provision of training

and technical assistance to such programs consistent with section 645A(g)(2) of such Act, and up to 3 percent shall be available for monitoring the operation of such programs consistent with section 641A of such Act.

(3) $1,000,000,000 for carrying out activities under sections 674 through 679 of the Community Services Block Grant Act, of which no part shall be subject to section 674(b)(3) of such Act: *Provided,* That notwithstanding section 675C(a)(1) and 675C(b) of such Act, 1 percent of the funds made available to each State from this additional amount shall be used for benefits enrollment coordination activities relating to the identification and enrollment of eligible individuals and families in Federal, State, and local benefit programs: *Provided further,* That all funds remaining available to a State from this additional amount after application of the previous proviso shall be distributed to eligible entities as defined in section 673(1) of such Act: *Provided further*, That for services furnished under such Act during fiscal years 2009 and 2010, States may apply the last sentence of section 673(2) of such Act by substituting "200 percent" for "125 percent".

(4) $50,000,000 for carrying out activities under section 1110 of the Social Security Act.

ADMINISTRATION ON AGING

AGING SERVICES PROGRAMS

For an additional amount for "Aging Services Programs" under subparts 1 and 2 of part C, of title III, and under title VI, of the Older Americans Act of 1965, $100,000,000, of which $65,000,000 shall be for Congregate Nutrition Services, $32,000,000 shall be for Home-Delivered Nutrition Services and $3,000,000 shall be for Nutrition Services for Native Americans.

OFFICE OF THE SECRETARY

OFFICE OF THE NATIONAL COORDINATOR FOR HEALTH INFORMATION TECHNOLOGY

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "Office of the National Coordinator for Health Information Technology", $2,000,000,000, to carry out title XIII of this Act, to remain available until expended: *Provided*, That of such amount, the Secretary of Health and Human Services shall transfer $20,000,000 to the Director of the National Institute of Standards and Technology in the Department of Commerce for continued work on advancing health care information enterprise integration through activities such as technical standards analysis and establishment of conformance testing infrastructure, so long as such activities are coordinated with the Office of the National Coordinator for Health Information Technology: *Provided further,* That $300,000,000 is to support regional or sub-national efforts toward health information exchange: *Provided further,* That 0.25 percent of the funds provided in this paragraph may be used for administration of such funds: *Provided further*, That funds available under this heading shall become available for obligation only upon submission of an annual operating plan by the Secretary

to the Committees on Appropriations of the House of Representatives and the Senate: *Provided further*, That the fiscal year 2009 operating plan shall be provided not later than 90 days after enactment of this Act and that subsequent annual operating plans shall be provided not later than November 1 of each year: *Provided further*, That these operating plans shall describe how expenditures are aligned with the specific objectives, milestones, and metrics of the Federal Health Information Technology Strategic Plan, including any subsequent updates to the Plan; the allocation of resources within the Department of Health and Human Services and other Federal agencies; and the identification of programs and activities that are supported: *Provided further*, That the Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate a report on the actual obligations, expenditures, and unobligated balances for each major set of activities not later than November 1, 2009, and every 6 months thereafter as long as funding provided under this heading is available for obligation or expenditure.

OFFICE OF INSPECTOR GENERAL

For an additional amount for the "Office of Inspector General", $17,000,000 which shall remain available until September 30, 2012.

PUBLIC HEALTH AND SOCIAL SERVICES EMERGENCY FUND

For an additional amount for "Public Health and Social Services Emergency Fund" to improve information technology security at the Department of Health and Human Services, $50,000,000.

PREVENTION AND WELLNESS FUND

(INCLUDING TRANSFER OF FUNDS)

For necessary expenses for a "Prevention and Wellness Fund" to be administered through the Department of Health and Human Services, Office of the Secretary, $1,000,000,000: *Provided,* That of the amount provided in this paragraph, $300,000,000 shall be transferred to the Centers for Disease Control and Prevention ("CDC") as an additional amount to carry out the immunization program ("section 317 immunization program") authorized by section 317(a), (j), and (k)(1) of the Public Health Service Act ("PHS Act"): *Provided further,* That of the amount provided in this paragraph, $650,000,000 shall be to carry out evidence-based clinical and community-based prevention and wellness strategies authorized by the PHS Act, as determined by the Secretary, that deliver specific, measurable health outcomes that address chronic disease rates: *Provided further*, That funds appropriated in the preceding proviso may be transferred to other appropriation accounts of the Department of Health and Human Services, as determined by the Secretary to be appropriate: *Provided further*, That of the amount appropriated in this paragraph, $50,000,000 shall be provided to States for an additional amount to carry out activities to implement healthcare associated infections reduction strategies: *Provided further,* That not more than 0.5 percent of funds made available in this paragraph may be used for management and oversight expenses in the office or division of the Department of Health and Human Services administering the funds: *Provided further*,

That the Secretary shall, directly or through contracts with public or private entities, provide for annual evaluations of programs carried out with funds provided under this heading in order to determine the quality and effectiveness of the programs: *Provided further*, That the Secretary shall, not later than 1 year after the date of enactment of this Act, submit to the Committees on Appropriations of the House of Representatives and the Senate, the Committee on Energy and Commerce of the House of Representatives, and the Committee on Health, Education, Labor, and Pensions of the Senate, a report summarizing the annual evaluations of programs from the preceding proviso: *Provided further*, That the Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate an operating plan for the Prevention and Wellness Fund prior to making any Federal obligations of funds provided in this paragraph (excluding funds to carry out the section 317 immunization program), but not later than 90 days after the date of enactment of this Act, that indicates the prevention priorities to be addressed; provides measurable goals for each prevention priority; details the allocation of resources within the Department of Health and Human Services; and identifies which programs or activities are supported, including descriptions of any new programs or activities: *Provided further*, That the Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate a report on the actual obligations, expenditures, and unobligated balances for each activity funded under this heading not later than November 1, 2009, and every 6 months thereafter as long as funding provided under this heading is available for obligation or expenditure.

DEPARTMENT OF EDUCATION

Education for the Disadvantaged

For an additional amount for "Education for the Disadvantaged" to carry out title I of the Elementary and Secondary Education Act of 1965 ("ESEA"), $13,000,000,000: *Provided*, That $5,000,000,000 shall be available for targeted grants under section 1125 of the ESEA: *Provided further*, That $5,000,000,000 shall be available for education finance incentive grants under section 1125A of the ESEA: *Provided further*, That $3,000,000,000 shall be for school improvement grants under section 1003(g) of the ESEA: *Provided further*, That each local educational agency receiving funds available under this paragraph shall be required to file with the State educational agency, no later than December 1, 2009, a school-by-school listing of per-pupil educational expenditures from State and local sources during the 2008–2009 academic year: *Provided further,* That each State educational agency shall report that information to the Secretary of Education by March 31, 2010.

Impact Aid

For an additional amount for "Impact Aid" to carry out section 8007 of title VIII of the Elementary and Secondary Education Act of 1965, $100,000,000, which shall be expended pursuant to the requirements of section 805.

School Improvement Programs

For an additional amount for "School Improvement Programs" to carry out subpart 1, part D of title II of the Elementary and Secondary Education Act of 1965 ("ESEA"), and subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, $720,000,000: *Provided*, That $650,000,000 shall be available for subpart 1, part D of title II of the ESEA: *Provided further,* That the Secretary shall allot $70,000,000 for grants under McKinney-Vento to each State in proportion to the number of homeless students identified by the State during the 2007–2008 school year relative to the number of such children identified nationally during that school year: *Provided further,* That State educational agencies shall subgrant the McKinney-Vento funds to local educational agencies on a competitive basis or according to a formula based on the number of homeless students identified by the local educational agencies in the State: *Provided further,* That the Secretary shall distribute the McKinney-Vento funds to the States not later than 60 days after the date of the enactment of this Act: *Provided further,* That each State shall subgrant the McKinney-Vento funds to local educational agencies not later than 120 days after receiving its grant from the Secretary.

Innovation and Improvement

For an additional amount for "Innovation and Improvement" to carry out subpart 1, part D of title V of the Elementary and Secondary Education Act of 1965 ("ESEA"), $200,000,000: *Provided*, That these funds shall be expended as directed in the fifth, sixth, and seventh provisos under the heading "Innovation and Improvement" in the Department of Education Appropriations Act, 2008: *Provided further*, That a portion of these funds shall also be used for a rigorous national evaluation by the Institute of Education Sciences, utilizing randomized controlled methodology to the extent feasible, that assesses the impact of performance-based teacher and principal compensation systems supported by the funds provided in this Act on teacher and principal recruitment and retention in high-need schools and subjects: *Provided further,* That the Secretary may reserve up to 1 percent of the amount made available under this heading for management and oversight of the activities supported with those funds.

Special Education

For an additional amount for "Special Education" for carrying out parts B and C of the Individuals with Disabilities Education Act ("IDEA"), $12,200,000,000, of which $11,300,000,000 shall be available for section 611 of the IDEA: *Provided,* That if every State, as defined by section 602(31) of the IDEA, reaches its maximum allocation under section 611(d)(3)(B)(iii) of the IDEA, and there are remaining funds, such funds shall be proportionally allocated to each State subject to the maximum amounts contained in section 611(a)(2) of the IDEA: *Provided further,* That by July 1, 2009, the Secretary of Education shall reserve the amount needed for grants under section 643(e) of the IDEA, with any remaining funds to be allocated in accordance with section 643(c) of the IDEA: *Provided further,* That the total amount for each of sections 611(b)(2) and 643(b)(1) of the IDEA, under this and all other Acts,

for fiscal year 2009, whenever enacted, shall be equal to the amounts respectively available for these activities under these sections during fiscal year 2008 increased by the amount of inflation as specified in section 619(d)(2)(B) of the IDEA: *Provided further*, That $400,000,000 shall be available for section 619 of the IDEA and $500,000,000 shall be available for part C of the IDEA.

REHABILITATION SERVICES AND DISABILITY RESEARCH

For an additional amount for "Rehabilitation Services and Disability Research" for providing grants to States to carry out the Vocational Rehabilitation Services program under part B of title I and parts B and C of chapter 1 and chapter 2 of title VII of the Rehabilitation Act of 1973, $680,000,000: *Provided*, That $540,000,000 shall be available for part B of title I of the Rehabilitation Act: *Provided further*, That funds provided herein shall not be considered in determining the amount required to be appropriated under section 100(b)(1) of the Rehabilitation Act of 1973 in any fiscal year: *Provided further*, That, notwithstanding section 7(14)(A), the Federal share of the costs of vocational rehabilitation services provided with the funds provided herein shall be 100 percent: *Provided further*, That $140,000,000 shall be available for parts B and C of chapter 1 and chapter 2 of title VII of the Rehabilitation Act: *Provided further*, That $18,200,000 shall be for State Grants, $87,500,000 shall be for independent living centers, and $34,300,000 shall be for services for older blind individuals.

STUDENT FINANCIAL ASSISTANCE

For an additional amount for "Student Financial Assistance" to carry out subpart 1 of part A and part C of title IV of the Higher Education Act of 1965 ("HEA"), $15,840,000,000, which shall remain available through September 30, 2011: *Provided*, That $15,640,000,000 shall be available for subpart 1 of part A of title IV of the HEA: *Provided further*, That $200,000,000 shall be available for part C of title IV of the HEA.

The maximum Pell Grant for which a student shall be eligible during award year 2009–2010 shall be $4,860.

STUDENT AID ADMINISTRATION

For an additional amount for "Student Aid Administration" to carry out part D of title I, and subparts 1, 3, and 4 of part A, and parts B, C, D, and E of title IV of the Higher Education Act of 1965, $60,000,000.

HIGHER EDUCATION

For an additional amount for "Higher Education" to carry out part A of title II of the Higher Education Act of 1965, $100,000,000.

INSTITUTE OF EDUCATION SCIENCES

For an additional amount for "Institute of Education Sciences" to carry out section 208 of the Educational Technical Assistance Act, $250,000,000, which may be used for Statewide data systems that include postsecondary and workforce information, of which

up to $5,000,000 may be used for State data coordinators and for awards to public or private organizations or agencies to improve data coordination.

DEPARTMENTAL MANAGEMENT

OFFICE OF THE INSPECTOR GENERAL

For an additional amount for the "Office of the Inspector General", $14,000,000, which shall remain available through September 30, 2012, for salaries and expenses necessary for oversight and audit of programs, grants, and projects funded in this Act.

RELATED AGENCIES

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

OPERATING EXPENSES

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "Operating Expenses" to carry out the Domestic Volunteer Service Act of 1973 ("1973 Act") and the National and Community Service Act of 1990 ("1990 Act"), $160,000,000: *Provided,* That $89,000,000 of the funds made available in this paragraph shall be used to make additional awards to existing AmeriCorps grantees and may be used to provide adjustments to awards under subtitle C of title I of the 1990 Act made prior to September 30, 2010 for which the Chief Executive Officer of the Corporation for National and Community Service ("CEO") determines that a waiver of the Federal share limitation is warranted under section 2521.70 of title 45 of the Code of Federal Regulations: *Provided further,* That of the amount made available in this paragraph, not less than $6,000,000 shall be transferred to "Salaries and Expenses" for necessary expenses relating to information technology upgrades, of which up to $800,000 may be used to administer the funds provided in this paragraph: *Provided further,* That of the amount provided in this paragraph, not less than $65,000,000 shall be for programs under title I, part A of the 1973 Act: *Provided further,* That funds provided in the previous proviso shall not be made available in connection with cost-share agreements authorized under section 192A(g)(10) of the 1990 Act: *Provided further*, That of the funds available under this heading, up to 20 percent of funds allocated to grants authorized under section 124(b) of title I, subtitle C of the 1990 Act may be used to administer, reimburse, or support any national service program under section 129(d)(2) of the 1990 Act: *Provided further,* That, except as provided herein and in addition to requirements identified herein, funds provided in this paragraph shall be subject to the terms and conditions under which funds were appropriated in fiscal year 2008: *Provided further,* That the CEO shall provide the Committees on Appropriations of the House of Representatives and the Senate a fiscal year 2009 operating plan for the funds appropriated in this paragraph prior to making any Federal obligations of such funds in fiscal year 2009, but not later than 90 days after the date of enactment of this Act, and a fiscal year 2010 operating plan for such funds prior to making any Federal obligations of such funds in fiscal year 2010, but not later than

November 1, 2009, that detail the allocation of resources and the increased number of members supported by the AmeriCorps programs: *Provided further,* That the CEO shall provide to the Committees on Appropriations of the House of Representatives and the Senate a report on the actual obligations, expenditures, and unobligated balances for each activity funded under this heading not later than November 1, 2009, and every 6 months thereafter as long as funding provided under this heading is available for obligation or expenditure.

OFFICE OF INSPECTOR GENERAL

For an additional amount for the "Office of Inspector General", $1,000,000, which shall remain available until September 30, 2012.

NATIONAL SERVICE TRUST

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "National Service Trust" established under subtitle D of title I of the National and Community Service Act of 1990 ("1990 Act"), $40,000,000, which shall remain available until expended: *Provided,* That the Corporation for National and Community Service may transfer additional funds from the amount provided within "Operating Expenses" for grants made under subtitle C of title I of the 1990 Act to this appropriation upon determination that such transfer is necessary to support the activities of national service participants and after notice is transmitted to the Committees on Appropriations of the House of Representatives and the Senate: *Provided further*, That the amount appropriated for or transferred to the National Service Trust may be invested under section 145(b) of the 1990 Act without regard to the requirement to apportion funds under 31 U.S.C. 1513(b).

SOCIAL SECURITY ADMINISTRATION

LIMITATION ON ADMINISTRATIVE EXPENSES

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "Limitation on Administrative Expenses", $1,000,000,000 shall be available as follows:

(1) $500,000,000 shall remain available until expended for necessary expenses of the replacement of the National Computer Center and the information technology costs associated with such Center: *Provided,* That the Commissioner of Social Security shall notify the Committees on Appropriations of the House of Representatives and the Senate not later than 10 days prior to each public notice soliciting bids related to site selection and construction and prior to the lease or purchase of such site: *Provided further,* That the construction plan and site selection for such center shall be subject to review and approval by the Office of Management and Budget: *Provided further*, That such center shall continue to be a government-operated facility; and

(2) $500,000,000 for processing disability and retirement workloads, including information technology acquisitions and research in support of such activities: *Provided*, That up to

$40,000,000 may be used by the Commissioner of Social Security for health information technology research and activities to facilitate the adoption of electronic medical records in disability claims, including the transfer of funds to "Supplemental Security Income Program" to carry out activities under section 1110 of the Social Security Act.

OFFICE OF INSPECTOR GENERAL

For an additional amount for the "Office of Inspector General", $2,000,000, which shall remain available through September 30, 2012, for salaries and expenses necessary for oversight and audit of programs, projects, and activities funded in this Act.

GENERAL PROVISIONS—THIS TITLE

SEC. 801. (a) Up to 1 percent of the funds made available to the Department of Labor in this title may be used for the administration, management, and oversight of the programs, grants, and activities funded by such appropriation, including the evaluation of the use of such funds.

(b) Funds designated for these purposes may be available for obligation through September 30, 2010.

(c) Not later than 30 days after enactment of this Act, the Secretary of Labor shall provide an operating plan describing the proposed use of funds for the purposes described in (a).

SEC. 802. REPORT ON THE IMPACT OF PAST AND FUTURE MINIMUM WAGE INCREASES. (a) IN GENERAL.—Section 8104 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Public Law 110–28; 121 Stat. 189) is amended to read as follows:

"SEC. 8104. REPORT ON THE IMPACT OF PAST AND FUTURE MINIMUM WAGE INCREASES.

"(a) STUDY.—Beginning on the date that is 60 days after the date of enactment of this Act, and every year thereafter until the minimum wage in the respective territory is $7.25 per hour, the Government Accountability Office shall conduct a study to—

"(1) assess the impact of the minimum wage increases that occurred in American Samoa and the Commonwealth of the Northern Mariana Islands in 2007 and 2008, as required under Public Law 110–28, on the rates of employment and the living standards of workers, with full consideration of the other factors that impact rates of employment and the living standards of workers such as inflation in the cost of food, energy, and other commodities; and

"(2) estimate the impact of any further wage increases on rates of employment and the living standards of workers in American Samoa and the Commonwealth of the Northern Mariana Islands, with full consideration of the other factors that may impact the rates of employment and the living standards of workers, including assessing how the profitability of major private sector firms may be impacted by wage increases in comparison to other factors such as energy costs and the value of tax benefits.

"(b) REPORT.—No earlier than March 15, 2010, and not later than April 15, 2010, the Government Accountability Office shall transmit its first report to Congress concerning the findings of

the study required under subsection (a). The Government Accountability Office shall transmit any subsequent reports to Congress concerning the findings of a study required by subsection (a) between March 15 and April 15 of each year.

"(c) ECONOMIC INFORMATION.—To provide sufficient economic data for the conduct of the study under subsection (a) the Bureau of the Census of the Department of Commerce shall include and separately report on American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the Virgin Islands in its County Business Patterns data with the same regularity and to the same extent as each Bureau collects and reports such data for the 50 States. In the event that the inclusion of American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the Virgin Islands in such surveys and data compilations requires time to structure and implement, the Bureau of the Census shall in the interim annually report the best available data that can feasibly be secured with respect to such territories. Such interim report shall describe the steps the Bureau will take to improve future data collection in the territories to achieve comparability with the data collected in the United States. The Bureau of the Census, together with the Department of the Interior, shall coordinate their efforts to achieve such improvements.".

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

SEC. 803. ELIGIBLE EMPLOYEES IN THE RECREATIONAL MARINE INDUSTRY. Section 2(3)(F) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 902(3)(F)) is amended—

(1) by striking ", repair or dismantle"; and

(2) by striking the semicolon and inserting ", or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel;".

SEC. 804. FEDERAL COORDINATING COUNCIL FOR COMPARATIVE EFFECTIVENESS RESEARCH. (a) ESTABLISHMENT.—There is hereby established a Federal Coordinating Council for Comparative Effectiveness Research (in this section referred to as the "Council").

(b) PURPOSE.—The Council shall foster optimum coordination of comparative effectiveness and related health services research conducted or supported by relevant Federal departments and agencies, with the goal of reducing duplicative efforts and encouraging coordinated and complementary use of resources.

(c) DUTIES.—The Council shall—

(1) assist the offices and agencies of the Federal Government, including the Departments of Health and Human Services, Veterans Affairs, and Defense, and other Federal departments or agencies, to coordinate the conduct or support of comparative effectiveness and related health services research; and

(2) advise the President and Congress on—

(A) strategies with respect to the infrastructure needs of comparative effectiveness research within the Federal Government; and

(B) organizational expenditures for comparative effectiveness research by relevant Federal departments and agencies.

(d) MEMBERSHIP.—

(1) NUMBER AND APPOINTMENT.—The Council shall be composed of not more than 15 members, all of whom are senior Federal officers or employees with responsibility for health-related programs, appointed by the President, acting through the Secretary of Health and Human Services (in this section referred to as the "Secretary"). Members shall first be appointed to the Council not later than 30 days after the date of the enactment of this Act.

(2) MEMBERS.—

(A) IN GENERAL.—The members of the Council shall include one senior officer or employee from each of the following agencies:

(i) The Agency for Healthcare Research and Quality.

(ii) The Centers for Medicare and Medicaid Services.

(iii) The National Institutes of Health.

(iv) The Office of the National Coordinator for Health Information Technology.

(v) The Food and Drug Administration.

(vi) The Veterans Health Administration within the Department of Veterans Affairs.

(vii) The office within the Department of Defense responsible for management of the Department of Defense Military Health Care System.

(B) QUALIFICATIONS.—At least half of the members of the Council shall be physicians or other experts with clinical expertise.

(3) CHAIRMAN; VICE CHAIRMAN.—The Secretary shall serve as Chairman of the Council and shall designate a member to serve as Vice Chairman.

(e) REPORTS.—

(1) INITIAL REPORT.—Not later than June 30, 2009, the Council shall submit to the President and the Congress a report containing information describing current Federal activities on comparative effectiveness research and recommendations for such research conducted or supported from funds made available for allotment by the Secretary for comparative effectiveness research in this Act.

(2) ANNUAL REPORT.—The Council shall submit to the President and Congress an annual report regarding its activities and recommendations concerning the infrastructure needs, organizational expenditures and opportunities for better coordination of comparative effectiveness research by relevant Federal departments and agencies.

(f) STAFFING; SUPPORT.—From funds made available for allotment by the Secretary for comparative effectiveness research in this Act, the Secretary shall make available not more than 1 percent to the Council for staff and administrative support.

(g) RULES OF CONSTRUCTION.—

(1) COVERAGE.—Nothing in this section shall be construed to permit the Council to mandate coverage, reimbursement, or other policies for any public or private payer.

(2) REPORTS AND RECOMMENDATIONS.—None of the reports submitted under this section or recommendations made by the Council shall be construed as mandates or clinical guidelines for payment, coverage, or treatment.

SEC. 805. GRANTS FOR IMPACT AID CONSTRUCTION. (a) RESERVATION FOR MANAGEMENT AND OVERSIGHT.—From the funds appropriated to carry out this section, the Secretary may reserve up to 1 percent for management and oversight of the activities carried out with those funds.

(b) CONSTRUCTION PAYMENTS.—

(1) FORMULA GRANTS.—(A) IN GENERAL.—From 40 percent of the amount not reserved under subsection (a), the Secretary shall make payments in accordance with section 8007(a) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7707(a)), except that the amount of such payments shall be determined in accordance with subparagraph (B).

(B) AMOUNT OF PAYMENTS.—The Secretary shall make a payment to each local educational agency eligible for a payment under section 8007(a) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7707(a)) in an amount that bears the same relationship to the funds made available under subparagraph (A) as the number of children determined under subparagraphs (B), (C), and (D)(i) of section 8003(a)(1) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7703(a)(1)(B), (C), and (D)(i)) who were in average daily attendance in the local educational agency for the most recent year for which such information is available bears to the number of such children in all the local educational agencies eligible for a payment under section 8007(a) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7707(a)).

(2) COMPETITIVE GRANTS.—From 60 percent of the amount not reserved under subsection (a), the Secretary—

(A) shall award emergency grants in accordance with section 8007(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7707(b)) to eligible local educational agencies to enable the agencies to carry out emergency repairs of school facilities; and

(B) may award modernization grants in accordance with section 8007(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7707(b)) to eligible local educational agencies to enable the agencies to carry out the modernization of school facilities.

(3) PROVISIONS NOT TO APPLY.—Paragraphs (2), (3), (4), (5)(A)(i), and (5)(A)(vi) of section 8007(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7707(b)(2), (3), (4), (5)(A)(i), and (5)(A)(vi)) shall not apply to grants made under paragraph (2).

(4) ELIGIBILITY.—A local educational agency is eligible to receive a grant under paragraph (2) if the local educational agency—

(A) was eligible to receive a payment under section 8002 or 8003 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7702 and 7703) for fiscal year 2008; and

(B) has—

(i) a total taxable assessed value of real property that may be taxed for school purposes of less than $100,000,000; or

(ii) an assessed value of real property per student that may be taxed for school purposes that is less

than the average of the assessed value of real property per student that may be taxed for school purposes in the State in which the local educational agency is located.

(5) CRITERIA FOR GRANTS.—In awarding grants under paragraph (2), the Secretary shall consider the following criteria:

(A) Whether the facility poses a health or safety threat to students and school personnel, including noncompliance with building codes and inaccessibility for persons with disabilities, or whether the existing building capacity meets the needs of the current enrollment and supports the provision of comprehensive educational services to meet current standards in the State in which the local educational agency is located.

(B) The extent to which the new design and proposed construction utilize energy efficient and recyclable materials.

(C) The extent to which the new design and proposed construction utilizes non-traditional or alternative building methods to expedite construction and project completion and maximize cost efficiency.

(D) The feasibility of project completion within 24 months from award.

(E) The availability of other resources for the proposed project.

SEC. 806. MANDATORY PELL GRANTS. Section 401(b)(9)(A) of the Higher Education Act of 1965 (20 U.S.C. 1070a(b)(9)(A)) is amended—

(1) in clause (ii), by striking "$2,090,000,000" and inserting "$2,733,000,000"; and

(2) in clause (iii), by striking "$3,030,000,000" and inserting "$3,861,000,000".

SEC. 807. (a) IN GENERAL.—Notwithstanding any other provision of law, and in order to begin expenditures and activities under this Act as quickly as possible consistent with prudent management, the Secretary of Education may—

(1) award fiscal year 2009 funds to States and local educational agencies on the basis of eligibility determinations made for the award of fiscal year 2008 funds; and

(2) require States to make prompt allocations to local educational agencies.

(b) INTEREST NOT TO ACCRUE.—Notwithstanding sections 3335 and 6503 of title 31, United States Code, or any other provision of law, the United States shall not be liable to any State or other entity for any interest or fee with respect to any funds under this Act that are allocated by the Secretary of Education to the State or other entity within 30 days of the date on which they are available for obligation.

TITLE IX—LEGISLATIVE BRANCH

GOVERNMENT ACCOUNTABILITY OFFICE

SALARIES AND EXPENSES

For an additional amount for "Salaries and Expenses" of the Government Accountability Office, $25,000,000, to remain available until September 30, 2010.

GENERAL PROVISIONS—THIS TITLE

SEC. 901. GOVERNMENT ACCOUNTABILITY OFFICE REVIEWS AND REPORTS. (a) REVIEWS AND REPORTS.—

(1) IN GENERAL.—The Comptroller General shall conduct bimonthly reviews and prepare reports on such reviews on the use by selected States and localities of funds made available in this Act. Such reports, along with any audits conducted by the Comptroller General of such funds, shall be posted on the Internet and linked to the website established under this Act by the Recovery Accountability and Transparency Board.

(2) REDACTIONS.—Any portion of a report or audit under this subsection may be redacted when made publicly available, if that portion would disclose information that is not subject to disclosure under section 552 of title 5, United States Code (commonly known as the Freedom of Information Act).

(b) EXAMINATION OF RECORDS.—The Comptroller General may examine any records related to obligations and use by any Federal, State, or local government agency of funds made available in this Act.

SEC. 902. ACCESS OF GOVERNMENT ACCOUNTABILITY OFFICE. (a) ACCESS.—Each contract awarded using funds made available in this Act shall provide that the Comptroller General and his representatives are authorized—

(1) to examine any records of the contractor or any of its subcontractors, or any State or local agency administering such contract, that directly pertain to, and involve transactions relating to, the contract or subcontract; and

(2) to interview any officer or employee of the contractor or any of its subcontractors, or of any State or local government agency administering the contract, regarding such transactions.

(b) RELATIONSHIP TO EXISTING AUTHORITY.—Nothing in this section shall be interpreted to limit or restrict in any way any existing authority of the Comptroller General.

TITLE X—MILITARY CONSTRUCTION AND VETERANS AFFAIRS

DEPARTMENT OF DEFENSE

MILITARY CONSTRUCTION, ARMY

For an additional amount for "Military Construction, Army", $180,000,000, to remain available until September 30, 2013: *Provided*, That notwithstanding any other provision of law, such funds may be obligated and expended to carry out planning and design

and military construction projects in the United States not otherwise authorized by law: *Provided further*, That of the amount provided under this heading, $80,000,000 shall be for child development centers, and $100,000,000 shall be for warrior transition complexes: *Provided further*, That not later than 30 days after the date of enactment of this Act, the Secretary of Defense shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

MILITARY CONSTRUCTION, NAVY AND MARINE CORPS

For an additional amount for "Military Construction, Navy and Marine Corps", $280,000,000, to remain available until September 30, 2013: *Provided*, That notwithstanding any other provision of law, such funds may be obligated and expended to carry out planning and design and military construction projects in the United States not otherwise authorized by law: *Provided further*, That of the amount provided under this heading, $100,000,000 shall be for troop housing, $80,000,000 shall be for child development centers, and $100,000,000 shall be for energy conservation and alternative energy projects: *Provided further*, That not later than 30 days after the date of enactment of this Act, the Secretary of Defense shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

MILITARY CONSTRUCTION, AIR FORCE

For an additional amount for "Military Construction, Air Force", $180,000,000, to remain available until September 30, 2013: *Provided*, That notwithstanding any other provision of law, such funds may be obligated and expended to carry out planning and design and military construction projects in the United States not otherwise authorized by law: *Provided further*, That of the amount provided under this heading, $100,000,000 shall be for troop housing and $80,000,000 shall be for child development centers: *Provided further*, That not later than 30 days after the date of enactment of this Act, the Secretary of Defense shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

MILITARY CONSTRUCTION, DEFENSE-WIDE

For an additional amount for "Military Construction, Defense-Wide", $1,450,000,000, to remain available until September 30, 2013: *Provided,* That notwithstanding any other provision of law, such funds may be obligated and expended to carry out planning and design and military construction projects in the United States not otherwise authorized by law: *Provided further,* That of the amount provided under this heading, $1,330,000,000 shall be for the construction of hospitals and $120,000,000 shall be for the Energy Conservation Investment Program: *Provided further,* That not later than 30 days after the date of enactment of this Act, the Secretary of Defense shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

MILITARY CONSTRUCTION, ARMY NATIONAL GUARD

For an additional amount for "Military Construction, Army National Guard", $50,000,000, to remain available until September 30, 2013: *Provided*, That notwithstanding any other provision of law, such funds may be obligated and expended to carry out planning and design and military construction projects in the United States not otherwise authorized by law: *Provided further*, That not later than 30 days after the date of enactment of this Act, the Secretary of Defense, in consultation with the Director of the Army National Guard, shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

MILITARY CONSTRUCTION, AIR NATIONAL GUARD

For an additional amount for "Military Construction, Air National Guard", $50,000,000, to remain available until September 30, 2013: *Provided*, That notwithstanding any other provision of law, such funds may be obligated and expended to carry out planning and design and military construction projects in the United States not otherwise authorized by law: *Provided further*, That not later than 30 days after the date of enactment of this Act, the Secretary of Defense, in consultation with the Director of the Air National Guard, shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

FAMILY HOUSING CONSTRUCTION, ARMY

For an additional amount for "Family Housing Construction, Army", $34,507,000, to remain available until September 30, 2013: *Provided,* That notwithstanding any other provision of law, such funds may be obligated and expended to carry out planning and design and military construction projects in the United States not otherwise authorized by law: *Provided further*, That within 30 days of enactment of this Act, the Secretary of Defense shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

FAMILY HOUSING OPERATION AND MAINTENANCE, ARMY

For an additional amount for "Family Housing Operation and Maintenance, Army", $3,932,000: *Provided,* That notwithstanding any other provision of law, such funds may be obligated and expended for maintenance and repair and minor construction projects in the United States not otherwise authorized by law.

FAMILY HOUSING CONSTRUCTION, AIR FORCE

For an additional amount for "Family Housing Construction, Air Force", $80,100,000, to remain available until September 30, 2013: *Provided,* That notwithstanding any other provision of law, such funds may be obligated and expended to carry out planning and design and military construction projects in the United States not otherwise authorized by law: *Provided further,* That within 30 days of enactment of this Act, the Secretary of Defense shall submit to the Committees on Appropriations of both Houses of

Congress an expenditure plan for funds provided under this heading.

FAMILY HOUSING OPERATION AND MAINTENANCE, AIR FORCE

For an additional amount for "Family Housing Operation and Maintenance, Air Force", $16,461,000: *Provided,* That notwithstanding any other provision of law, such funds may be obligated and expended for maintenance and repair and minor construction projects in the United States not otherwise authorized by law.

HOMEOWNERS ASSISTANCE FUND

For an additional amount for "Homeowners Assistance Fund", established by section 1013 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended (42 U.S.C. 3374), $555,000,000, to remain available until expended: *Provided,* That the Secretary of Defense shall submit quarterly reports to the Committees on Appropriations of both Houses of Congress on the expenditure of funds made available under this heading in this or any other Act.

ADMINISTRATIVE PROVISION

SEC. 1001. (a) TEMPORARY EXPANSION OF HOMEOWNERS ASSISTANCE PROGRAM TO RESPOND TO MORTGAGE FORECLOSURE AND CREDIT CRISIS. Section 1013 of the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. 3374) is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (1), (2), and (3) as clauses (i), (ii), and (iii), respectively, and indenting such subparagraphs, as so redesignated, 6 ems from the left margin;

(B) by striking "Notwithstanding any other provision of law" and inserting the following:

"(1) ACQUISITION OF PROPERTY AT OR NEAR MILITARY INSTALLATIONS THAT HAVE BEEN ORDERED TO BE CLOSED.—Notwithstanding any other provision of law";

(C) by striking "if he determines" and inserting "if—

"(A) the Secretary determines—";

(D) in clause (iii), as redesignated by subparagraph (A), by striking the period at the end and inserting "; or"; and

(E) by adding at the end the following:

"(B) the Secretary determines—

"(i) that the conditions in clauses (i) and (ii) of subparagraph (A) have been met;

"(ii) that the closing or realignment of the base or installation resulted from a realignment or closure carried out under the 2005 round of defense base closure and realignment under the Defense Base Closure and Realignment Act of 1990 (part XXIX of Public Law 101–510; 10 U.S.C. 2687 note);

"(iii) that the property was purchased by the owner before July 1, 2006;

"(iv) that the property was sold by the owner between July 1, 2006, and September 30, 2012, or an earlier end date designated by the Secretary;

"(v) that the property is the primary residence of the owner; and

"(vi) that the owner has not previously received benefit payments authorized under this subsection.

"(2) HOMEOWNER ASSISTANCE FOR WOUNDED MEMBERS OF THE ARMED FORCES, DEPARTMENT OF DEFENSE AND UNITED STATES COAST GUARD CIVILIAN EMPLOYEES, AND THEIR SPOUSES.—Notwithstanding any other provision of law, the Secretary of Defense is authorized to acquire title to, hold, manage, and dispose of, or, in lieu thereof, to reimburse for certain losses upon private sale of, or foreclosure against, any property improved with a one- or two-family dwelling which was at the time of the relevant wound, injury, or illness, the primary residence of—

"(A) any member of the Armed Forces in medical transition who—

"(i) incurred a wound, injury, or illness in the line of duty during a deployment in support of the Armed Forces;

"(ii) is disabled to a degree of 30 percent or more as a result of such wound, injury, or illness, as determined by the Secretary of Defense; and

"(iii) is reassigned in furtherance of medical treatment or rehabilitation, or due to medical retirement in connection with such disability;

"(B) any civilian employee of the Department of Defense or the United States Coast Guard who—

"(i) was wounded, injured, or became ill in the performance of his or her duties during a forward deployment occurring on or after September 11, 2001, in support of the Armed Forces; and

"(ii) is reassigned in furtherance of medical treatment, rehabilitation, or due to medical retirement resulting from the sustained disability; or

"(C) the spouse of a member of the Armed Forces or a civilian employee of the Department of Defense or the United States Coast Guard if—

"(i) the member or employee was killed in the line of duty or in the performance of his or her duties during a deployment on or after September 11, 2001, in support of the Armed Forces or died from a wound, injury, or illness incurred in the line of duty during such a deployment; and

"(ii) the spouse relocates from such residence within 2 years after the death of such member or employee.

"(3) TEMPORARY HOMEOWNER ASSISTANCE FOR MEMBERS OF THE ARMED FORCES PERMANENTLY REASSIGNED DURING SPECIFIED MORTGAGE CRISIS.—Notwithstanding any other provision of law, the Secretary of Defense is authorized to acquire title to, hold, manage, and dispose of, or, in lieu thereof, to reimburse for certain losses upon private sale of, or foreclosure against, any property improved with a one- or two-family dwelling situated at or near a military base or installation, if the Secretary determines—

"(A) that the owner is a member of the Armed Forces serving on permanent assignment;

"(B) that the owner is permanently reassigned by order of the United States Government to a duty station or home port outside a 50-mile radius of the base or installation;

"(C) that the reassignment was ordered between February 1, 2006, and September 30, 2012, or an earlier end date designated by the Secretary;

"(D) that the property was purchased by the owner before July 1, 2006;

"(E) that the property was sold by the owner between July 1, 2006, and September 30, 2012, or an earlier end date designated by the Secretary;

"(F) that the property is the primary residence of the owner; and

"(G) that the owner has not previously received benefit payments authorized under this subsection.";

(2) in subsection (b), by striking "this section" each place it appears and inserting "subsection (a)(1)";

(3) in subsection (c)—

(A) by striking "Such persons" and inserting the following:

"(1) HOMEOWNER ASSISTANCE RELATED TO CLOSED MILITARY INSTALLATIONS.—

"(A) IN GENERAL.—Such persons";

(B) by striking "set forth above shall elect either (1) to receive" and inserting the following: "set forth in subsection (a)(1) shall elect either—

"(i) to receive";

(C) by striking "difference between (A) 95 per centum" and all that follows through "(B) the fair market value" and inserting the following: "difference between—

"(I) 95 per centum of the fair market value of their property (as such value is determined by the Secretary of Defense) prior to public announcement of intention to close all or part of the military base or installation; and

"(II) the fair market value";

(D) by striking "time of the sale, or (2) to receive" and inserting the following: "time of the sale; or

"(ii) to receive";

(E) by striking "outstanding mortgages. The Secretary may also pay a person who elects to receive a cash payment under clause (1) of the preceding sentence an amount" and inserting "outstanding mortgages.

"(B) REIMBURSEMENT OF EXPENSES.—The Secretary may also pay a person who elects to receive a cash payment under subparagraph (A) an amount"; and

(F) by striking "best interest of the Federal Government. Cash payment" and inserting the following: "best interest of the United States.

"(2) HOMEOWNER ASSISTANCE FOR WOUNDED INDIVIDUALS AND THEIR SPOUSES.—

"(A) IN GENERAL.—Persons eligible under the criteria set forth in subsection (a)(2) may elect either—

"(i) to receive a cash payment as compensation for losses which may be or have been sustained in

a private sale, in an amount not to exceed the difference between—

"(I) 95 per centum of prior fair market value of their property (as such value is determined by the Secretary of Defense); and

"(II) the fair market value of such property (as such value is determined by the Secretary of Defense) at the time of sale; or

"(ii) to receive, as purchase price for their property an amount not to exceed 90 per centum of prior fair market value as such value is determined by the Secretary of Defense, or the amount of the outstanding mortgages.

"(B) DETERMINATION OF BENEFITS.—The Secretary may also pay a person who elects to receive a cash payment under subparagraph (A) an amount that the Secretary determines appropriate to reimburse the person for the costs incurred by the person in the sale of the property if the Secretary determines that such payment will benefit the person and is in the best interest of the United States.

"(3) HOMEOWNER ASSISTANCE FOR PERMANENTLY REASSIGNED INDIVIDUALS.—

"(A) IN GENERAL.—Persons eligible under the criteria set forth in subsection (a)(3) may elect either—

"(i) to receive a cash payment as compensation for losses which may be or have been sustained in a private sale, in an amount not to exceed the difference between—

"(I) 95 per centum of prior fair market value of their property (as such value is determined by the Secretary of Defense); and

"(II) the fair market value of such property (as such value is determined by the Secretary of Defense) at the time of sale; or

"(ii) to receive, as purchase price for their property an amount not to exceed 90 per centum of prior fair market value as such value is determined by the Secretary of Defense, or the amount of the outstanding mortgages.

"(B) DETERMINATION OF BENEFITS.—The Secretary may also pay a person who elects to receive a cash payment under subparagraph (A) an amount that the Secretary determines appropriate to reimburse the person for the costs incurred by the person in the sale of the property if the Secretary determines that such payment will benefit the person and is in the best interest of the United States.

"(4) COMPENSATION AND LIMITATIONS RELATED TO FORECLOSURES AND ENCUMBRANCES.—Cash payment";

(4) by striking subsection (g);

(5) in subsection (l), by striking "(a)(2)" and inserting "(a)(1)(A)(ii)";

(6) in subsection (m), by striking "this section" and inserting "subsection (a)(1)";

(7) in subsection (n)—

(A) in paragraph (1), by striking "this section" and inserting "subsection (a)(1)"; and

(B) in paragraph (2), by striking "this section" and inserting "subsection (a)(1)";

(8) in subsection (o)—

(A) in paragraph (1), by striking "this section" and inserting "subsection (a)(1)";

(B) in paragraph (2), by striking "this section" and inserting "subsection (a)(1)"; and

(C) by striking paragraph (4); and

(9) by adding at the end the following new subsection:

"(p) DEFINITIONS.—In this section:

"(1) the term 'Armed Forces' has the meaning given the term 'armed forces' in section 101(a) of title 10, United States Code;

"(2) the term 'civilian employee' has the meaning given the term 'employee' in section 2105(a) of title 5, United States Code;

"(3) the term 'medical transition', in the case of a member of the Armed Forces, means a member who—

"(A) is in Medical Holdover status;

"(B) is in Active Duty Medical Extension status;

"(C) is in Medical Hold status;

"(D) is in a status pending an evaluation by a medical evaluation board;

"(E) has a complex medical need requiring six or more months of medical treatment; or

"(F) is assigned or attached to an Army Warrior Transition Unit, an Air Force Patient Squadron, a Navy Patient Multidisciplinary Care Team, or a Marine Patient Affairs Team/Wounded Warrior Regiment; and

"(4) the term 'nonappropriated fund instrumentality employee' means a civilian employee who—

"(A) is a citizen of the United States; and

"(B) is paid from nonappropriated funds of Army and Air Force Exchange Service, Navy Resale and Services Support Office, Marine Corps exchanges, or any other instrumentality of the United States under the jurisdiction of the Armed Forces which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces.".

(b) CLERICAL AMENDMENT.—Such section is further amended in the section heading by inserting "and certain property owned by members of the Armed Forces, Department of Defense and United States Coast Guard civilian employees, and surviving spouses" after "ordered to be closed".

(c) AUTHORITY TO USE APPROPRIATED FUNDS.—Notwithstanding subsection (i) of such section, amounts appropriated or otherwise made available by this title under the heading "Homeowners Assistance Fund" may be used for the Homeowners Assistance Fund established under such section.

DEPARTMENT OF VETERANS AFFAIRS

VETERANS HEALTH ADMINISTRATION

MEDICAL FACILITIES

For an additional amount for "Medical Facilities" for non-recurring maintenance, including energy projects, $1,000,000,000, to remain available until September 30, 2010: *Provided*, That not later than 30 days after the date of enactment of this Act, the Secretary of Veterans Affairs shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

NATIONAL CEMETERY ADMINISTRATION

For an additional amount for "National Cemetery Administration" for monument and memorial repairs, including energy projects, $50,000,000, to remain available until September 30, 2010: *Provided*, That not later than 30 days after the date of enactment of this Act, the Secretary of Veterans Affairs shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

DEPARTMENTAL ADMINISTRATION

GENERAL OPERATING EXPENSES

For an additional amount for "General Operating Expenses", $150,000,000, to remain available until September 30, 2010, for additional expenses related to hiring and training temporary surge claims processors.

INFORMATION TECHNOLOGY SYSTEMS

For an additional amount for "Information Technology Systems", $50,000,000, to remain available until September 30, 2010, for the Veterans Benefits Administration: *Provided,* That not later than 30 days after the enactment of this Act, the Secretary of Veterans Affairs shall submit to the Committees on Appropriations of both Houses of Congress an expenditure plan for funds provided under this heading.

OFFICE OF INSPECTOR GENERAL

For an additional amount for "Office of Inspector General", $1,000,000, to remain available until September 30, 2011, for oversight and audit of programs, grants and projects funded under this title.

GRANTS FOR CONSTRUCTION OF STATE EXTENDED CARE FACILITIES

For an additional amount for "Grants for Construction of State Extended Care Facilities", $150,000,000, to remain available until September 30, 2010, for grants to assist States to acquire or construct State nursing home and domiciliary facilities and to remodel, modify, or alter existing hospital, nursing home, and domiciliary facilities in State homes, for furnishing care to veterans as authorized by sections 8131 through 8137 of title 38, United States Code.

ADMINISTRATIVE PROVISION

SEC. 1002. PAYMENTS TO ELIGIBLE PERSONS WHO SERVED IN THE UNITED STATES ARMED FORCES IN THE FAR EAST DURING WORLD WAR II. (a) FINDINGS.—Congress makes the following findings:

(1) The Philippine islands became a United States possession in 1898 when they were ceded from Spain following the Spanish-American War.

(2) During World War II, Filipinos served in a variety of units, some of which came under the direct control of the United States Armed Forces.

(3) The regular Philippine Scouts, the new Philippine Scouts, the Guerrilla Services, and more than 100,000 members of the Philippine Commonwealth Army were called into the service of the United States Armed Forces of the Far East on July 26, 1941, by an executive order of President Franklin D. Roosevelt.

(4) Even after hostilities had ceased, wartime service of the new Philippine Scouts continued as a matter of law until the end of 1946, and the force gradually disbanded and was disestablished in 1950.

(5) Filipino veterans who were granted benefits prior to the enactment of the so-called Rescissions Acts of 1946 (Public Laws 79–301 and 79–391) currently receive full benefits under laws administered by the Secretary of Veterans Affairs, but under section 107 of title 38, United States Code, the service of certain other Filipino veterans is deemed not to be active service for purposes of such laws.

(6) These other Filipino veterans only receive certain benefits under title 38, United States Code, and, depending on where they legally reside, are paid such benefit amounts at reduced rates.

(7) The benefits such veterans receive include service-connected compensation benefits paid under chapter 11 of title 38, United States Code, dependency indemnity compensation survivor benefits paid under chapter 13 of title 38, United States Code, and burial benefits under chapters 23 and 24 of title 38, United States Code, and such benefits are paid to beneficiaries at the rate of $0.50 per dollar authorized, unless they lawfully reside in the United States.

(8) Dependents' educational assistance under chapter 35 of title 38, United States Code, is also payable for the dependents of such veterans at the rate of $0.50 per dollar authorized, regardless of the veterans' residency.

(b) COMPENSATION FUND.—

(1) IN GENERAL.—There is in the general fund of the Treasury a fund to be known as the "Filipino Veterans Equity Compensation Fund" (in this section referred to as the "compensation fund").

(2) AVAILABILITY OF FUNDS.—Subject to the availability of appropriations for such purpose, amounts in the fund shall be available to the Secretary of Veterans Affairs without fiscal year limitation to make payments to eligible persons in accordance with this section.

(c) PAYMENTS.—

(1) IN GENERAL.—The Secretary may make a payment from the compensation fund to an eligible person who, during the one-year period beginning on the date of the enactment of this Act, submits to the Secretary a claim for benefits under this section. The application for the claim shall contain such information and evidence as the Secretary may require.

(2) PAYMENT TO SURVIVING SPOUSE.—If an eligible person who has filed a claim for benefits under this section dies before payment is made under this section, the payment under this section shall be made instead to the surviving spouse, if any, of the eligible person.

(d) ELIGIBLE PERSONS.—An eligible person is any person who—

(1) served—

(A) before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States; or

(B) in the Philippine Scouts under section 14 of the Armed Forces Voluntary Recruitment Act of 1945 (59 Stat. 538); and

(2) was discharged or released from service described in paragraph (1) under conditions other than dishonorable.

(e) PAYMENT AMOUNTS.—Each payment under this section shall be—

(1) in the case of an eligible person who is not a citizen of the United States, in the amount of $9,000; and

(2) in the case of an eligible person who is a citizen of the United States, in the amount of $15,000.

(f) LIMITATION.—The Secretary may not make more than one payment under this section for each eligible person described in subsection (d).

(g) CLARIFICATION OF TREATMENT OF PAYMENTS UNDER CERTAIN LAWS.—Amounts paid to a person under this section—

(1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering; and

(2) shall not be included in income or resources for purposes of determining—

(A) eligibility of an individual to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code, or the amount of such benefits;

(B) eligibility of an individual to receive benefits under title VIII of the Social Security Act, or the amount of such benefits; or

(C) eligibility of an individual for, or the amount of benefits under, any other Federal or federally assisted program.

(h) RELEASE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the acceptance by an eligible person or surviving spouse, as applicable, of a payment under this section shall be final,

and shall constitute a complete release of any claim against the United States by reason of any service described in subsection (d).

(2) PAYMENT OF PRIOR ELIGIBILITY STATUS.—Nothing in this section shall prohibit a person from receiving any benefit (including health care, survivor, or burial benefits) which the person would have been eligible to receive based on laws in effect as of the day before the date of the enactment of this Act.

(i) RECOGNITION OF SERVICE.—The service of a person as described in subsection (d) is hereby recognized as active military service in the Armed Forces for purposes of, and to the extent provided in, this section.

(j) ADMINISTRATION.—

(1) The Secretary shall promptly issue application forms and instructions to ensure the prompt and efficient administration of the provisions of this section.

(2) The Secretary shall administer the provisions of this section in a manner consistent with applicable provisions of title 38, United States Code, and other provisions of law, and shall apply the definitions in section 101 of such title in the administration of such provisions, except to the extent otherwise provided in this section.

(k) REPORTS.—The Secretary shall include, in documents submitted to Congress by the Secretary in support of the President's budget for each fiscal year, detailed information on the operation of the compensation fund, including the number of applicants, the number of eligible persons receiving benefits, the amounts paid out of the compensation fund, and the administration of the compensation fund for the most recent fiscal year for which such data is available.

(l) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated to the compensation fund $198,000,000, to remain available until expended, to make payments under this section.

TITLE XI—STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS

DEPARTMENT OF STATE

ADMINISTRATION OF FOREIGN AFFAIRS

DIPLOMATIC AND CONSULAR PROGRAMS

For an additional amount for "Diplomatic and Consular Programs" for urgent domestic facilities requirements for passport and training functions, $90,000,000: *Provided,* That the Secretary of State shall submit to the Committees on Appropriations within 90 days of enactment of this Act a detailed spending plan for funds appropriated under this heading: *Provided further,* That with respect to the funds made available for passport agencies, such plan shall be developed in consultation with the Department of Homeland Security and the General Services Administration and shall coordinate and co-locate, to the extent feasible, passport agencies with other Federal facilities.

CAPITAL INVESTMENT FUND

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "Capital Investment Fund", $290,000,000, for information technology security and upgrades to support mission-critical operations, of which up to $38,000,000 shall be transferred to, and merged with, funds made available under the heading "Capital Investment Fund" of the United States Agency for International Development: *Provided,* That the Secretary of State and the Administrator of the United States Agency for International Development shall coordinate information technology systems, where appropriate, to increase efficiencies and eliminate redundancies, to include co-location of backup information management facilities, and shall submit to the Committees on Appropriations within 90 days of enactment of this Act a detailed spending plan for funds appropriated under this heading.

OFFICE OF INSPECTOR GENERAL

For an additional amount for "Office of Inspector General" for oversight requirements, $2,000,000.

INTERNATIONAL COMMISSIONS

INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

CONSTRUCTION

(INCLUDING TRANSFER OF FUNDS)

For an additional amount for "Construction" for the water quantity program to meet immediate repair and rehabilitation requirements, $220,000,000: *Provided,* That up to $2,000,000 may be transferred to, and merged with, funds available under the heading "International Boundary and Water Commission, United States and Mexico—Salaries and Expenses": *Provided further,* That the Secretary of State shall submit to the Committees on Appropriations within 90 days of enactment of this Act a detailed spending plan for funds appropriated under this heading.

TITLE XII—TRANSPORTATION AND HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES

DEPARTMENT OF TRANSPORTATION

OFFICE OF THE SECRETARY

SUPPLEMENTAL DISCRETIONARY GRANTS FOR A NATIONAL SURFACE TRANSPORTATION SYSTEM

For an additional amount for capital investments in surface transportation infrastructure, $1,500,000,000, to remain available through September 30, 2011: *Provided,* That the Secretary of Transportation shall distribute funds provided under this heading as discretionary grants to be awarded to State and local governments or transit agencies on a competitive basis for projects that will have a significant impact on the Nation, a metropolitan area,

or a region: *Provided further,* That projects eligible for funding provided under this heading shall include, but not be limited to, highway or bridge projects eligible under title 23, United States Code, including interstate rehabilitation, improvements to the rural collector road system, the reconstruction of overpasses and interchanges, bridge replacements, seismic retrofit projects for bridges, and road realignments; public transportation projects eligible under chapter 53 of title 49, United States Code, including investments in projects participating in the New Starts or Small Starts programs that will expedite the completion of those projects and their entry into revenue service; passenger and freight rail transportation projects; and port infrastructure investments, including projects that connect ports to other modes of transportation and improve the efficiency of freight movement: *Provided further,* That of the amount made available under this paragraph, the Secretary may use an amount not to exceed $200,000,000 for the purpose of paying the subsidy and administrative costs of projects eligible for federal credit assistance under chapter 6 of title 23, United States Code, if the Secretary finds that such use of the funds would advance the purposes of this paragraph: *Provided further,* That in distributing funds provided under this heading, the Secretary shall take such measures so as to ensure an equitable geographic distribution of funds and an appropriate balance in addressing the needs of urban and rural communities: *Provided further,* That a grant funded under this heading shall be not less than $20,000,000 and not greater than $300,000,000: *Provided further,* That the Secretary may waive the minimum grant size cited in the preceding proviso for the purpose of funding significant projects in smaller cities, regions, or States: *Provided further,* That not more than 20 percent of the funds made available under this paragraph may be awarded to projects in a single State: *Provided further,* That the Federal share of the costs for which an expenditure is made under this heading may be up to 100 percent: *Provided further,* That the Secretary shall give priority to projects that require a contribution of Federal funds in order to complete an overall financing package, and to projects that are expected to be completed within 3 years of enactment of this Act: *Provided further,* That the Secretary shall publish criteria on which to base the competition for any grants awarded under this heading not later than 90 days after enactment of this Act: *Provided further,* That the Secretary shall require applications for funding provided under this heading to be submitted not later than 180 days after the publication of such criteria, and announce all projects selected to be funded from such funds not later than 1 year after enactment of this Act: *Provided further,* That projects conducted using funds provided under this heading must comply with the requirements of subchapter IV of chapter 31 of title 40, United States Code: *Provided further,* That the Secretary may retain up to $1,500,000 of the funds provided under this heading, and may transfer portions of those funds to the Administrators of the Federal Highway Administration, the Federal Transit Administration, the Federal Railroad Administration and the Maritime Administration, to fund the award and oversight of grants made under this heading.

FEDERAL AVIATION ADMINISTRATION

SUPPLEMENTAL FUNDING FOR FACILITIES AND EQUIPMENT

For an additional amount for necessary investments in Federal Aviation Administration infrastructure, $200,000,000, to remain available through September 30, 2010: *Provided,* That funding provided under this heading shall be used to make improvements to power systems, air route traffic control centers, air traffic control towers, terminal radar approach control facilities, and navigation and landing equipment: *Provided further,* That priority be given to such projects or activities that will be completed within 2 years of enactment of this Act: *Provided further,* That amounts made available under this heading may be provided through grants in addition to the other instruments authorized under section 106(l)(6) of title 49, United States Code: *Provided further,* That the Federal share of the costs for which an expenditure is made under this heading shall be 100 percent: *Provided further,* That amounts provided under this heading may be used for expenses the agency incurs in administering this program: *Provided further,* That not more than 60 days after enactment of this Act, the Administrator shall establish a process for applying, reviewing and awarding grants and cooperative and other transaction agreements, including the form and content of an application, and requirements for the maintenance of records that are necessary to facilitate an effective audit of the use of the funding provided: *Provided further,* That section 50101 of title 49, United States Code, shall apply to funds provided under this heading.

GRANTS-IN-AID FOR AIRPORTS

For an additional amount for "Grants-In-Aid for Airports", to enable the Secretary of Transportation to make grants for discretionary projects as authorized by subchapter 1 of chapter 471 and subchapter 1 of chapter 475 of title 49, United States Code, and for the procurement, installation and commissioning of runway incursion prevention devices and systems at airports of such title, $1,100,000,000, to remain available through September 30, 2010: *Provided*, That such funds shall not be subject to apportionment formulas, special apportionment categories, or minimum percentages under chapter 471: *Provided further,* That the Secretary shall distribute funds provided under this heading as discretionary grants to airports, with priority given to those projects that demonstrate to his satisfaction their ability to be completed within 2 years of enactment of this Act, and serve to supplement and not supplant planned expenditures from airport-generated revenues or from other State and local sources on such activities: *Provided further,* That the Secretary shall award grants totaling not less than 50 percent of the funds made available under this heading within 120 days of enactment of this Act, and award grants for the remaining amounts not later than 1 year after enactment of this Act: *Provided further,* That the Federal share payable of the costs for which a grant is made under this heading shall be 100 percent: *Provided further,* That the amount made available under this heading shall not be subject to any limitation on obligations for the Grants-in-Aid for Airports program set forth in any Act: *Provided further,* That the Administrator of the Federal Aviation Administration may retain up to 0.2 percent of the funds provided under this

heading to fund the award and oversight by the Administrator of grants made under this heading.

FEDERAL HIGHWAY ADMINISTRATION

HIGHWAY INFRASTRUCTURE INVESTMENT

For an additional amount for restoration, repair, construction and other activities eligible under paragraph (b) of section 133 of title 23, United States Code, and for passenger and freight rail transportation and port infrastructure projects eligible for assistance under subsection 601(a)(8) of such title, $27,500,000,000, to remain available through September 30, 2010: *Provided,* That, after making the set-asides required under this heading, 50 percent of the funds made available under this heading shall be apportioned to States using the formula set forth in section 104(b)(3) of title 23, United States Code, and the remaining funds shall be apportioned to States in the same ratio as the obligation limitation for fiscal year 2008 was distributed among the States in accordance with the formula specified in section 120(a)(6) of division K of Public Law 110–161: *Provided further,* That funds made available under this heading shall be apportioned not later than 21 days after the date of enactment of this Act: *Provided further,* That in selecting projects to be carried out with funds apportioned under this heading, priority shall be given to projects that are projected for completion within a 3-year time frame, and are located in economically distressed areas as defined by section 301 of the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3161): *Provided further,* That 120 days following the date of such apportionment, the Secretary of Transportation shall withdraw from each State an amount equal to 50 percent of the funds awarded to that State (excluding funds suballocated within the State) less the amount of funding obligated (excluding funds suballocated within the State), and the Secretary shall redistribute such amounts to other States that have had no funds withdrawn under this proviso in the manner described in section 120(c) of division K of Public Law 110–161: *Provided further,* That 1 year following the date of such apportionment, the Secretary shall withdraw from each recipient of funds apportioned under this heading any unobligated funds, and the Secretary shall redistribute such amounts to States that have had no funds withdrawn under this proviso (excluding funds suballocated within the State) in the manner described in section 120(c) of division K of Public Law 110–161: *Provided further,* That at the request of a State, the Secretary of Transportation may provide an extension of such 1-year period only to the extent that he feels satisfied that the State has encountered extreme conditions that create an unworkable bidding environment or other extenuating circumstances: *Provided further*, That before granting such an extension, the Secretary shall send a letter to the House and Senate Committees on Appropriations that provides a thorough justification for the extension: *Provided further,* That 3 percent of the funds apportioned to a State under this heading shall be set aside for the purposes described in subsection 133(d)(2) of title 23, United States Code (without regard to the comparison to fiscal year 2005): *Provided further,* That 30 percent of the funds apportioned to a State under this heading shall be suballocated within the State in the manner and for the purposes described in the first sentence of subsection

133(d)(3)(A), in subsection 133(d)(3)(B), and in subsection 133(d)(3)(D): *Provided further,* That such suballocation shall be conducted in every State: *Provided further,* That funds suballocated within a State to urbanized areas and other areas shall not be subject to the redistribution of amounts required 120 days following the date of apportionment of funds provided under this heading: *Provided further,* That of the funds provided under this heading, $105,000,000 shall be for the Puerto Rico highway program authorized under section 165 of title 23, United States Code, and $45,000,000 shall be for the territorial highway program authorized under section 215 of title 23, United States Code: *Provided further,* That of the funds provided under this heading, $60,000,000 shall be for capital expenditures eligible under section 147 of title 23, United States Code (without regard to subsection(d)): *Provided further,* That the Secretary of Transportation shall distribute such $60,000,000 as competitive discretionary grants to States, with priority given to those projects that demonstrate to his satisfaction their ability to be completed within 2 years of enactment of this Act: *Provided further,* That of the funds provided under this heading, $550,000,000 shall be for investments in transportation at Indian reservations and Federal lands: *Provided further,* That of the funds identified in the preceding proviso, $310,000,000 shall be for the Indian Reservation Roads program, $170,000,000 shall be for the Park Roads and Parkways program, $60,000,000 shall be for the Forest Highway Program, and $10,000,000 shall be for the Refuge Roads program: *Provided further,* That for investments at Indian reservations and Federal lands, priority shall be given to capital investments, and to projects and activities that can be completed within 2 years of enactment of this Act: *Provided further,* That 1 year following the enactment of this Act, to ensure the prompt use of the $550,000,000 provided for investments at Indian reservations and Federal lands, the Secretary shall have the authority to redistribute unobligated funds within the respective program for which the funds were appropriated: *Provided further,* That up to 4 percent of the funding provided for Indian Reservation Roads may be used by the Secretary of the Interior for program management and oversight and project-related administrative expenses: *Provided further,* That section 134(f)(3)(C)(ii)(II) of title 23, United States Code, shall not apply to funds provided under this heading: *Provided further,* That of the funds made available under this heading, $20,000,000 shall be for highway surface transportation and technology training under section 140(b) of title 23, United States Code, and $20,000,000 shall be for disadvantaged business enterprises bonding assistance under section 332(e) of title 49, United States Code: *Provided further,* That funds made available under this heading shall be administered as if apportioned under chapter 1 of title 23, United States Code, except for funds made available for investments in transportation at Indian reservations and Federal lands, and for the territorial highway program, which shall be administered in accordance with chapter 2 of title 23, United States Code, and except for funds made available for disadvantaged business enterprises bonding assistance, which shall be administered in accordance with chapter 3 of title 49, United States Code: *Provided further,* That the Federal share payable on account of any project or activity carried out with funds made available under this heading shall be, at the option of the recipient, up to 100 percent of the total cost thereof: *Provided further*, That

funds made available by this Act shall not be obligated for the purposes authorized under section 115(b) of title 23, United States Code: *Provided further,* That funding provided under this heading shall be in addition to any and all funds provided for fiscal years 2009 and 2010 in any other Act for "Federal-aid Highways" and shall not affect the distribution of funds provided for "Federal-aid Highways" in any other Act: *Provided further,* That the amount made available under this heading shall not be subject to any limitation on obligations for Federal-aid highways or highway safety construction programs set forth in any Act: *Provided further,* That section 1101(b) of Public Law 109–59 shall apply to funds apportioned under this heading: *Provided further,* That the Administrator of the Federal Highway Administration may retain up to $40,000,000 of the funds provided under this heading to fund the oversight by the Administrator of projects and activities carried out with funds made available to the Federal Highway Administration in this Act, and such funds shall be available through September 30, 2012.

FEDERAL RAILROAD ADMINISTRATION

CAPITAL ASSISTANCE FOR HIGH SPEED RAIL CORRIDORS AND INTERCITY PASSENGER RAIL SERVICE

For an additional amount for section 501 of Public Law 110–432 and discretionary grants to States to pay for the cost of projects described in paragraphs (2)(A) and (2)(B) of section 24401 of title 49, United States Code, subsection (b) of section 24105 of such title, $8,000,000,000, to remain available through September 30, 2012: *Provided,* That the Secretary of Transportation shall give priority to projects that support the development of intercity high speed rail service: *Provided further,* That within 60 days of the enactment of this Act, the Secretary shall submit to the House and Senate Committees on Appropriations a strategic plan that describes how the Secretary will use the funding provided under this heading to improve and deploy high speed passenger rail systems: *Provided further,* That within 120 days of enactment of this Act, the Secretary shall issue interim guidance to applicants covering grant terms, conditions, and procedures until final regulations are issued: *Provided further,* That such interim guidance shall provide separate instructions for the high speed rail corridor program, capital assistance for intercity passenger rail service grants, and congestion grants: *Provided further,* That the Secretary shall waive the requirement that a project conducted using funds provided under this heading be in a State rail plan developed under chapter 227 of title 49, United States Code: *Provided further,* That the Federal share payable of the costs for which a grant is made under this heading shall be, at the option of the recipient, up to 100 percent: *Provided further,* That projects conducted using funds provided under this heading must comply with the requirements of subchapter IV of chapter 31 of title 40, United States Code: *Provided further,* That section 24405 of title 49, United States Code, shall apply to funds provided under this heading: *Provided further,* That the Administrator of the Federal Railroad Administration may retain up to one-quarter of 1 percent of the funds provided under this heading to fund the award and oversight by the Administrator of grants made under this heading, and funds retained for said purposes shall remain available through September 30, 2014.

CAPITAL GRANTS TO THE NATIONAL RAILROAD PASSENGER CORPORATION

For an additional amount for the National Railroad Passenger Corporation (Amtrak) to enable the Secretary of Transportation to make capital grants to Amtrak as authorized by section 101(c) of the Passenger Rail Investment and Improvement Act of 2008 (Public Law 110–432), $1,300,000,000, to remain available through September 30, 2010, of which $450,000,000 shall be used for capital security grants: *Provided,* That priority for the use of non-security funds shall be given to projects for the repair, rehabilitation, or upgrade of railroad assets or infrastructure, and for capital projects that expand passenger rail capacity including the rehabilitation of rolling stock: *Provided further*, That none of the funds under this heading shall be used to subsidize the operating losses of Amtrak: *Provided further*, That funds provided under this heading shall be awarded not later than 30 days after the date of enactment of this Act: *Provided further,* That the Secretary shall take measures to ensure that projects funded under this heading shall be completed within 2 years of enactment of this Act, and shall serve to supplement and not supplant planned expenditures for such activities from other Federal, State, local and corporate sources: *Provided further,* That the Secretary shall certify to the House and Senate Committees on Appropriations in writing compliance with the preceding proviso: *Provided further,* That not more than 60 percent of the funds provided for non-security activities under this heading may be used for capital projects along the Northeast Corridor: *Provided further,* That of the funding provided under this heading, $5,000,000 shall be made available for the Amtrak Office of Inspector General and made available through September 30, 2013.

FEDERAL TRANSIT ADMINISTRATION

TRANSIT CAPITAL ASSISTANCE

For an additional amount for transit capital assistance grants authorized under section 5302(a)(1) of title 49, United States Code, $6,900,000,000, to remain available through September 30, 2010: *Provided*, That the Secretary of Transportation shall provide 80 percent of the funds appropriated under this heading for grants under section 5307 of title 49, United States Code, and apportion such funds in accordance with section 5336 of such title (other than subsections (i)(1) and (j)): *Provided further,* That the Secretary shall apportion 10 percent of the funds appropriated under this heading in accordance with section 5340 of such title: *Provided further,* That the Secretary shall provide 10 percent of the funds appropriated under this heading for grants under section 5311 of title 49, United States Code, and apportion such funds in accordance with such section: *Provided further,* That funds apportioned under this heading shall be apportioned not later than 21 days after the date of enactment of this Act: *Provided further,* That 180 days following the date of such apportionment, the Secretary shall withdraw from each urbanized area or State an amount equal to 50 percent of the funds apportioned to such urbanized areas or States less the amount of funding obligated, and the Secretary shall redistribute such amounts to other urbanized areas or States that have had no funds withdrawn under this proviso utilizing whatever method he deems appropriate to ensure that all funds

redistributed under this proviso shall be utilized promptly: *Provided further,* That 1 year following the date of such apportionment, the Secretary shall withdraw from each urbanized area or State any unobligated funds, and the Secretary shall redistribute such amounts to other urbanized areas or States that have had no funds withdrawn under this proviso utilizing whatever method he deems appropriate to ensure that all funds redistributed under this proviso shall be utilized promptly: *Provided further,* That at the request of an urbanized area or State, the Secretary of Transportation may provide an extension of such 1-year period if he feels satisfied that the urbanized area or State has encountered an unworkable bidding environment or other extenuating circumstances: *Provided further,* That before granting such an extension, the Secretary shall send a letter to the House and Senate Committees on Appropriations that provides a thorough justification for the extension: *Provided further,* That of the funds provided for section 5311 of title 49, United States Code, 2.5 percent shall be made available for section 5311(c)(1): *Provided further,* That of the funding provided under this heading, $100,000,000 shall be distributed as discretionary grants to public transit agencies for capital investments that will assist in reducing the energy consumption or greenhouse gas emissions of their public transportation systems: *Provided further,* That for such grants on energy-related investments, priority shall be given to projects based on the total energy savings that are projected to result from the investment, and projected energy savings as a percentage of the total energy usage of the public transit agency: *Provided further,* That applicable chapter 53 requirements shall apply to funding provided under this heading, except that the Federal share of the costs for which any grant is made under this heading shall be, at the option of the recipient, up to 100 percent: *Provided further,* That the amount made available under this heading shall not be subject to any limitation on obligations for transit programs set forth in any Act: *Provided further,* That section 1101(b) of Public Law 109–59 shall apply to funds appropriated under this heading: *Provided further,* That the funds appropriated under this heading shall not be comingled with any prior year funds: *Provided further,* That notwithstanding any other provision of law, three-quarters of 1 percent of the funds provided for grants under section 5307 and section 5340, and one-half of 1 percent of the funds provided for grants under section 5311, shall be available for administrative expenses and program management oversight, and such funds shall be available through September 30, 2012.

FIXED GUIDEWAY INFRASTRUCTURE INVESTMENT

For an amount for capital expenditures authorized under section 5309(b)(2) of title 49, United States Code, $750,000,000, to remain available through September 30, 2010: *Provided*, That the Secretary of Transportation shall apportion funds under this heading pursuant to the formula set forth in section 5337 of title 49, United States Code: *Provided further*, That the funds appropriated under this heading shall not be commingled with any prior year funds: *Provided further*, That funds made available under this heading shall be apportioned not later than 21 days after the date of enactment of this Act: *Provided further*, That 180 days following the date of such apportionment, the Secretary shall

withdraw from each urbanized area an amount equal to 50 percent of the funds apportioned to such urbanized area less the amount of funding obligated, and the Secretary shall redistribute such amounts to other urbanized areas that have had no funds withdrawn under this proviso utilizing whatever method he or she deems appropriate to ensure that all funds redistributed under this proviso shall be utilized promptly: *Provided further*, That 1 year following the date of such apportionment, the Secretary shall withdraw from each urbanized area any unobligated funds, and the Secretary shall redistribute such amounts to other urbanized areas that have had no funds withdrawn under this proviso utilizing whatever method he or she deems appropriate to ensure that all funds redistributed under this proviso shall be utilized promptly: *Provided further*, That at the request of an urbanized area, the Secretary of Transportation may provide an extension of such 1-year period if he or she feels satisfied that the urbanized area has encountered an unworkable bidding environment or other extenuating circumstances: *Provided further*, That before granting such an extension, the Secretary shall send a letter to the House and Senate Committees on Appropriations that provides a thorough justification for the extension: *Provided further*, That applicable chapter 53 requirements shall apply except that the Federal share of the costs for which a grant is made under this heading shall be, at the option of the recipient, up to 100 percent: *Provided further*, That the provisions of section 1101(b) of Public Law 109–59 shall apply to funds made available under this heading: *Provided further*, That notwithstanding any other provision of law, up to 1 percent of the funds under this heading shall be available for administrative expenses and program management oversight and shall remain available for obligation until September 30, 2012.

CAPITAL INVESTMENT GRANTS

For an additional amount for "Capital Investment Grants", as authorized under section 5338(c)(4) of title 49, United States Code, and allocated under section 5309(m)(2)(A) of such title, to enable the Secretary of Transportation to make discretionary grants as authorized by section 5309(d) and (e) of such title, $750,000,000, to remain available through September 30, 2010: *Provided*, That such amount shall be allocated without regard to the limitation under section 5309(m)(2)(A)(i): *Provided further*, That in selecting projects to be funded, priority shall be given to projects that are currently in construction or are able to obligate funds within 150 days of enactment of this Act: *Provided further*, That the provisions of section 1101(b) of Public Law 109–59 shall apply to funds made available under this heading: *Provided further*, That funds appropriated under this heading shall not be commingled with any prior year funds: *Provided further*, That applicable chapter 53 requirements shall apply, except that notwithstanding any other provision of law, up to 1 percent of the funds provided under this heading shall be available for administrative expenses and program management oversight, and shall remain available through September 30, 2012.

MARITIME ADMINISTRATION

SUPPLEMENTAL GRANTS FOR ASSISTANCE TO SMALL SHIPYARDS

To make grants to qualified shipyards as authorized under section 3508 of Public Law 110–417 or section 54101 of title 46, United States Code, $100,000,000, to remain available through September 30, 2010: *Provided,* That the Secretary of Transportation shall institute measures to ensure that funds provided under this heading shall be obligated within 180 days of the date of their distribution: *Provided further,* That the Maritime Administrator may retain and transfer to "Maritime Administration, Operations and Training" up to 2 percent of the funds provided under this heading to fund the award and oversight by the Administrator of grants made under this heading.

OFFICE OF INSPECTOR GENERAL

SALARIES AND EXPENSES

For an additional amount for necessary expenses of the Office of Inspector General to carry out the provisions of the Inspector General Act of 1978, as amended, $20,000,000, to remain available through September 30, 2013: *Provided,* That the funding made available under this heading shall be used for conducting audits and investigations of projects and activities carried out with funds made available in this Act to the Department of Transportation: *Provided further,* That the Inspector General shall have all necessary authority, in carrying out the duties specified in the Inspector General Act, as amended (5 U.S.C. App. 3), to investigate allegations of fraud, including false statements to the Government (18 U.S.C. 1001), by any person or entity that is subject to regulation by the Department.

GENERAL PROVISION—DEPARTMENT OF TRANSPORTATION

SEC. 1201. (a) MAINTENANCE OF EFFORT.—Not later than 30 days after the date of enactment of this Act, for each amount that is distributed to a State or agency thereof from an appropriation in this Act for a covered program, the Governor of the State shall certify to the Secretary of Transportation that the State will maintain its effort with regard to State funding for the types of projects that are funded by the appropriation. As part of this certification, the Governor shall submit to the Secretary of Transportation a statement identifying the amount of funds the State planned to expend from State sources as of the date of enactment of this Act during the period beginning on the date of enactment of this Act through September 30, 2010, for the types of projects that are funded by the appropriation.

(b) FAILURE TO MAINTAIN EFFORT.—

If a State is unable to maintain the level of effort certified pursuant to subsection (a), the State will be prohibited by the Secretary of Transportation from receiving additional limitation pursuant to the redistribution of the limitation on obligations for Federal-aid highway and highway safety construction programs that occurs after August 1 for fiscal year 2011.

(c) PERIODIC REPORTS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, each grant recipient shall submit to the covered agency from which they received funding periodic reports on the use of the funds appropriated in this Act for covered programs. Such reports shall be collected and compiled by the covered agency and transmitted to Congress. Covered agencies may develop such reports on behalf of grant recipients to ensure the accuracy and consistency of such reports.

(2) CONTENTS OF REPORTS.—For amounts received under each covered program by a grant recipient under this Act, the grant recipient shall include in the periodic reports information tracking-

(A) the amount of Federal funds appropriated, allocated, obligated, and outlayed under the appropriation;

(B) the number of projects that have been put out to bid under the appropriation and the amount of Federal funds associated with such projects;

(C) the number of projects for which contracts have been awarded under the appropriation and the amount of Federal funds associated with such contracts;

(D) the number of projects for which work has begun under such contracts and the amount of Federal funds associated with such contracts;

(E) the number of projects for which work has been completed under such contracts and the amount of Federal funds associated with such contracts;

(F) the number of direct, on-project jobs created or sustained by the Federal funds provided for projects under the appropriation and, to the extent possible, the estimated indirect jobs created or sustained in the associated supplying industries, including the number of job-years created and the total increase in employment since the date of enactment of this Act; and

(G) for each covered program report information tracking the actual aggregate expenditures by each grant recipient from State sources for projects eligible for funding under the program during the period beginning on the date of enactment of this Act through September 30, 2010, as compared to the level of such expenditures that were planned to occur during such period as of the date of enactment of this Act.

(3) TIMING OF REPORTS.—Each grant recipient shall submit the first of the periodic reports required under this subsection not later than 90 days after the date of enactment of this Act and shall submit updated reports not later than 180 days, 1 year, 2 years, and 3 years after such date of enactment.

(d) DEFINITIONS.—In this section, the following definitions apply:

(1) COVERED AGENCY.—The term "covered agency" means the Office of the Secretary of Transportation, the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the Federal Transit Administration and the Maritime Administration of the Department of Transportation.

(2) COVERED PROGRAM.—The term "covered program" means funds appropriated in this Act for "Supplemental Discretionary Grants for a National Surface Transportation System"

to the Office of the Secretary of Transportation, for "Supplemental Funding for Facilities and Equipment" and "Grants-in-Aid for Airports" to the Federal Aviation Administration; for "Highway Infrastructure Investment" to the Federal Highway Administration; for "Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service" and "Capital Grants to the National Railroad Passenger Corporation" to the Federal Railroad Administration; for "Transit Capital Assistance", "Fixed Guideway Infrastructure Investment", and "Capital Investment Grants" to the Federal Transit Administration; and "Supplemental Grants for Assistance to Small Shipyards" to the Maritime Administration.

(3) GRANT RECIPIENT.—The term "grant recipient" means a State or other recipient of assistance provided under a covered program in this Act. Such term does not include a Federal department or agency.

(e) Notwithstanding any other provision of law, sections 3501–3521 of title 44, United States Code, shall not apply to the provisions of this section.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PUBLIC AND INDIAN HOUSING

PUBLIC HOUSING CAPITAL FUND

For an additional amount for the "Public Housing Capital Fund" to carry out capital and management activities for public housing agencies, as authorized under section 9 of the United States Housing Act of 1937 (42 U.S.C. 1437g) (the "Act"), $4,000,000,000, to remain available until September 30, 2011: *Provided,* That the Secretary of Housing and Urban Development shall distribute $3,000,000,000 of this amount by the same formula used for amounts made available in fiscal year 2008, except that the Secretary may determine not to allocate funding to public housing agencies currently designated as troubled or to public housing agencies that elect not to accept such funding: *Provided further,* That the Secretary shall obligate funds allocated by formula within 30 days of enactment of this Act: *Provided further,* That the Secretary shall make available $1,000,000,000 by competition for priority investments, including investments that leverage private sector funding or financing for renovations and energy conservation retrofit investments: *Provided further,* That the Secretary shall obligate competitive funding by September 30, 2009: *Provided further,* That public housing authorities shall give priority to capital projects that can award contracts based on bids within 120 days from the date the funds are made available to the public housing authorities: *Provided further,* That public housing agencies shall give priority consideration to the rehabilitation of vacant rental units: *Provided further,* That public housing agencies shall prioritize capital projects that are already underway or included in the 5-year capital fund plans required by the Act (42 U.S.C. 1437c–1(a)): *Provided further,* That notwithstanding any other provision of law, (1) funding provided under this heading may not be used for operating or rental assistance activities, and (2) any restriction of funding to replacement housing uses shall be inapplicable: *Provided further,* That notwithstanding any other provision of law, the Secretary shall institute measures to ensure that funds provided under this heading

shall serve to supplement and not supplant expenditures from other Federal, State, or local sources or funds independently generated by the grantee: *Provided further,* That notwithstanding section 9(j), public housing agencies shall obligate 100 percent of the funds within 1 year of the date on which funds become available to the agency for obligation, shall expend at least 60 percent of funds within 2 years of the date on which funds become available to the agency for obligation, and shall expend 100 percent of the funds within 3 years of such date: *Provided further,* That if a public housing agency fails to comply with the 1-year obligation requirement, the Secretary shall recapture all remaining unobligated funds awarded to the public housing agency and reallocate such funds to agencies that are in compliance with those requirements: *Provided further,* That if a public housing agency fails to comply with either the 2-year or the 3-year expenditure requirement, the Secretary shall recapture the balance of the funds awarded to the public housing agency and reallocate such funds to agencies that are in compliance with those requirements: *Provided further,* That in administering funds appropriated or otherwise made available under this heading, the Secretary may waive or specify alternative requirements for any provision of any statute or regulation in connection with the obligation by the Secretary or the use of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment), upon a finding that such a waiver is necessary to expedite or facilitate the use of such funds: *Provided further,* That, in addition to waivers authorized under the previous proviso, the Secretary may direct that requirements relating to the procurement of goods and services arising under state and local laws and regulations shall not apply to amounts made available under this heading: *Provided further,* That of the funds made available under this heading, up to .5 percent shall be available for staffing, training, technical assistance, technology, monitoring, travel, enforcement, research and evaluation activities: *Provided further,* That funds set aside in the previous proviso shall remain available until September 30, 2012: *Provided further,* That any funds made available under this heading used by the Secretary for personnel expenses related to administering funding under this heading shall be transferred to "Personnel Compensation and Benefits, Office of Public and Indian Housing" and shall retain the terms and conditions of this account, including reprogramming provisions, except that the period of availability set forth in the previous proviso shall govern such transferred funds: *Provided further,* That any funds made available under this heading used by the Secretary for training or other administrative expenses shall be transferred to "Administration, Operations, and Management", for non-personnel expenses of the Department of Housing and Urban Development: *Provided further,* That any funds made available under this heading used by the Secretary for technology shall be transferred to "Working Capital Fund".

NATIVE AMERICAN HOUSING BLOCK GRANTS

For an additional amount for "Native American Housing Block Grants", as authorized under title I of the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA") (25

U.S.C. 4111 et seq.), $510,000,000 to remain available until September 30, 2011: *Provided,* That $255,000,000 of the amount provided under this heading shall be distributed according to the same funding formula used in fiscal year 2008: *Provided further,* That the Secretary shall obligate funds allocated by formula within 30 days of enactment of this Act: *Provided further,* That the amounts distributed through the formula shall be used for new construction, acquisition, rehabilitation including energy efficiency and conservation, and infrastructure development: *Provided further,* That in selecting projects to be funded, recipients shall give priority to projects for which contracts can be awarded within 180 days from the date that funds are available to the recipients: *Provided further,* that the Secretary may obligate $255,000,000 of the amount provided under this heading for competitive grants to eligible entities that apply for funds authorized under NAHASDA: *Provided further,* That the Secretary shall obligate competitive funding by September 30, 2009: *Provided further,* That in awarding competitive funds, the Secretary shall give priority to projects that will spur construction and rehabilitation and will create employment opportunities for low-income and unemployed persons: *Provided further,* That recipients of funds under this heading shall obligate 100 percent of such funds within 1 year of the date funds are made available to a recipient, expend at least 50 percent of such funds within 2 years of the date on which funds become available to such recipients for obligation and expend 100 percent of such funds within 3 years of such date: *Provided further,* That if a recipient fails to comply with the 2-year expenditure requirement, the Secretary shall recapture all remaining funds awarded to the recipient and reallocate such funds through the funding formula to recipients that are in compliance with these requirements: *Provided further,* That if a recipient fails to comply with the 3-year expenditure requirement, the Secretary shall recapture the balance of the funds originally awarded to the recipient: *Provided further,* That notwithstanding any other provision of law, the Secretary may set aside up to 2 percent of funds made available under this paragraph for a housing entity eligible to receive funding under title VIII of NAHASDA (25 U.S.C. 4221 et seq.): *Provided further,* That in administering funds appropriated or otherwise made available under this heading, the Secretary may waive or specify alternative requirements for any provision of any statute or regulation in connection with the obligation by the Secretary or the use of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment), upon a finding that such a waiver is necessary to expedite or facilitate the use of such funds: *Provided further,* That of the funds made available under this heading, up to .5 percent shall be available for staffing, training, technical assistance, technology, monitoring, travel, enforcement, research and evaluation activities: *Provided further,* That funds set aside in the previous proviso shall remain available until September 30, 2012: *Provided further,* That any funds made available under this heading used by the Secretary for personnel expenses related to administering funding under this heading shall be transferred to "Personnel Compensation and Benefits, Office of Public and Indian Housing" and shall retain the terms and conditions of this account, including reprogramming provisions, except that the period of availability set forth in the

previous proviso shall govern such transferred funds: *Provided further,* That any funds made available under this heading used by the Secretary for training or other administrative expenses shall be transferred to "Administration, Operations, and Management", for non-personnel expenses of the Department of Housing and Urban Development: *Provided further,* That any funds made available under this heading used by the Secretary for technology shall be transferred to "Working Capital Fund".

COMMUNITY PLANNING AND DEVELOPMENT

COMMUNITY DEVELOPMENT FUND

For an additional amount for "Community Development Fund" $1,000,000,000, to remain available until September 30, 2010 to carry out the community development block grant program under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 et seq.): *Provided*, That the amount appropriated in this paragraph shall be distributed pursuant to 42 U.S.C. 5306 to grantees that received funding in fiscal year 2008: *Provided further*, That in administering the funds appropriated in this paragraph, the Secretary of Housing and Urban Development shall establish requirements to expedite the use of the funds: *Provided further*, That in selecting projects to be funded, recipients shall give priority to projects that can award contracts based on bids within 120 days from the date the funds are made available to the recipients: *Provided further*, That in administering funds appropriated or otherwise made available under this heading, the Secretary may waive or specify alternative requirements for any provision of any statute or regulation in connection with the obligation by the Secretary or the use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment), upon a finding that such waiver is necessary to expedite or facilitate the timely use of such funds and would not be inconsistent with the overall purpose of the statute.

For the provision of emergency assistance for the redevelopment of abandoned and foreclosed homes, as authorized under division B, title III of the Housing and Economic Recovery Act of 2008 ("the Act") (Public Law 110–289) (42 U.S.C. 5301 note), $2,000,000,000, to remain available until September 30, 2010: *Provided,* That grantees shall expend at least 50 percent of allocated funds within 2 years of the date funds become available to the grantee for obligation, and 100 percent of such funds within 3 years of such date: *Provided further,* That unless otherwise noted herein, the provisions of the Act govern the use of the additional funds made available under this heading: *Provided further,* That notwithstanding the provisions of sections 2301(b) and (c)(1) and section 2302 of the Act, funding under this paragraph shall be allocated by competitions for which eligible entities shall be States, units of general local government, and nonprofit entities or consortia of nonprofit entities, which may submit proposals in partnership with for profit entities: *Provided further,* That in selecting grantees, the Secretary of Housing and Urban Development shall ensure that the grantees are in areas with the greatest number and percentage of foreclosures and can expend funding within the period allowed under this heading: *Provided further,* That additional award criteria for such competitions shall include demonstrated grantee

capacity to execute projects, leveraging potential, concentration of investment to achieve neighborhood stabilization, and any additional factors determined by the Secretary of Housing and Urban Development: *Provided further,* That the Secretary may establish a minimum grant size: *Provided further,* That the Secretary shall publish criteria on which to base competition for any grants awarded under this heading not later than 75 days after the enactment of this Act and applications shall be due to HUD not later than 150 days after the enactment of this Act: *Provided further,* That the Secretary shall obligate all funding within 1 year of enactment of this Act: *Provided further,* That section 2301(d)(4) of the Act is repealed: *Provided further,* That section 2301(c)(3)(C) of the Act is amended to read "establish and operate land banks for homes and residential properties that have been foreclosed upon": *Provided further,* That funding used for section 2301(c)(3)(E) of the Act shall be available only for the redevelopment of demolished or vacant properties as housing: *Provided further,* That no amounts made available from a grant under this heading may be used to demolish any public housing (as such term is defined in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a)): *Provided further,* That a grantee may not use more than 10 percent of its grant under this heading for demolition activities under section 2301(c)(3)(C) and (D) unless the Secretary determines that such use represents an appropriate response to local market conditions: *Provided further,* That the recipient of any grant or loan from amounts made available under this heading or, after the date of enactment under division B, title III of the Housing and Economic Recovery Act of 2008, may not refuse to lease a dwelling unit in housing with such loan or grant to a participant under section 8 of the United States Housing Act of 1937 (42 U.S.C 1437f) because of the status of the prospective tenant as such a participant: *Provided further,* That in addition to the eligible uses in section 2301, the Secretary may also use up to 10 percent of the funds provided under this heading for grantees for the provision of capacity building of and support for local communities receiving funding under section 2301 of the Act or under this heading: *Provided further,* That in administering funds appropriated or otherwise made available under this section, the Secretary may waive or specify alternative requirements for any provision of any statute or regulation in connection with the obligation by the Secretary or the use of funds except for requirements related to fair housing, nondiscrimination, labor standards and the environment, upon a finding that such a waiver is necessary to expedite or facilitate the use of such funds: *Provided further*, That in the case of any acquisition of a foreclosed upon dwelling or residential real property acquired after the date of enactment with any amounts made available under this heading or under division B, title III of the Housing and Economic Recovery Act of 2008 (Public Law 110–289), the initial successor in interest in such property pursuant to the foreclosure shall assume such interest subject to: (1) the provision by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and (2) the rights of any bona fide tenant, as of the date of such notice of foreclosure: (A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on

the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90-day notice under this paragraph; or (B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90-day notice under this paragraph, except that nothing in this paragraph shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants: *Provided further*, That, for purposes of this paragraph, a lease or tenancy shall be considered bona fide only if: (1) the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property: *Provided further*, That the recipient of any grant or loan from amounts made available under this heading or, after the date of enactment, under division B, title III of the Housing and Economic Recovery Act of 2008 (Public Law 110–289) may not refuse to lease a dwelling unit in housing assisted with such loan or grant to a holder of a voucher or certificate of eligibility under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) because of the status of the prospective tenant as such a holder: *Provided further*, That in the case of any qualified foreclosed housing for which funds made available under this heading or, after the date of enactment, under division B, title III of the Housing and Economic Recovery Act of 2008 (Public Law 110–289) are used and in which a recipient of assistance under section 8(o) of the U.S. Housing Act of 1937 resides at the time of foreclosure, the initial successor in interest shall be subject to the lease and to the housing assistance payments contract for the occupied unit: *Provided further*, That vacating the property prior to sale shall not constitute good cause for termination of the tenancy unless the property is unmarketable while occupied or unless the owner or subsequent purchaser desires the unit for personal or family use: *Provided further*, That if a public housing agency is unable to make payments under the contract to the immediate successor in interest after foreclosures, due to (1) an action or inaction by the successor in interest, including the rejection of payments or the failure of the successor to maintain the unit in compliance with section 8(o)(8) of the United States Housing Act of 1937 (42 U.S.C.1437f) or (2) an inability to identify the successor, the agency may use funds that would have been used to pay the rental amount on behalf of the family—(i) to pay for utilities that are the responsibility of the owner under the lease or applicable law, after taking reasonable steps to notify the owner that it intends to make payments to a utility provider in lieu of payments to the owner, except prior notification shall not be required in any case in which the unit will be or has been rendered uninhabitable due to the termination or threat of termination of service, in which case the public housing agency shall notify the owner within a reasonable time after making such payment; or (ii) for the family's reasonable moving costs, including security deposit costs: *Provided further,* That this paragraph shall not preempt any Federal, State or local law that provides more protections for tenants: *Provided further,* That of the funds made available under this heading, up to 1 percent shall be available for staffing, training, technical assistance, technology, monitoring, travel,

enforcement, research and evaluation activities: *Provided further*, That funds set aside in the previous proviso shall remain available until September 30, 2012: *Provided further*, That any funds made available under this heading used by the Secretary for personnel expenses related to administering funding under this heading shall be transferred to "Personnel Compensation and Benefits, Community Planning and Development" and shall retain the terms and conditions of this account, including reprogramming provisions, except that the period of availability set forth in the previous proviso shall govern such transferred funds: *Provided further*, That any funds made available under this heading used by the Secretary for training or other administrative expenses shall be transferred to "Administration, Operations, and Management" for non-personnel expenses of the Department of Housing and Urban Development: *Provided further*, That any funds made available under this heading used by the Secretary for technology shall be transferred to "Working Capital Fund".

HOME INVESTMENT PARTNERSHIPS PROGRAM

For an additional amount for capital investments in low-income housing tax credit projects, $2,250,000,000, to remain available until September 30, 2011: *Provided,* That such funds shall be made available to State housing credit agencies, as defined in section 42(h) of the Internal Revenue Code of 1986, and shall be apportioned among the States based on the percentage of HOME funds apportioned to each State and the participating jurisdictions therein for Fiscal Year 2008: *Provided further,* That the housing credit agencies in each State shall distribute these funds competitively under this heading and pursuant to their qualified allocation plan (as defined in section 42(m) of the Internal Revenue Code of 1986) to owners of projects who have received or receive simultaneously an award of low-income housing tax credits under section 42(h) of the Internal Revenue Code of 1986: *Provided further,* That housing credit agencies in each State shall commit not less than 75 percent of such funds within one year of the date of enactment of this Act, and shall demonstrate that the project owners shall have expended 75 percent of the funds made available under this heading within two years of the date of enactment of this Act, and shall have expended 100 percent of the funds within 3 years of the date of enactment of this Act: *Provided further,* That failure by an owner to expend funds within the parameters required within the previous proviso shall result in a redistribution of these funds by a housing credit agency to a more deserving project in such State, except any funds not expended after 3 years from enactment shall be redistributed by the Secretary to other States that have fully utilized the funds made available to them: *Provided further,* That projects awarded low income housing tax credits under section 42(h) of the IRC of 1986 in fiscal years 2007, 2008, or 2009 shall be eligible for funding under this heading: *Provided further,* That housing credit agencies shall give priority to projects that are expected to be completed within 3 years of enactment: *Provided further,* That any assistance provided to an eligible low income housing tax credit project under this heading shall be made in the same manner and be subject to the same limitations (including rent, income, and use restrictions, in lieu of corresponding limitations under the HOME program) as required by the state housing

credit agency with respect to an award of low income housing credits under section 42 of the IRC of 1986: *Provided further,* That the housing credit agency shall perform asset management functions, or shall contract for the performance of such services, in either case, at the owner's expense, to ensure compliance with section 42 of the IRC of 1986, and the long term viability of buildings funded by assistance under this heading: *Provided further,* That the term eligible basis (as such term is defined in such section 42) of a qualified low-income housing tax credit building receiving assistance under this heading shall not be reduced by the amount of any grant described under this heading: *Provided further,* That the Secretary shall be given access upon reasonable notice to a State housing credit agency to information related to the award of Federal funds from such housing credit agency pursuant to this heading and shall establish an Internet site that shall identify all projects selected for an award, including the amount of the award and such site shall provide linkage to the housing credit agency allocation plan which describes the process that was used to make the award decision: *Provided further,* That in administering funds under this heading, the Secretary may waive any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds except for requirements imposed by this heading and requirements related to fair housing, non-discrimination, labor standards and the environment, upon a finding that such waiver is required to expedite the use of such funds: *Provided further,* That for purposes of environmental compliance review, funds under this heading that are made available to State housing credit agencies for distribution to projects awarded low income housing tax credits shall be treated as funds under the HOME program and shall be subject to Section 288 of the HOME Investment Partnership Act.

HOMELESSNESS PREVENTION FUND

For homelessness prevention and rapid re-housing activities, $1,500,000,000, to remain available until September 30, 2011: *Provided,* That funds provided under this heading shall be used for the provision of short-term or medium-term rental assistance; housing relocation and stabilization services including housing search, mediation or outreach to property owners, credit repair, security or utility deposits, utility payments, rental assistance for a final month at a location, moving cost assistance, and case management; or other appropriate activities for homelessness prevention and rapid re-housing of persons who have become homeless: *Provided further,* That grantees receiving such assistance shall collect data on the use of the funds awarded and persons served with this assistance in the HUD Homeless Management Information System ("HMIS") or other comparable database: *Provided further,* That grantees may use up to 5 percent of any grant for administrative costs: *Provided further,* That funding made available under this heading shall be allocated to eligible grantees (as defined and designated in sections 411 and 412 of subtitle B of title IV of the McKinney-Vento Homeless Assistance Act, (the "Act")) pursuant to the formula authorized by section 413 of the Act: *Provided further,* That the Secretary may establish a minimum grant size: *Provided further,* That grantees shall expend at least 60 percent

of funds within 2 years of the date that funds became available to them for obligation, and 100 percent of funds within 3 years of such date, and the Secretary may recapture unexpended funds in violation of the 2-year expenditure requirement and reallocate such funds to grantees in compliance with that requirement: *Provided further,* That the Secretary may waive statutory or regulatory provisions (except provisions for fair housing, nondiscrimination, labor standards, and the environment) necessary to facilitate the timely expenditure of funds: *Provided further,* That the Secretary shall publish a notice to establish such requirements as may be necessary to carry out the provisions of this section within 30 days of enactment of this Act and that this notice shall take effect upon issuance: *Provided further,* That of the funds provided under this heading, up to .5 percent shall be available for staffing, training, technical assistance, technology, monitoring, research and evaluation activities: *Provided further,* That funds set aside under the previous proviso shall remain available until September 30, 2012: *Provided further,* That any funds made available under this heading used by the Secretary for personnel expenses related to administering funding under this heading shall be transferred to "Community Planning and Development Personnel Compensation and Benefits" and shall retain the terms and conditions of this account including reprogramming provisions except that the period of availability set forth in the previous proviso shall govern such transferred funds: *Provided further,* That any funds made available under this heading used by the Secretary for training or other administrative expenses shall be transferred to "Administration, Operations, and Management" for non-personnel expenses of the Department of Housing and Urban Development: *Provided further,* That any funding made available under this heading used by the Secretary for technology shall be transferred to "Working Capital Fund."

HOUSING PROGRAMS

ASSISTED HOUSING STABILITY AND ENERGY AND GREEN RETROFIT INVESTMENTS

For assistance to owners of properties receiving project-based assistance pursuant to section 202 of the Housing Act of 1959 (12 U.S.C. 17012), section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013), or section 8 of the United States Housing Act of 1937 as amended (42 U.S.C. 1437f), $2,250,000,000, of which $2,000,000,000 shall be for an additional amount for paragraph (1) under the heading "Project-Based Rental Assistance" in Public Law 110–161 for payments to owners for 12-month periods, and of which $250,000,000 shall be for grants or loans for energy retrofit and green investments in such assisted housing: *Provided,* That projects funded with grants or loans provided under this heading must comply with the requirements of subchapter IV of chapter 31 of title 40, United States Code: *Provided further,* That such grants or loans shall be provided through the policies, procedures, contracts, and transactional infrastructure of the authorized programs administered by the Office of Affordable Housing Preservation of the Department of Housing and Urban Development, on such terms and conditions as the Secretary of Housing and Urban Development deems appropriate to ensure the

maintenance and preservation of the property, the continued operation and maintenance of energy efficiency technologies, and the timely expenditure of funds: *Provided further,* That the Secretary may provide incentives to owners to undertake energy or green retrofits as a part of such grant or loan terms, including, but not limited to, fees to cover investment oversight and implementation by said owner, or to encourage job creation for low-income or very low-income individuals: *Provided further,* That the Secretary may share in a portion of future property utility savings resulting from improvements made by grants or loans made available under this heading: *Provided further,* That the grants or loans shall include a financial assessment and physical inspection of such property: *Provided further,* That eligible owners must have at least a satisfactory management review rating, be in substantial compliance with applicable performance standards and legal requirements, and commit to an additional period of affordability determined by the Secretary, but of not fewer than 15 years: *Provided further,* That the Secretary shall undertake appropriate underwriting and oversight with respect to grant and loan transactions and may set aside up to 5 percent of the funds made available under this heading for grants or loans for such purpose: *Provided further,* That the Secretary shall take steps necessary to ensure that owners receiving funding for energy and green retrofit investments under this heading shall expend such funding within 2 years of the date they received the funding: *Provided further,* That in administering funds appropriated or otherwise made available under this heading, the Secretary may waive or specify alternative requirements for any provision of any statute or regulation in connection with the obligation by the Secretary or the use of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment), upon a finding that such a waiver is necessary to expedite or facilitate the use of such funds: *Provided further,* That of the funds provided under this heading for grants and loans, up to 1 percent shall be available for staffing, training, technical assistance, technology, monitoring, research and evaluation activities: *Provided further,* That funds set aside in the previous proviso shall remain available until September 30, 2012: *Provided further,* That funding made available under this heading and used by the Secretary for personnel expenses related to administering funding under this heading shall be transferred to "Housing Personnel Compensation and Benefits" and shall retain the terms and conditions of this account including reprogramming provisos except that the period of availability set forth in the previous proviso shall govern such transferred funds: *Provided further,* That any funding made available under this heading used by the Secretary for training and other administrative expenses shall be transferred to "Administration, Operations and Management" for nonpersonnel expenses of the Department of Housing and Urban Development: *Provided further,* That any funding made available under this heading used by the Secretary for technology shall be transferred to "Working Capital Fund."

OFFICE OF LEAD HAZARD CONTROL AND HEALTHY HOMES

For an additional amount for the "Lead Hazard Reduction Program", as authorized by section 1011 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, and by sections 501

and 502 of the Housing and Urban Development Act of 1974, $100,000,000, to remain available until September 30, 2011: *Provided,* That for purposes of environmental review, pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and other provisions of law that further the purposes of such Act, a grant under the Healthy Homes Initiative, Operation Lead Elimination Action Plan (LEAP), or the Lead Technical Studies program under this heading or under prior appropriations Acts for such purposes under this heading, shall be considered to be funds for a special project for purposes of section 305(e) of the Multifamily Housing Property Disposition Reform Act of 1994: *Provided further,* That funds shall be awarded first to applicants which had applied under the Lead Hazard Reduction Program Notices of Funding Availability for fiscal year 2008, and were found in the application review to be qualified for award, but were not awarded because of funding limitations, and that any funds which remain after reservation of funds for such grants shall be added to the amount of funds to be awarded under the Lead Hazard Reduction Program Notices of Funding Availability for fiscal year 2009: *Provided further,* That each applicant for the Lead Hazard Program Notices of Funding Availability for fiscal year 2009 shall submit a detailed plan and strategy that demonstrates adequate capacity that is acceptable to the Secretary to carry out the proposed use of funds: *Provided further,* That recipients of funds under this heading shall expend at least 50 percent of such funds within 2 years of the date on which funds become available to such jurisdictions for obligation, and expend 100 percent of such funds within 3 years of such date: *Provided further,* That if a recipient fails to comply with the 2-year expenditure requirement, the Secretary shall recapture all remaining funds awarded to the recipient and reallocate such funds to recipients that are in compliance with those requirements: *Provided further,* That if a recipient fails to comply with the 3-year expenditure requirement, the Secretary shall recapture the balance of the funds awarded to the recipient: *Provided further,* That in administering funds appropriated or otherwise made available under this heading, the Secretary may waive or specify alternative requirements for any provision of any statute or regulation in connection with the obligation by the Secretary or the use of these funds (except for requirements related to fair housing, nondiscrimination, labor standards and the environment), upon a finding that such a waiver is necessary to expedite or facilitate the use of such funds: *Provided further,* That of the funds made available under this heading, up to .5 percent shall be available for staffing, training, technical assistance, technology, monitoring, travel, enforcement, research and evaluation activities: *Provided further,* That funds set aside in the previous proviso shall remain available until September 30, 2012: *Provided further,* That any funds made available under this heading used by the Secretary for personnel expenses related to administering funding under this heading shall be transferred to "Personnel Compensation and Benefits, Office of Lead Hazard Control and Healthy Homes" and shall retain the terms and conditions of this account, including reprogramming provisions, except that the period of availability set forth in the previous proviso shall govern such transferred funds: *Provided further,* That any funds made available under this heading used by the Secretary for training or other administrative expenses shall be transferred

to "Administration, Operations, and Management", for non-personnel expenses of the Department of Housing and Urban Development: *Provided further,* That any funds made available under this heading used by the Secretary for technology shall be transferred to "Working Capital Fund".

MANAGEMENT AND ADMINISTRATION

OFFICE OF INSPECTOR GENERAL

For an additional amount for the necessary salaries and expenses of the Office of Inspector General in carrying out the Inspector General Act of 1978, as amended, $15,000,000, to remain available until September 30, 2013: *Provided,* That the Inspector General shall have independent authority over all personnel issues within this office.

GENERAL PROVISIONS—DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

SEC. 1202. FHA LOAN LIMITS FOR 2009. (a) LOAN LIMIT FLOOR BASED ON 2008 LEVELS.—For mortgages for which the mortgagee issues credit approval for the borrower during calendar year 2009, if the dollar amount limitation on the principal obligation of a mortgage determined under section 203(b)(2) of the National Housing Act (12 U.S.C. 1709(b)(2)) for any size residence for any area is less than such dollar amount limitation that was in effect for such size residence for such area for 2008 pursuant to section 202 of the Economic Stimulus Act of 2008 (Public Law 110–185; 122 Stat. 620), notwithstanding any other provision of law, the maximum dollar amount limitation on the principal obligation of a mortgage for such size residence for such area for purposes of such section 203(b)(2) shall be considered (except for purposes of section 255(g) of such Act (12 U.S.C. 1715z–20(g))) to be such dollar amount limitation in effect for such size residence for such area for 2008.

(b) DISCRETIONARY AUTHORITY FOR SUB-AREAS.—Notwithstanding any other provision of law, if the Secretary of Housing and Urban Development determines, for any geographic area that is smaller than an area for which dollar amount limitations on the principal obligation of a mortgage are determined under section 203(b)(2) of the National Housing Act, that a higher such maximum dollar amount limitation is warranted for any particular size or sizes of residences in such sub-area by higher median home prices in such sub-area, the Secretary may, for mortgages for which the mortgagee issues credit approval for the borrower during calendar year 2009, increase the maximum dollar amount limitation for such size or sizes of residences for such sub-area that is otherwise in effect (including pursuant to subsection (a) of this section), but in no case to an amount that exceeds the amount specified in section 202(a)(2) of the Economic Stimulus Act of 2008.

SEC. 1203. GSE CONFORMING LOAN LIMITS FOR 2009. (a) LOAN LIMIT FLOOR BASED ON 2008 LEVELS.—For mortgages originated during calendar year 2009, if the limitation on the maximum original principal obligation of a mortgage that may be purchased by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation determined under section 302(b)(2) of the Federal National Mortgage Association Charter Act (12 U.S.C.

1717(b)(2)) or section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1754(a)(2)), respectively, for any size residence for any area is less than such maximum original principal obligation limitation that was in effect for such size residence for such area for 2008 pursuant to section 201 of the Economic Stimulus Act of 2008 (Public Law 110–185; 122 Stat. 619), notwithstanding any other provision of law, the limitation on the maximum original principal obligation of a mortgage for such Association and Corporation for such size residence for such area shall be such maximum limitation in effect for such size residence for such area for 2008.

(b) DISCRETIONARY AUTHORITY FOR SUB-AREAS.—Notwithstanding any other provision of law, if the Director of the Federal Housing Finance Agency determines, for any geographic area that is smaller than an area for which limitations on the maximum original principal obligation of a mortgage are determined for the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, that a higher such maximum original principal obligation limitation is warranted for any particular size or sizes of residences in such sub-area by higher median home prices in such sub-area, the Director may, for mortgages originated during 2009, increase the maximum original principal obligation limitation for such size or sizes of residences for such sub-area that is otherwise in effect (including pursuant to subsection (a) of this section) for such Association and Corporation, but in no case to an amount that exceeds the amount specified in the matter following the comma in section 201(a)(1)(B) of the Economic Stimulus Act of 2008.

SEC. 1204. FHA REVERSE MORTGAGE LOAN LIMITS FOR 2009. For mortgages for which the mortgagee issues credit approval for the borrower during calendar year 2009, the second sentence of section 255(g) of the National Housing Act (12 U.S.C. 1715z–20(g)) shall be considered to require that in no case may the benefits of insurance under such section 255 exceed 150 percent of the maximum dollar amount in effect under the sixth sentence of section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)).

TITLE XIII—HEALTH INFORMATION TECHNOLOGY

SEC. 13001. SHORT TITLE; TABLE OF CONTENTS OF TITLE.

(a) SHORT TITLE.—This title (and title IV of division B) may be cited as the "Health Information Technology for Economic and Clinical Health Act" or the "HITECH Act".

(b) TABLE OF CONTENTS OF TITLE.—The table of contents of this title is as follows:

Subtitle A—Promotion of Health Information Technology

PART 1—IMPROVING HEALTH CARE QUALITY, SAFETY, AND EFFICIENCY

SEC. 13101. ONCHIT; STANDARDS DEVELOPMENT AND ADOPTION.

The Public Health Service Act (42 U.S.C. 201 et seq.) is amended by adding at the end the following:

"TITLE XXX—HEALTH INFORMATION TECHNOLOGY AND QUALITY

"SEC. 3000. DEFINITIONS.

"In this title:

"(1) CERTIFIED EHR TECHNOLOGY.—The term 'certified EHR technology' means a qualified electronic health record that is certified pursuant to section 3001(c)(5) as meeting standards adopted under section 3004 that are applicable to the type of record involved (as determined by the Secretary, such as an ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals).

"(2) ENTERPRISE INTEGRATION.—The term 'enterprise integration' means the electronic linkage of health care providers, health plans, the government, and other interested parties, to enable the electronic exchange and use of health information among all the components in the health care infrastructure in accordance with applicable law, and such term includes related application protocols and other related standards.

"(3) HEALTH CARE PROVIDER.—The term 'health care provider' includes a hospital, skilled nursing facility, nursing facility, home health entity or other long term care facility, health care clinic, community mental health center (as defined in section 1913(b)(1)), renal dialysis facility, blood center, ambulatory surgical center described in section 1833(i) of the Social Security Act, emergency medical services provider, Federally qualified health center, group practice, a pharmacist, a pharmacy, a laboratory, a physician (as defined in section 1861(r) of the Social Security Act), a practitioner (as described in section 1842(b)(18)(C) of the Social Security Act), a provider operated by, or under contract with, the Indian Health Service or by an Indian tribe (as defined in the Indian Self-Determination and Education Assistance Act), tribal organization, or urban Indian organization (as defined in section 4 of the Indian Health Care Improvement Act), a rural health clinic, a covered entity under section 340B, an ambulatory surgical center described in section 1833(i) of the Social Security Act, a therapist (as defined in section 1848(k)(3)(B)(iii) of the Social Security Act), and any other category of health care facility, entity,

practitioner, or clinician determined appropriate by the Secretary.

"(4) HEALTH INFORMATION.—The term 'health information' has the meaning given such term in section 1171(4) of the Social Security Act.

"(5) HEALTH INFORMATION TECHNOLOGY.—The term 'health information technology' means hardware, software, integrated technologies or related licenses, intellectual property, upgrades, or packaged solutions sold as services that are designed for or support the use by health care entities or patients for the electronic creation, maintenance, access, or exchange of health information

"(6) HEALTH PLAN.—The term 'health plan' has the meaning given such term in section 1171(5) of the Social Security Act.

"(7) HIT POLICY COMMITTEE.—The term 'HIT Policy Committee' means such Committee established under section 3002(a).

"(8) HIT STANDARDS COMMITTEE.—The term 'HIT Standards Committee' means such Committee established under section 3003(a).

"(9) INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION.—The term 'individually identifiable health information' has the meaning given such term in section 1171(6) of the Social Security Act.

"(10) LABORATORY.—The term 'laboratory' has the meaning given such term in section 353(a).

"(11) NATIONAL COORDINATOR.—The term 'National Coordinator' means the head of the Office of the National Coordinator for Health Information Technology established under section 3001(a).

"(12) PHARMACIST.—The term 'pharmacist' has the meaning given such term in section 804(2) of the Federal Food, Drug, and Cosmetic Act.

"(13) QUALIFIED ELECTRONIC HEALTH RECORD.—The term 'qualified electronic health record' means an electronic record of health-related information on an individual that—

"(A) includes patient demographic and clinical health information, such as medical history and problem lists; and

"(B) has the capacity—

"(i) to provide clinical decision support;

"(ii) to support physician order entry;

"(iii) to capture and query information relevant to health care quality; and

"(iv) to exchange electronic health information with, and integrate such information from other sources.

"(14) STATE.—The term 'State' means each of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

"Subtitle A—Promotion of Health Information Technology

"SEC. 3001. OFFICE OF THE NATIONAL COORDINATOR FOR HEALTH INFORMATION TECHNOLOGY.

"(a) ESTABLISHMENT.—There is established within the Department of Health and Human Services an Office of the National Coordinator for Health Information Technology (referred to in this section as the 'Office'). The Office shall be headed by a National Coordinator who shall be appointed by the Secretary and shall report directly to the Secretary.

"(b) PURPOSE.—The National Coordinator shall perform the duties under subsection (c) in a manner consistent with the development of a nationwide health information technology infrastructure that allows for the electronic use and exchange of information and that—

"(1) ensures that each patient's health information is secure and protected, in accordance with applicable law;

"(2) improves health care quality, reduces medical errors, reduces health disparities, and advances the delivery of patient-centered medical care;

"(3) reduces health care costs resulting from inefficiency, medical errors, inappropriate care, duplicative care, and incomplete information;

"(4) provides appropriate information to help guide medical decisions at the time and place of care;

"(5) ensures the inclusion of meaningful public input in such development of such infrastructure;

"(6) improves the coordination of care and information among hospitals, laboratories, physician offices, and other entities through an effective infrastructure for the secure and authorized exchange of health care information;

"(7) improves public health activities and facilitates the early identification and rapid response to public health threats and emergencies, including bioterror events and infectious disease outbreaks;

"(8) facilitates health and clinical research and health care quality;

"(9) promotes early detection, prevention, and management of chronic diseases;

"(10) promotes a more effective marketplace, greater competition, greater systems analysis, increased consumer choice, and improved outcomes in health care services; and

"(11) improves efforts to reduce health disparities.

"(c) DUTIES OF THE NATIONAL COORDINATOR.—

"(1) STANDARDS.—The National Coordinator shall—

"(A) review and determine whether to endorse each standard, implementation specification, and certification criterion for the electronic exchange and use of health information that is recommended by the HIT Standards Committee under section 3003 for purposes of adoption under section 3004;

"(B) make such determinations under subparagraph (A), and report to the Secretary such determinations, not later than 45 days after the date the recommendation is received by the Coordinator; and

"(C) review Federal health information technology investments to ensure that Federal health information technology programs are meeting the objectives of the strategic plan published under paragraph (3).

"(2) HIT POLICY COORDINATION.—

"(A) IN GENERAL.—The National Coordinator shall coordinate health information technology policy and programs of the Department with those of other relevant executive branch agencies with a goal of avoiding duplication of efforts and of helping to ensure that each agency undertakes health information technology activities primarily within the areas of its greatest expertise and technical capability and in a manner towards a coordinated national goal.

"(B) HIT POLICY AND STANDARDS COMMITTEES.—The National Coordinator shall be a leading member in the establishment and operations of the HIT Policy Committee and the HIT Standards Committee and shall serve as a liaison among those two Committees and the Federal Government.

"(3) STRATEGIC PLAN.—

"(A) IN GENERAL.—The National Coordinator shall, in consultation with other appropriate Federal agencies (including the National Institute of Standards and Technology), update the Federal Health IT Strategic Plan (developed as of June 3, 2008) to include specific objectives, milestones, and metrics with respect to the following:

"(i) The electronic exchange and use of health information and the enterprise integration of such information.

"(ii) The utilization of an electronic health record for each person in the United States by 2014.

"(iii) The incorporation of privacy and security protections for the electronic exchange of an individual's individually identifiable health information.

"(iv) Ensuring security methods to ensure appropriate authorization and electronic authentication of health information and specifying technologies or methodologies for rendering health information unusable, unreadable, or indecipherable.

"(v) Specifying a framework for coordination and flow of recommendations and policies under this subtitle among the Secretary, the National Coordinator, the HIT Policy Committee, the HIT Standards Committee, and other health information exchanges and other relevant entities.

"(vi) Methods to foster the public understanding of health information technology.

"(vii) Strategies to enhance the use of health information technology in improving the quality of health care, reducing medical errors, reducing health disparities, improving public health, increasing prevention and coordination with community resources, and improving the continuity of care among health care settings.

"(viii) Specific plans for ensuring that populations with unique needs, such as children, are appropriately

addressed in the technology design, as appropriate, which may include technology that automates enrollment and retention for eligible individuals.

"(B) COLLABORATION.—The strategic plan shall be updated through collaboration of public and private entities.

"(C) MEASURABLE OUTCOME GOALS.—The strategic plan update shall include measurable outcome goals.

"(D) PUBLICATION.—The National Coordinator shall republish the strategic plan, including all updates.

"(4) WEBSITE.—The National Coordinator shall maintain and frequently update an Internet website on which there is posted information on the work, schedules, reports, recommendations, and other information to ensure transparency in promotion of a nationwide health information technology infrastructure.

"(5) CERTIFICATION.—

"(A) IN GENERAL.—The National Coordinator, in consultation with the Director of the National Institute of Standards and Technology, shall keep or recognize a program or programs for the voluntary certification of health information technology as being in compliance with applicable certification criteria adopted under this subtitle. Such program shall include, as appropriate, testing of the technology in accordance with section 13201(b) of the Health Information Technology for Economic and Clinical Health Act.

"(B) CERTIFICATION CRITERIA DESCRIBED.—In this title, the term 'certification criteria' means, with respect to standards and implementation specifications for health information technology, criteria to establish that the technology meets such standards and implementation specifications.

"(6) REPORTS AND PUBLICATIONS.—

"(A) REPORT ON ADDITIONAL FUNDING OR AUTHORITY NEEDED.—Not later than 12 months after the date of the enactment of this title, the National Coordinator shall submit to the appropriate committees of jurisdiction of the House of Representatives and the Senate a report on any additional funding or authority the Coordinator or the HIT Policy Committee or HIT Standards Committee requires to evaluate and develop standards, implementation specifications, and certification criteria, or to achieve full participation of stakeholders in the adoption of a nationwide health information technology infrastructure that allows for the electronic use and exchange of health information.

"(B) IMPLEMENTATION REPORT.—The National Coordinator shall prepare a report that identifies lessons learned from major public and private health care systems in their implementation of health information technology, including information on whether the technologies and practices developed by such systems may be applicable to and usable in whole or in part by other health care providers.

"(C) ASSESSMENT OF IMPACT OF HIT ON COMMUNITIES WITH HEALTH DISPARITIES AND UNINSURED, UNDERINSURED, AND MEDICALLY UNDERSERVED AREAS.—The National Coordinator shall assess and publish the impact of health

information technology in communities with health disparities and in areas with a high proportion of individuals who are uninsured, underinsured, and medically underserved individuals (including urban and rural areas) and identify practices to increase the adoption of such technology by health care providers in such communities, and the use of health information technology to reduce and better manage chronic diseases.

"(D) EVALUATION OF BENEFITS AND COSTS OF THE ELECTRONIC USE AND EXCHANGE OF HEALTH INFORMATION.—The National Coordinator shall evaluate and publish evidence on the benefits and costs of the electronic use and exchange of health information and assess to whom these benefits and costs accrue.

"(E) RESOURCE REQUIREMENTS.—The National Coordinator shall estimate and publish resources required annually to reach the goal of utilization of an electronic health record for each person in the United States by 2014, including—

"(i) the required level of Federal funding;

"(ii) expectations for regional, State, and private investment;

"(iii) the expected contributions by volunteers to activities for the utilization of such records; and

"(iv) the resources needed to establish a health information technology workforce sufficient to support this effort (including education programs in medical informatics and health information management).

"(7) ASSISTANCE.—The National Coordinator may provide financial assistance to consumer advocacy groups and not-for-profit entities that work in the public interest for purposes of defraying the cost to such groups and entities to participate under, whether in whole or in part, the National Technology Transfer Act of 1995 (15 U.S.C. 272 note).

"(8) GOVERNANCE FOR NATIONWIDE HEALTH INFORMATION NETWORK.—The National Coordinator shall establish a governance mechanism for the nationwide health information network.

"(d) DETAIL OF FEDERAL EMPLOYEES.—

"(1) IN GENERAL.—Upon the request of the National Coordinator, the head of any Federal agency is authorized to detail, with or without reimbursement from the Office, any of the personnel of such agency to the Office to assist it in carrying out its duties under this section.

"(2) EFFECT OF DETAIL.—Any detail of personnel under paragraph (1) shall—

"(A) not interrupt or otherwise affect the civil service status or privileges of the Federal employee; and

"(B) be in addition to any other staff of the Department employed by the National Coordinator.

"(3) ACCEPTANCE OF DETAILEES.—Notwithstanding any other provision of law, the Office may accept detailed personnel from other Federal agencies without regard to whether the agency described under paragraph (1) is reimbursed.

"(e) CHIEF PRIVACY OFFICER OF THE OFFICE OF THE NATIONAL COORDINATOR.—Not later than 12 months after the date of the enactment of this title, the Secretary shall appoint a Chief Privacy Officer of the Office of the National Coordinator, whose duty it

shall be to advise the National Coordinator on privacy, security, and data stewardship of electronic health information and to coordinate with other Federal agencies (and similar privacy officers in such agencies), with State and regional efforts, and with foreign countries with regard to the privacy, security, and data stewardship of electronic individually identifiable health information.

"SEC. 3002. HIT POLICY COMMITTEE.

"(a) ESTABLISHMENT.—There is established a HIT Policy Committee to make policy recommendations to the National Coordinator relating to the implementation of a nationwide health information technology infrastructure, including implementation of the strategic plan described in section 3001(c)(3).

"(b) DUTIES.—

"(1) RECOMMENDATIONS ON HEALTH INFORMATION TECHNOLOGY INFRASTRUCTURE.—The HIT Policy Committee shall recommend a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the strategic plan under section 3001(c)(3) and that includes the recommendations under paragraph (2). The Committee shall update such recommendations and make new recommendations as appropriate.

"(2) SPECIFIC AREAS OF STANDARD DEVELOPMENT.—

"(A) IN GENERAL.—The HIT Policy Committee shall recommend the areas in which standards, implementation specifications, and certification criteria are needed for the electronic exchange and use of health information for purposes of adoption under section 3004 and shall recommend an order of priority for the development, harmonization, and recognition of such standards, specifications, and certification criteria among the areas so recommended. Such standards and implementation specifications shall include named standards, architectures, and software schemes for the authentication and security of individually identifiable health information and other information as needed to ensure the reproducible development of common solutions across disparate entities.

"(B) AREAS REQUIRED FOR CONSIDERATION.—For purposes of subparagraph (A), the HIT Policy Committee shall make recommendations for at least the following areas:

"(i) Technologies that protect the privacy of health information and promote security in a qualified electronic health record, including for the segmentation and protection from disclosure of specific and sensitive individually identifiable health information with the goal of minimizing the reluctance of patients to seek care (or disclose information about a condition) because of privacy concerns, in accordance with applicable law, and for the use and disclosure of limited data sets of such information.

"(ii) A nationwide health information technology infrastructure that allows for the electronic use and accurate exchange of health information.

"(iii) The utilization of a certified electronic health record for each person in the United States by 2014.

"(iv) Technologies that as a part of a qualified electronic health record allow for an accounting of disclosures made by a covered entity (as defined for purposes of regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996) for purposes of treatment, payment, and health care operations (as such terms are defined for purposes of such regulations).

"(v) The use of certified electronic health records to improve the quality of health care, such as by promoting the coordination of health care and improving continuity of health care among health care providers, by reducing medical errors, by improving population health, by reducing health disparities, by reducing chronic disease, and by advancing research and education.

"(vi) Technologies that allow individually identifiable health information to be rendered unusable, unreadable, or indecipherable to unauthorized individuals when such information is transmitted in the nationwide health information network or physically transported outside of the secured, physical perimeter of a health care provider, health plan, or health care clearinghouse.

"(vii) The use of electronic systems to ensure the comprehensive collection of patient demographic data, including, at a minimum, race, ethnicity, primary language, and gender information.

"(viii) Technologies that address the needs of children and other vulnerable populations.

"(C) OTHER AREAS FOR CONSIDERATION.—In making recommendations under subparagraph (A), the HIT Policy Committee may consider the following additional areas:

"(i) The appropriate uses of a nationwide health information infrastructure, including for purposes of—

"(I) the collection of quality data and public reporting;

"(II) biosurveillance and public health;

"(III) medical and clinical research; and

"(IV) drug safety.

"(ii) Self-service technologies that facilitate the use and exchange of patient information and reduce wait times.

"(iii) Telemedicine technologies, in order to reduce travel requirements for patients in remote areas.

"(iv) Technologies that facilitate home health care and the monitoring of patients recuperating at home.

"(v) Technologies that help reduce medical errors.

"(vi) Technologies that facilitate the continuity of care among health settings.

"(vii) Technologies that meet the needs of diverse populations.

"(viii) Methods to facilitate secure access by an individual to such individual's protected health information.

"(ix) Methods, guidelines, and safeguards to facilitate secure access to patient information by a family member, caregiver, or guardian acting on behalf of a patient due to age-related and other disability, cognitive impairment, or dementia.

"(x) Any other technology that the HIT Policy Committee finds to be among the technologies with the greatest potential to improve the quality and efficiency of health care.

"(3) FORUM.—The HIT Policy Committee shall serve as a forum for broad stakeholder input with specific expertise in policies relating to the matters described in paragraphs (1) and (2).

"(4) CONSISTENCY WITH EVALUATION CONDUCTED UNDER MIPPA.—

"(A) REQUIREMENT FOR CONSISTENCY.—The HIT Policy Committee shall ensure that recommendations made under paragraph (2)(B)(vi) are consistent with the evaluation conducted under section 1809(a) of the Social Security Act.

"(B) SCOPE.—Nothing in subparagraph (A) shall be construed to limit the recommendations under paragraph (2)(B)(vi) to the elements described in section 1809(a)(3) of the Social Security Act.

"(C) TIMING.—The requirement under subparagraph (A) shall be applicable to the extent that evaluations have been conducted under section 1809(a) of the Social Security Act, regardless of whether the report described in subsection (b) of such section has been submitted.

"(c) MEMBERSHIP AND OPERATIONS.—

"(1) IN GENERAL.—The National Coordinator shall take a leading position in the establishment and operations of the HIT Policy Committee.

"(2) MEMBERSHIP.—The HIT Policy Committee shall be composed of members to be appointed as follows:

"(A) 3 members shall be appointed by the Secretary, 1 of whom shall be appointed to represent the Department of Health and Human Services and 1 of whom shall be a public health official.

"(B) 1 member shall be appointed by the majority leader of the Senate.

"(C) 1 member shall be appointed by the minority leader of the Senate.

"(D) 1 member shall be appointed by the Speaker of the House of Representatives.

"(E) 1 member shall be appointed by the minority leader of the House of Representatives.

"(F) Such other members as shall be appointed by the President as representatives of other relevant Federal agencies.

"(G) 13 members shall be appointed by the Comptroller General of the United States of whom—

"(i) 3 members shall advocates for patients or consumers;

"(ii) 2 members shall represent health care providers, one of which shall be a physician;

"(iii) 1 member shall be from a labor organization representing health care workers;

"(iv) 1 member shall have expertise in health information privacy and security;

"(v) 1 member shall have expertise in improving the health of vulnerable populations;

"(vi) 1 member shall be from the research community;

"(vii) 1 member shall represent health plans or other third-party payers;

"(viii) 1 member shall represent information technology vendors;

"(ix) 1 member shall represent purchasers or employers; and

"(x) 1 member shall have expertise in health care quality measurement and reporting.

"(3) PARTICIPATION.—The members of the HIT Policy Committee appointed under paragraph (2) shall represent a balance among various sectors of the health care system so that no single sector unduly influences the recommendations of the Policy Committee.

"(4) TERMS.—

"(A) IN GENERAL.—The terms of the members of the HIT Policy Committee shall be for 3 years, except that the Comptroller General shall designate staggered terms for the members first appointed.

"(B) VACANCIES.—Any member appointed to fill a vacancy in the membership of the HIT Policy Committee that occurs prior to the expiration of the term for which the member's predecessor was appointed shall be appointed only for the remainder of that term. A member may serve after the expiration of that member's term until a successor has been appointed. A vacancy in the HIT Policy Committee shall be filled in the manner in which the original appointment was made.

"(5) OUTSIDE INVOLVEMENT.—The HIT Policy Committee shall ensure an opportunity for the participation in activities of the Committee of outside advisors, including individuals with expertise in the development of policies for the electronic exchange and use of health information, including in the areas of health information privacy and security.

"(6) QUORUM.—A majority of the member of the HIT Policy Committee shall constitute a quorum for purposes of voting, but a lesser number of members may meet and hold hearings.

"(7) FAILURE OF INITIAL APPOINTMENT.—If, on the date that is 45 days after the date of enactment of this title, an official authorized under paragraph (2) to appoint one or more members of the HIT Policy Committee has not appointed the full number of members that such paragraph authorizes such official to appoint, the Secretary is authorized to appoint such members.

"(8) CONSIDERATION.—The National Coordinator shall ensure that the relevant and available recommendations and comments from the National Committee on Vital and Health Statistics are considered in the development of policies.

"(d) APPLICATION OF FACA.—The Federal Advisory Committee Act (5 U.S.C. App.), other than section 14 of such Act, shall apply to the HIT Policy Committee.

"(e) PUBLICATION.—The Secretary shall provide for publication in the Federal Register and the posting on the Internet website of the Office of the National Coordinator for Health Information Technology of all policy recommendations made by the HIT Policy Committee under this section.

"SEC. 3003. HIT STANDARDS COMMITTEE.

"(a) ESTABLISHMENT.—There is established a committee to be known as the HIT Standards Committee to recommend to the National Coordinator standards, implementation specifications, and certification criteria for the electronic exchange and use of health information for purposes of adoption under section 3004, consistent with the implementation of the strategic plan described in section 3001(c)(3) and beginning with the areas listed in section 3002(b)(2)(B) in accordance with policies developed by the HIT Policy Committee.

"(b) DUTIES.—

"(1) STANDARDS DEVELOPMENT.—

"(A) IN GENERAL.—The HIT Standards Committee shall recommend to the National Coordinator standards, implementation specifications, and certification criteria described in subsection (a) that have been developed, harmonized, or recognized by the HIT Standards Committee. The HIT Standards Committee shall update such recommendations and make new recommendations as appropriate, including in response to a notification sent under section 3004(a)(2)(B). Such recommendations shall be consistent with the latest recommendations made by the HIT Policy Committee.

"(B) HARMONIZATION.—The HIT Standards Committee recognize harmonized or updated standards from an entity or entities for the purpose of harmonizing or updating standards and implementation specifications in order to achieve uniform and consistent implementation of the standards and implementation specifications.

"(C) PILOT TESTING OF STANDARDS AND IMPLEMENTATION SPECIFICATIONS.—In the development, harmonization, or recognition of standards and implementation specifications, the HIT Standards Committee shall, as appropriate, provide for the testing of such standards and specifications by the National Institute for Standards and Technology under section 13201(a) of the Health Information Technology for Economic and Clinical Health Act.

"(D) CONSISTENCY.—The standards, implementation specifications, and certification criteria recommended under this subsection shall be consistent with the standards for information transactions and data elements adopted pursuant to section 1173 of the Social Security Act.

"(2) FORUM.—The HIT Standards Committee shall serve as a forum for the participation of a broad range of stakeholders to provide input on the development, harmonization, and recognition of standards, implementation specifications, and certification criteria necessary for the development and adoption of a nationwide health information technology infrastructure that allows for the electronic use and exchange of health information.

"(3) SCHEDULE.—Not later than 90 days after the date of the enactment of this title, the HIT Standards Committee shall develop a schedule for the assessment of policy recommendations developed by the HIT Policy Committee under

section 3002. The HIT Standards Committee shall update such schedule annually. The Secretary shall publish such schedule in the Federal Register.

"(4) PUBLIC INPUT.—The HIT Standards Committee shall conduct open public meetings and develop a process to allow for public comment on the schedule described in paragraph (3) and recommendations described in this subsection. Under such process comments shall be submitted in a timely manner after the date of publication of a recommendation under this subsection.

"(5) CONSIDERATION.—The National Coordinator shall ensure that the relevant and available recommendations and comments from the National Committee on Vital and Health Statistics are considered in the development of standards.

"(c) MEMBERSHIP AND OPERATIONS.—

"(1) IN GENERAL.—The National Coordinator shall take a leading position in the establishment and operations of the HIT Standards Committee.

"(2) MEMBERSHIP.—The membership of the HIT Standards Committee shall at least reflect providers, ancillary healthcare workers, consumers, purchasers, health plans, technology vendors, researchers, relevant Federal agencies, and individuals with technical expertise on health care quality, privacy and security, and on the electronic exchange and use of health information.

"(3) PARTICIPATION.—The members of the HIT Standards Committee appointed under this subsection shall represent a balance among various sectors of the health care system so that no single sector unduly influences the recommendations of such Committee.

"(4) OUTSIDE INVOLVEMENT.—The HIT Policy Committee shall ensure an opportunity for the participation in activities of the Committee of outside advisors, including individuals with expertise in the development of standards for the electronic exchange and use of health information, including in the areas of health information privacy and security.

"(5) BALANCE AMONG SECTORS.—In developing the procedures for conducting the activities of the HIT Standards Committee, the HIT Standards Committee shall act to ensure a balance among various sectors of the health care system so that no single sector unduly influences the actions of the HIT Standards Committee.

"(6) ASSISTANCE.—For the purposes of carrying out this section, the Secretary may provide or ensure that financial assistance is provided by the HIT Standards Committee to defray in whole or in part any membership fees or dues charged by such Committee to those consumer advocacy groups and not for profit entities that work in the public interest as a part of their mission.

"(d) APPLICATION OF FACA.—The Federal Advisory Committee Act (5 U.S.C. App.), other than section 14, shall apply to the HIT Standards Committee.

"(e) PUBLICATION.—The Secretary shall provide for publication in the Federal Register and the posting on the Internet website of the Office of the National Coordinator for Health Information Technology of all recommendations made by the HIT Standards Committee under this section.

"SEC. 3004. PROCESS FOR ADOPTION OF ENDORSED RECOMMENDATIONS; ADOPTION OF INITIAL SET OF STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.

"(a) PROCESS FOR ADOPTION OF ENDORSED RECOMMENDATIONS.—

"(1) REVIEW OF ENDORSED STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.—Not later than 90 days after the date of receipt of standards, implementation specifications, or certification criteria endorsed under section 3001(c), the Secretary, in consultation with representatives of other relevant Federal agencies, shall jointly review such standards, implementation specifications, or certification criteria and shall determine whether or not to propose adoption of such standards, implementation specifications, or certification criteria.

"(2) DETERMINATION TO ADOPT STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.—If the Secretary determines—

"(A) to propose adoption of any grouping of such standards, implementation specifications, or certification criteria, the Secretary shall, by regulation under section 553 of title 5, United States Code, determine whether or not to adopt such grouping of standards, implementation specifications, or certification criteria; or

"(B) not to propose adoption of any grouping of standards, implementation specifications, or certification criteria, the Secretary shall notify the National Coordinator and the HIT Standards Committee in writing of such determination and the reasons for not proposing the adoption of such recommendation.

"(3) PUBLICATION.—The Secretary shall provide for publication in the Federal Register of all determinations made by the Secretary under paragraph (1).

"(b) ADOPTION OF STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.—

"(1) IN GENERAL.—Not later than December 31, 2009, the Secretary shall, through the rulemaking process consistent with subsection (a)(2)(A), adopt an initial set of standards, implementation specifications, and certification criteria for the areas required for consideration under section 3002(b)(2)(B). The rulemaking for the initial set of standards, implementation specifications, and certification criteria may be issued on an interim, final basis.

"(2) APPLICATION OF CURRENT STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA.—The standards, implementation specifications, and certification criteria adopted before the date of the enactment of this title through the process existing through the Office of the National Coordinator for Health Information Technology may be applied towards meeting the requirement of paragraph (1).

"(3) SUBSEQUENT STANDARDS ACTIVITY.—The Secretary shall adopt additional standards, implementation specifications, and certification criteria as necessary and consistent with the schedule published under section 3003(b)(2).

"SEC. 3005. APPLICATION AND USE OF ADOPTED STANDARDS AND IMPLEMENTATION SPECIFICATIONS BY FEDERAL AGENCIES.

"For requirements relating to the application and use by Federal agencies of the standards and implementation specifications adopted under section 3004, see section 13111 of the Health Information Technology for Economic and Clinical Health Act.

"SEC. 3006. VOLUNTARY APPLICATION AND USE OF ADOPTED STANDARDS AND IMPLEMENTATION SPECIFICATIONS BY PRIVATE ENTITIES.

"(a) IN GENERAL.—Except as provided under section 13112 of the HITECH Act, nothing in such Act or in the amendments made by such Act shall be construed—

"(1) to require a private entity to adopt or comply with a standard or implementation specification adopted under section 3004; or

"(2) to provide a Federal agency authority, other than the authority such agency may have under other provisions of law, to require a private entity to comply with such a standard or implementation specification.

"(b) RULE OF CONSTRUCTION.—Nothing in this subtitle shall be construed to require that a private entity that enters into a contract with the Federal Government apply or use the standards and implementation specifications adopted under section 3004 with respect to activities not related to the contract.

"SEC. 3007. FEDERAL HEALTH INFORMATION TECHNOLOGY.

"(a) IN GENERAL.—The National Coordinator shall support the development and routine updating of qualified electronic health record technology (as defined in section 3000) consistent with subsections (b) and (c) and make available such qualified electronic health record technology unless the Secretary determines through an assessment that the needs and demands of providers are being substantially and adequately met through the marketplace.

"(b) CERTIFICATION.—In making such electronic health record technology publicly available, the National Coordinator shall ensure that the qualified electronic health record technology described in subsection (a) is certified under the program developed under section 3001(c)(3) to be in compliance with applicable standards adopted under section 3003(a).

"(c) AUTHORIZATION TO CHARGE A NOMINAL FEE.—The National Coordinator may impose a nominal fee for the adoption by a health care provider of the health information technology system developed or approved under subsection (a) and (b). Such fee shall take into account the financial circumstances of smaller providers, low income providers, and providers located in rural or other medically underserved areas.

"(d) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to require that a private or government entity adopt or use the technology provided under this section.

"SEC. 3008. TRANSITIONS.

"(a) ONCHIT.—To the extent consistent with section 3001, all functions, personnel, assets, liabilities, and administrative actions applicable to the National Coordinator for Health Information Technology appointed under Executive Order No. 13335 or the Office of such National Coordinator on the date before the

date of the enactment of this title shall be transferred to the National Coordinator appointed under section 3001(a) and the Office of such National Coordinator as of the date of the enactment of this title.

"(b) NATIONAL EHEALTH COLLABORATIVE.—Nothing in sections 3002 or 3003 or this subsection shall be construed as prohibiting the AHIC Successor, Inc. doing business as the National eHealth Collaborative from modifying its charter, duties, membership, and any other structure or function required to be consistent with section 3002 and 3003 so as to allow the Secretary to recognize such AHIC Successor, Inc. as the HIT Policy Committee or the HIT Standards Committee.

"(c) CONSISTENCY OF RECOMMENDATIONS.—In carrying out section 3003(b)(1)(A), until recommendations are made by the HIT Policy Committee, recommendations of the HIT Standards Committee shall be consistent with the most recent recommendations made by such AHIC Successor, Inc.

"SEC. 3009. MISCELLANEOUS PROVISIONS.

"(a) RELATION TO HIPAA PRIVACY AND SECURITY LAW.—

"(1) IN GENERAL.—With respect to the relation of this title to HIPAA privacy and security law:

"(A) This title may not be construed as having any effect on the authorities of the Secretary under HIPAA privacy and security law.

"(B) The purposes of this title include ensuring that the health information technology standards and implementation specifications adopted under section 3004 take into account the requirements of HIPAA privacy and security law.

"(2) DEFINITION.—For purposes of this section, the term 'HIPAA privacy and security law' means—

"(A) the provisions of part C of title XI of the Social Security Act, section 264 of the Health Insurance Portability and Accountability Act of 1996, and subtitle D of title IV of the Health Information Technology for Economic and Clinical Health Act; and

"(B) regulations under such provisions.

"(b) FLEXIBILITY.—In administering the provisions of this title, the Secretary shall have flexibility in applying the definition of health care provider under section 3000(3), including the authority to omit certain entities listed in such definition when applying such definition under this title, where appropriate.".

SEC. 13102. TECHNICAL AMENDMENT.

Section 1171(5) of the Social Security Act (42 U.S.C. 1320d) is amended by striking "or C" and inserting "C, or D".

PART 2—APPLICATION AND USE OF ADOPTED HEALTH INFORMATION TECHNOLOGY STANDARDS; REPORTS

SEC. 13111. COORDINATION OF FEDERAL ACTIVITIES WITH ADOPTED STANDARDS AND IMPLEMENTATION SPECIFICATIONS.

(a) SPENDING ON HEALTH INFORMATION TECHNOLOGY SYSTEMS.—As each agency (as defined by the Director of the Office of Management and Budget, in consultation with the Secretary

of Health and Human Services) implements, acquires, or upgrades health information technology systems used for the direct exchange of individually identifiable health information between agencies and with non-Federal entities, it shall utilize, where available, health information technology systems and products that meet standards and implementation specifications adopted under section 3004 of the Public Health Service Act, as added by section 13101.

(b) FEDERAL INFORMATION COLLECTION ACTIVITIES.—With respect to a standard or implementation specification adopted under section 3004 of the Public Health Service Act, as added by section 13101, the President shall take measures to ensure that Federal activities involving the broad collection and submission of health information are consistent with such standard or implementation specification, respectively, within three years after the date of such adoption.

(c) APPLICATION OF DEFINITIONS.—The definitions contained in section 3000 of the Public Health Service Act, as added by section 13101, shall apply for purposes of this part.

SEC. 13112. APPLICATION TO PRIVATE ENTITIES.

Each agency (as defined in such Executive Order issued on August 22, 2006, relating to promoting quality and efficient health care in Federal government administered or sponsored health care programs) shall require in contracts or agreements with health care providers, health plans, or health insurance issuers that as each provider, plan, or issuer implements, acquires, or upgrades health information technology systems, it shall utilize, where available, health information technology systems and products that meet standards and implementation specifications adopted under section 3004 of the Public Health Service Act, as added by section 13101.

SEC. 13113. STUDY AND REPORTS.

(a) REPORT ON ADOPTION OF NATIONWIDE SYSTEM.—Not later than 2 years after the date of the enactment of this Act and annually thereafter, the Secretary of Health and Human Services shall submit to the appropriate committees of jurisdiction of the House of Representatives and the Senate a report that—

(1) describes the specific actions that have been taken by the Federal Government and private entities to facilitate the adoption of a nationwide system for the electronic use and exchange of health information;

(2) describes barriers to the adoption of such a nationwide system; and

(3) contains recommendations to achieve full implementation of such a nationwide system.

(b) REIMBURSEMENT INCENTIVE STUDY AND REPORT.—

(1) STUDY.—The Secretary of Health and Human Services shall carry out, or contract with a private entity to carry out, a study that examines methods to create efficient reimbursement incentives for improving health care quality in Federally qualified health centers, rural health clinics, and free clinics.

(2) REPORT.—Not later than 2 years after the date of the enactment of this Act, the Secretary of Health and Human Services shall submit to the appropriate committees of jurisdiction of the House of Representatives and the Senate a report on the study carried out under paragraph (1).

(c) AGING SERVICES TECHNOLOGY STUDY AND REPORT.—

(1) IN GENERAL.—The Secretary of Health and Human Services shall carry out, or contract with a private entity to carry out, a study of matters relating to the potential use of new aging services technology to assist seniors, individuals with disabilities, and their caregivers throughout the aging process.

(2) MATTERS TO BE STUDIED.—The study under paragraph (1) shall include—

(A) an evaluation of—

(i) methods for identifying current, emerging, and future health technology that can be used to meet the needs of seniors and individuals with disabilities and their caregivers across all aging services settings, as specified by the Secretary;

(ii) methods for fostering scientific innovation with respect to aging services technology within the business and academic communities; and

(iii) developments in aging services technology in other countries that may be applied in the United States; and

(B) identification of—

(i) barriers to innovation in aging services technology and devising strategies for removing such barriers; and

(ii) barriers to the adoption of aging services technology by health care providers and consumers and devising strategies to removing such barriers.

(3) REPORT.—Not later than 24 months after the date of the enactment of this Act, the Secretary shall submit to the appropriate committees of jurisdiction of the House of Representatives and of the Senate a report on the study carried out under paragraph (1).

(4) DEFINITIONS.—For purposes of this subsection:

(A) AGING SERVICES TECHNOLOGY.—The term "aging services technology" means health technology that meets the health care needs of seniors, individuals with disabilities, and the caregivers of such seniors and individuals.

(B) SENIOR.—The term "senior" has such meaning as specified by the Secretary.

Subtitle B—Testing of Health Information Technology

SEC. 13201. NATIONAL INSTITUTE FOR STANDARDS AND TECHNOLOGY TESTING.

(a) PILOT TESTING OF STANDARDS AND IMPLEMENTATION SPECIFICATIONS.—In coordination with the HIT Standards Committee established under section 3003 of the Public Health Service Act, as added by section 13101, with respect to the development of standards and implementation specifications under such section, the Director of the National Institute for Standards and Technology shall test such standards and implementation specifications, as appropriate, in order to assure the efficient implementation and use of such standards and implementation specifications.

(b) VOLUNTARY TESTING PROGRAM.—In coordination with the HIT Standards Committee established under section 3003 of the

Public Health Service Act, as added by section 13101, with respect to the development of standards and implementation specifications under such section, the Director of the National Institute of Standards and Technology shall support the establishment of a conformance testing infrastructure, including the development of technical test beds. The development of this conformance testing infrastructure may include a program to accredit independent, non-Federal laboratories to perform testing.

SEC. 13202. RESEARCH AND DEVELOPMENT PROGRAMS.

(a) HEALTH CARE INFORMATION ENTERPRISE INTEGRATION RESEARCH CENTERS.—

(1) IN GENERAL.—The Director of the National Institute of Standards and Technology, in consultation with the Director of the National Science Foundation and other appropriate Federal agencies, shall establish a program of assistance to institutions of higher education (or consortia thereof which may include nonprofit entities and Federal Government laboratories) to establish multidisciplinary Centers for Health Care Information Enterprise Integration.

(2) REVIEW; COMPETITION.—Grants shall be awarded under this subsection on a merit-reviewed, competitive basis.

(3) PURPOSE.—The purposes of the Centers described in paragraph (1) shall be—

(A) to generate innovative approaches to health care information enterprise integration by conducting cutting-edge, multidisciplinary research on the systems challenges to health care delivery; and

(B) the development and use of health information technologies and other complementary fields.

(4) RESEARCH AREAS.—Research areas may include—

(A) interfaces between human information and communications technology systems;

(B) voice-recognition systems;

(C) software that improves interoperability and connectivity among health information systems;

(D) software dependability in systems critical to health care delivery;

(E) measurement of the impact of information technologies on the quality and productivity of health care;

(F) health information enterprise management;

(G) health information technology security and integrity; and

(H) relevant health information technology to reduce medical errors.

(5) APPLICATIONS.—An institution of higher education (or a consortium thereof) seeking funding under this subsection shall submit an application to the Director of the National Institute of Standards and Technology at such time, in such manner, and containing such information as the Director may require. The application shall include, at a minimum, a description of—

(A) the research projects that will be undertaken by the Center established pursuant to assistance under paragraph (1) and the respective contributions of the participating entities;

(B) how the Center will promote active collaboration among scientists and engineers from different disciplines, such as information technology, biologic sciences, management, social sciences, and other appropriate disciplines;

(C) technology transfer activities to demonstrate and diffuse the research results, technologies, and knowledge; and

(D) how the Center will contribute to the education and training of researchers and other professionals in fields relevant to health information enterprise integration.

(b) NATIONAL INFORMATION TECHNOLOGY RESEARCH AND DEVELOPMENT PROGRAM.—The National High-Performance Computing Program established by section 101 of the High-Performance Computing Act of 1991 (15 U.S.C. 5511) shall include Federal research and development programs related to health information technology.

Subtitle C—Grants and Loans Funding

SEC. 13301. GRANT, LOAN, AND DEMONSTRATION PROGRAMS.

Title XXX of the Public Health Service Act, as added by section 13101, is amended by adding at the end the following new subtitle:

"Subtitle B—Incentives for the Use of Health Information Technology

"SEC. 3011. IMMEDIATE FUNDING TO STRENGTHEN THE HEALTH INFORMATION TECHNOLOGY INFRASTRUCTURE.

"(a) IN GENERAL.—The Secretary shall, using amounts appropriated under section 3018, invest in the infrastructure necessary to allow for and promote the electronic exchange and use of health information for each individual in the United States consistent with the goals outlined in the strategic plan developed by the National Coordinator (and as available) under section 3001. The Secretary shall invest funds through the different agencies with expertise in such goals, such as the Office of the National Coordinator for Health Information Technology, the Health Resources and Services Administration, the Agency for Healthcare Research and Quality, the Centers of Medicare & Medicaid Services, the Centers for Disease Control and Prevention, and the Indian Health Service to support the following:

"(1) Health information technology architecture that will support the nationwide electronic exchange and use of health information in a secure, private, and accurate manner, including connecting health information exchanges, and which may include updating and implementing the infrastructure necessary within different agencies of the Department of Health and Human Services to support the electronic use and exchange of health information.

"(2) Development and adoption of appropriate certified electronic health records for categories of health care providers not eligible for support under title XVIII or XIX of the Social Security Act for the adoption of such records.

"(3) Training on and dissemination of information on best practices to integrate health information technology, including

electronic health records, into a provider's delivery of care, consistent with best practices learned from the Health Information Technology Research Center developed under section 3012(b), including community health centers receiving assistance under section 330, covered entities under section 340B, and providers participating in one or more of the programs under titles XVIII, XIX, and XXI of the Social Security Act (relating to Medicare, Medicaid, and the State Children's Health Insurance Program).

"(4) Infrastructure and tools for the promotion of telemedicine, including coordination among Federal agencies in the promotion of telemedicine.

"(5) Promotion of the interoperability of clinical data repositories or registries.

"(6) Promotion of technologies and best practices that enhance the protection of health information by all holders of individually identifiable health information.

"(7) Improvement and expansion of the use of health information technology by public health departments.

"(b) COORDINATION.—The Secretary shall ensure funds under this section are used in a coordinated manner with other health information promotion activities.

"(c) ADDITIONAL USE OF FUNDS.—In addition to using funds as provided in subsection (a), the Secretary may use amounts appropriated under section 3018 to carry out health information technology activities that are provided for under laws in effect on the date of the enactment of this title.

"(d) STANDARDS FOR ACQUISITION OF HEALTH INFORMATION TECHNOLOGY.—To the greatest extent practicable, the Secretary shall ensure that where funds are expended under this section for the acquisition of health information technology, such funds shall be used to acquire health information technology that meets applicable standards adopted under section 3004. Where it is not practicable to expend funds on health information technology that meets such applicable standards, the Secretary shall ensure that such health information technology meets applicable standards otherwise adopted by the Secretary.

"SEC. 3012. HEALTH INFORMATION TECHNOLOGY IMPLEMENTATION ASSISTANCE.

"(a) HEALTH INFORMATION TECHNOLOGY EXTENSION PROGRAM.—To assist health care providers to adopt, implement, and effectively use certified EHR technology that allows for the electronic exchange and use of health information, the Secretary, acting through the Office of the National Coordinator, shall establish a health information technology extension program to provide health information technology assistance services to be carried out through the Department of Health and Human Services. The National Coordinator shall consult with other Federal agencies with demonstrated experience and expertise in information technology services, such as the National Institute of Standards and Technology, in developing and implementing this program.

"(b) HEALTH INFORMATION TECHNOLOGY RESEARCH CENTER.—

"(1) IN GENERAL.—The Secretary shall create a Health Information Technology Research Center (in this section referred to as the 'Center') to provide technical assistance and develop or recognize best practices to support and accelerate

efforts to adopt, implement, and effectively utilize health information technology that allows for the electronic exchange and use of information in compliance with standards, implementation specifications, and certification criteria adopted under section 3004.

"(2) INPUT.—The Center shall incorporate input from—

"(A) other Federal agencies with demonstrated experience and expertise in information technology services such as the National Institute of Standards and Technology;

"(B) users of health information technology, such as providers and their support and clerical staff and others involved in the care and care coordination of patients, from the health care and health information technology industry; and

"(C) others as appropriate.

"(3) PURPOSES.—The purposes of the Center are to—

"(A) provide a forum for the exchange of knowledge and experience;

"(B) accelerate the transfer of lessons learned from existing public and private sector initiatives, including those currently receiving Federal financial support;

"(C) assemble, analyze, and widely disseminate evidence and experience related to the adoption, implementation, and effective use of health information technology that allows for the electronic exchange and use of information including through the regional centers described in subsection (c);

"(D) provide technical assistance for the establishment and evaluation of regional and local health information networks to facilitate the electronic exchange of information across health care settings and improve the quality of health care;

"(E) provide technical assistance for the development and dissemination of solutions to barriers to the exchange of electronic health information; and

"(F) learn about effective strategies to adopt and utilize health information technology in medically underserved communities.

"(c) HEALTH INFORMATION TECHNOLOGY REGIONAL EXTENSION CENTERS.—

"(1) IN GENERAL.—The Secretary shall provide assistance for the creation and support of regional centers (in this subsection referred to as 'regional centers') to provide technical assistance and disseminate best practices and other information learned from the Center to support and accelerate efforts to adopt, implement, and effectively utilize health information technology that allows for the electronic exchange and use of information in compliance with standards, implementation specifications, and certification criteria adopted under section 3004. Activities conducted under this subsection shall be consistent with the strategic plan developed by the National Coordinator, (and, as available) under section 3001.

"(2) AFFILIATION.—Regional centers shall be affiliated with any United States-based nonprofit institution or organization, or group thereof, that applies and is awarded financial assistance under this section. Individual awards shall be decided on the basis of merit.

"(3) OBJECTIVE.—The objective of the regional centers is to enhance and promote the adoption of health information technology through—

"(A) assistance with the implementation, effective use, upgrading, and ongoing maintenance of health information technology, including electronic health records, to healthcare providers nationwide;

"(B) broad participation of individuals from industry, universities, and State governments;

"(C) active dissemination of best practices and research on the implementation, effective use, upgrading, and ongoing maintenance of health information technology, including electronic health records, to health care providers in order to improve the quality of healthcare and protect the privacy and security of health information;

"(D) participation, to the extent practicable, in health information exchanges;

"(E) utilization, when appropriate, of the expertise and capability that exists in Federal agencies other than the Department; and

"(F) integration of health information technology, including electronic health records, into the initial and ongoing training of health professionals and others in the healthcare industry that would be instrumental to improving the quality of healthcare through the smooth and accurate electronic use and exchange of health information.

"(4) REGIONAL ASSISTANCE.—Each regional center shall aim to provide assistance and education to all providers in a region, but shall prioritize any direct assistance first to the following:

"(A) Public or not-for-profit hospitals or critical access hospitals.

"(B) Federally qualified health centers (as defined in section 1861(aa)(4) of the Social Security Act).

"(C) Entities that are located in rural and other areas that serve uninsured, underinsured, and medically underserved individuals (regardless of whether such area is urban or rural).

"(D) Individual or small group practices (or a consortium thereof) that are primarily focused on primary care.

"(5) FINANCIAL SUPPORT.—The Secretary may provide financial support to any regional center created under this subsection for a period not to exceed four years. The Secretary may not provide more than 50 percent of the capital and annual operating and maintenance funds required to create and maintain such a center, except in an instance of national economic conditions which would render this cost-share requirement detrimental to the program and upon notification to Congress as to the justification to waive the cost-share requirement.

"(6) NOTICE OF PROGRAM DESCRIPTION AND AVAILABILITY OF FUNDS.—The Secretary shall publish in the Federal Register, not later than 90 days after the date of the enactment of this title, a draft description of the program for establishing regional centers under this subsection. Such description shall include the following:

"(A) A detailed explanation of the program and the programs goals.

"(B) Procedures to be followed by the applicants.

"(C) Criteria for determining qualified applicants.

"(D) Maximum support levels expected to be available to centers under the program.

"(7) APPLICATION REVIEW.—The Secretary shall subject each application under this subsection to merit review. In making a decision whether to approve such application and provide financial support, the Secretary shall consider at a minimum the merits of the application, including those portions of the application regarding—

"(A) the ability of the applicant to provide assistance under this subsection and utilization of health information technology appropriate to the needs of particular categories of health care providers;

"(B) the types of service to be provided to health care providers;

"(C) geographical diversity and extent of service area; and

"(D) the percentage of funding and amount of in-kind commitment from other sources.

"(8) BIENNIAL EVALUATION.—Each regional center which receives financial assistance under this subsection shall be evaluated biennially by an evaluation panel appointed by the Secretary. Each evaluation panel shall be composed of private experts, none of whom shall be connected with the center involved, and of Federal officials. Each evaluation panel shall measure the involved center's performance against the objective specified in paragraph (3). The Secretary shall not continue to provide funding to a regional center unless its evaluation is overall positive.

"(9) CONTINUING SUPPORT.—After the second year of assistance under this subsection, a regional center may receive additional support under this subsection if it has received positive evaluations and a finding by the Secretary that continuation of Federal funding to the center was in the best interest of provision of health information technology extension services.

"SEC. 3013. STATE GRANTS TO PROMOTE HEALTH INFORMATION TECHNOLOGY.

"(a) IN GENERAL.—The Secretary, acting through the National Coordinator, shall establish a program in accordance with this section to facilitate and expand the electronic movement and use of health information among organizations according to nationally recognized standards.

"(b) PLANNING GRANTS.—The Secretary may award a grant to a State or qualified State-designated entity (as described in subsection (f)) that submits an application to the Secretary at such time, in such manner, and containing such information as the Secretary may specify, for the purpose of planning activities described in subsection (d).

"(c) IMPLEMENTATION GRANTS.—The Secretary may award a grant to a State or qualified State designated entity that—

"(1) has submitted, and the Secretary has approved, a plan described in subsection (e) (regardless of whether such plan was prepared using amounts awarded under subsection (b); and

"(2) submits an application at such time, in such manner, and containing such information as the Secretary may specify.

"(d) USE OF FUNDS.—Amounts received under a grant under subsection (c) shall be used to conduct activities to facilitate and expand the electronic movement and use of health information among organizations according to nationally recognized standards through activities that include—

"(1) enhancing broad and varied participation in the authorized and secure nationwide electronic use and exchange of health information;

"(2) identifying State or local resources available towards a nationwide effort to promote health information technology;

"(3) complementing other Federal grants, programs, and efforts towards the promotion of health information technology;

"(4) providing technical assistance for the development and dissemination of solutions to barriers to the exchange of electronic health information;

"(5) promoting effective strategies to adopt and utilize health information technology in medically underserved communities;

"(6) assisting patients in utilizing health information technology;

"(7) encouraging clinicians to work with Health Information Technology Regional Extension Centers as described in section 3012, to the extent they are available and valuable;

"(8) supporting public health agencies' authorized use of and access to electronic health information;

"(9) promoting the use of electronic health records for quality improvement including through quality measures reporting; and

"(10) such other activities as the Secretary may specify.

"(e) PLAN.—

"(1) IN GENERAL.—A plan described in this subsection is a plan that describes the activities to be carried out by a State or by the qualified State-designated entity within such State to facilitate and expand the electronic movement and use of health information among organizations according to nationally recognized standards and implementation specifications.

"(2) REQUIRED ELEMENTS.—A plan described in paragraph (1) shall—

"(A) be pursued in the public interest;

"(B) be consistent with the strategic plan developed by the National Coordinator, (and, as available) under section 3001;

"(C) include a description of the ways the State or qualified State-designated entity will carry out the activities described in subsection (b); and

"(D) contain such elements as the Secretary may require.

"(f) QUALIFIED STATE-DESIGNATED ENTITY.—For purposes of this section, to be a qualified State-designated entity, with respect to a State, an entity shall—

"(1) be designated by the State as eligible to receive awards under this section;

"(2) be a not-for-profit entity with broad stakeholder representation on its governing board;

"(3) demonstrate that one of its principal goals is to use information technology to improve health care quality and efficiency through the authorized and secure electronic exchange and use of health information;

"(4) adopt nondiscrimination and conflict of interest policies that demonstrate a commitment to open, fair, and nondiscriminatory participation by stakeholders; and

"(5) conform to such other requirements as the Secretary may establish.

"(g) REQUIRED CONSULTATION.—In carrying out activities described in subsections (b) and (c), a State or qualified State-designated entity shall consult with and consider the recommendations of—

"(1) health care providers (including providers that provide services to low income and underserved populations);

"(2) health plans;

"(3) patient or consumer organizations that represent the population to be served;

"(4) health information technology vendors;

"(5) health care purchasers and employers;

"(6) public health agencies;

"(7) health professions schools, universities and colleges;

"(8) clinical researchers;

"(9) other users of health information technology such as the support and clerical staff of providers and others involved in the care and care coordination of patients; and

"(10) such other entities, as may be determined appropriate by the Secretary.

"(h) CONTINUOUS IMPROVEMENT.—The Secretary shall annually evaluate the activities conducted under this section and shall, in awarding grants under this section, implement the lessons learned from such evaluation in a manner so that awards made subsequent to each such evaluation are made in a manner that, in the determination of the Secretary, will lead towards the greatest improvement in quality of care, decrease in costs, and the most effective authorized and secure electronic exchange of health information.

"(i) REQUIRED MATCH.—

"(1) IN GENERAL.—For a fiscal year (beginning with fiscal year 2011), the Secretary may not make a grant under this section to a State unless the State agrees to make available non-Federal contributions (which may include in-kind contributions) toward the costs of a grant awarded under subsection (c) in an amount equal to—

"(A) for fiscal year 2011, not less than $1 for each $10 of Federal funds provided under the grant;

"(B) for fiscal year 2012, not less than $1 for each $7 of Federal funds provided under the grant; and

"(C) for fiscal year 2013 and each subsequent fiscal year, not less than $1 for each $3 of Federal funds provided under the grant.

"(2) AUTHORITY TO REQUIRE STATE MATCH FOR FISCAL YEARS BEFORE FISCAL YEAR 2011.—For any fiscal year during the grant program under this section before fiscal year 2011, the Secretary may determine the extent to which there shall be required a non-Federal contribution from a State receiving a grant under this section.

"SEC. 3014. COMPETITIVE GRANTS TO STATES AND INDIAN TRIBES FOR THE DEVELOPMENT OF LOAN PROGRAMS TO FACILITATE THE WIDESPREAD ADOPTION OF CERTIFIED EHR TECHNOLOGY.

"(a) IN GENERAL.—The National Coordinator may award competitive grants to eligible entities for the establishment of programs for loans to health care providers to conduct the activities described in subsection (e).

"(b) ELIGIBLE ENTITY DEFINED.—For purposes of this subsection, the term 'eligible entity' means a State or Indian tribe (as defined in the Indian Self-Determination and Education Assistance Act) that—

"(1) submits to the National Coordinator an application at such time, in such manner, and containing such information as the National Coordinator may require;

"(2) submits to the National Coordinator a strategic plan in accordance with subsection (d) and provides to the National Coordinator assurances that the entity will update such plan annually in accordance with such subsection;

"(3) provides assurances to the National Coordinator that the entity will establish a Loan Fund in accordance with subsection (c);

"(4) provides assurances to the National Coordinator that the entity will not provide a loan from the Loan Fund to a health care provider unless the provider agrees to—

"(A) submit reports on quality measures adopted by the Federal Government (by not later than 90 days after the date on which such measures are adopted), to—

"(i) the Administrator of the Centers for Medicare & Medicaid Services (or his or her designee), in the case of an entity participating in the Medicare program under title XVIII of the Social Security Act or the Medicaid program under title XIX of such Act; or

"(ii) the Secretary in the case of other entities;

"(B) demonstrate to the satisfaction of the Secretary (through criteria established by the Secretary) that any certified EHR technology purchased, improved, or otherwise financially supported under a loan under this section is used to exchange health information in a manner that, in accordance with law and standards (as adopted under section 3004) applicable to the exchange of information, improves the quality of health care, such as promoting care coordination; and

"(C) comply with such other requirements as the entity or the Secretary may require;

"(D) include a plan on how health care providers involved intend to maintain and support the certified EHR technology over time;

"(E) include a plan on how the health care providers involved intend to maintain and support the certified EHR technology that would be purchased with such loan, including the type of resources expected to be involved and any such other information as the State or Indian Tribe, respectively, may require; and

"(5) agrees to provide matching funds in accordance with subsection (h).

"(c) ESTABLISHMENT OF FUND.—For purposes of subsection (b)(3), an eligible entity shall establish a certified EHR technology loan fund (referred to in this subsection as a 'Loan Fund') and comply with the other requirements contained in this section. A grant to an eligible entity under this section shall be deposited in the Loan Fund established by the eligible entity. No funds authorized by other provisions of this title to be used for other purposes specified in this title shall be deposited in any Loan Fund.

"(d) STRATEGIC PLAN.—

"(1) IN GENERAL.—For purposes of subsection (b)(2), a strategic plan of an eligible entity under this subsection shall identify the intended uses of amounts available to the Loan Fund of such entity.

"(2) CONTENTS.—A strategic plan under paragraph (1), with respect to a Loan Fund of an eligible entity, shall include for a year the following:

"(A) A list of the projects to be assisted through the Loan Fund during such year.

"(B) A description of the criteria and methods established for the distribution of funds from the Loan Fund during the year.

"(C) A description of the financial status of the Loan Fund as of the date of submission of the plan.

"(D) The short-term and long-term goals of the Loan Fund.

"(e) USE OF FUNDS.—Amounts deposited in a Loan Fund, including loan repayments and interest earned on such amounts, shall be used only for awarding loans or loan guarantees, making reimbursements described in subsection (g)(4)(A), or as a source of reserve and security for leveraged loans, the proceeds of which are deposited in the Loan Fund established under subsection (c). Loans under this section may be used by a health care provider to—

"(1) facilitate the purchase of certified EHR technology;

"(2) enhance the utilization of certified EHR technology (which may include costs associated with upgrading health information technology so that it meets criteria necessary to be a certified EHR technology);

"(3) train personnel in the use of such technology; or

"(4) improve the secure electronic exchange of health information.

"(f) TYPES OF ASSISTANCE.—Except as otherwise limited by applicable State law, amounts deposited into a Loan Fund under this section may only be used for the following:

"(1) To award loans that comply with the following:

"(A) The interest rate for each loan shall not exceed the market interest rate.

"(B) The principal and interest payments on each loan shall commence not later than 1 year after the date the loan was awarded, and each loan shall be fully amortized not later than 10 years after the date of the loan.

"(C) The Loan Fund shall be credited with all payments of principal and interest on each loan awarded from the Loan Fund.

"(2) To guarantee, or purchase insurance for, a local obligation (all of the proceeds of which finance a project eligible

for assistance under this subsection) if the guarantee or purchase would improve credit market access or reduce the interest rate applicable to the obligation involved.

"(3) As a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the eligible entity if the proceeds of the sale of the bonds will be deposited into the Loan Fund.

"(4) To earn interest on the amounts deposited into the Loan Fund.

"(5) To make reimbursements described in subsection (g)(4)(A).

"(g) ADMINISTRATION OF LOAN FUNDS.—

"(1) COMBINED FINANCIAL ADMINISTRATION.—An eligible entity may (as a convenience and to avoid unnecessary administrative costs) combine, in accordance with applicable State law, the financial administration of a Loan Fund established under this subsection with the financial administration of any other revolving fund established by the entity if otherwise not prohibited by the law under which the Loan Fund was established.

"(2) COST OF ADMINISTERING FUND.—Each eligible entity may annually use not to exceed 4 percent of the funds provided to the entity under a grant under this section to pay the reasonable costs of the administration of the programs under this section, including the recovery of reasonable costs expended to establish a Loan Fund which are incurred after the date of the enactment of this title.

"(3) GUIDANCE AND REGULATIONS.—The National Coordinator shall publish guidance and promulgate regulations as may be necessary to carry out the provisions of this section, including—

"(A) provisions to ensure that each eligible entity commits and expends funds allotted to the entity under this section as efficiently as possible in accordance with this title and applicable State laws; and

"(B) guidance to prevent waste, fraud, and abuse.

"(4) PRIVATE SECTOR CONTRIBUTIONS.—

"(A) IN GENERAL.—A Loan Fund established under this section may accept contributions from private sector entities, except that such entities may not specify the recipient or recipients of any loan issued under this subsection. An eligible entity may agree to reimburse a private sector entity for any contribution made under this subparagraph, except that the amount of such reimbursement may not be greater than the principal amount of the contribution made.

"(B) AVAILABILITY OF INFORMATION.—An eligible entity shall make publicly available the identity of, and amount contributed by, any private sector entity under subparagraph (A) and may issue letters of commendation or make other awards (that have no financial value) to any such entity.

"(h) MATCHING REQUIREMENTS.—

"(1) IN GENERAL.—The National Coordinator may not make a grant under subsection (a) to an eligible entity unless the entity agrees to make available (directly or through donations from public or private entities) non-Federal contributions in cash to the costs of carrying out the activities for which the

grant is awarded in an amount equal to not less than $1 for each $5 of Federal funds provided under the grant.

"(2) DETERMINATION OF AMOUNT OF NON-FEDERAL CONTRIBUTION.—In determining the amount of non-Federal contributions that an eligible entity has provided pursuant to subparagraph (A), the National Coordinator may not include any amounts provided to the entity by the Federal Government.

"(i) EFFECTIVE DATE.—The Secretary may not make an award under this section prior to January 1, 2010.

"SEC. 3015. DEMONSTRATION PROGRAM TO INTEGRATE INFORMATION TECHNOLOGY INTO CLINICAL EDUCATION.

"(a) IN GENERAL.—The Secretary may award grants under this section to carry out demonstration projects to develop academic curricula integrating certified EHR technology in the clinical education of health professionals. Such awards shall be made on a competitive basis and pursuant to peer review.

"(b) ELIGIBILITY.—To be eligible to receive a grant under subsection (a), an entity shall—

"(1) submit to the Secretary an application at such time, in such manner, and containing such information as the Secretary may require;

"(2) submit to the Secretary a strategic plan for integrating certified EHR technology in the clinical education of health professionals to reduce medical errors, increase access to prevention, reduce chronic diseases, and enhance health care quality;

"(3) be—

"(A) a school of medicine, osteopathic medicine, dentistry, or pharmacy, a graduate program in behavioral or mental health, or any other graduate health professions school;

"(B) a graduate school of nursing or physician assistant studies;

"(C) a consortium of two or more schools described in subparagraph (A) or (B); or

"(D) an institution with a graduate medical education program in medicine, osteopathic medicine, dentistry, pharmacy, nursing, or physician assistance studies;

"(4) provide for the collection of data regarding the effectiveness of the demonstration project to be funded under the grant in improving the safety of patients, the efficiency of health care delivery, and in increasing the likelihood that graduates of the grantee will adopt and incorporate certified EHR technology, in the delivery of health care services; and

"(5) provide matching funds in accordance with subsection (d).

"(c) USE OF FUNDS.—

"(1) IN GENERAL.—With respect to a grant under subsection (a), an eligible entity shall—

"(A) use grant funds in collaboration with 2 or more disciplines; and

"(B) use grant funds to integrate certified EHR technology into community-based clinical education.

"(2) LIMITATION.—An eligible entity shall not use amounts received under a grant under subsection (a) to purchase hardware, software, or services.

"(d) FINANCIAL SUPPORT.—The Secretary may not provide more than 50 percent of the costs of any activity for which assistance is provided under subsection (a), except in an instance of national economic conditions which would render the cost-share requirement under this subsection detrimental to the program and upon notification to Congress as to the justification to waive the cost-share requirement.

"(e) EVALUATION.—The Secretary shall take such action as may be necessary to evaluate the projects funded under this section and publish, make available, and disseminate the results of such evaluations on as wide a basis as is practicable.

"(f) REPORTS.—Not later than 1 year after the date of enactment of this title, and annually thereafter, the Secretary shall submit to the Committee on Health, Education, Labor, and Pensions and the Committee on Finance of the Senate, and the Committee on Energy and Commerce of the House of Representatives a report that—

"(1) describes the specific projects established under this section; and

"(2) contains recommendations for Congress based on the evaluation conducted under subsection (e).

"SEC. 3016. INFORMATION TECHNOLOGY PROFESSIONALS IN HEALTH CARE.

"(a) IN GENERAL.—The Secretary, in consultation with the Director of the National Science Foundation, shall provide assistance to institutions of higher education (or consortia thereof) to establish or expand medical health informatics education programs, including certification, undergraduate, and masters degree programs, for both health care and information technology students to ensure the rapid and effective utilization and development of health information technologies (in the United States health care infrastructure).

"(b) ACTIVITIES.—Activities for which assistance may be provided under subsection (a) may include the following:

"(1) Developing and revising curricula in medical health informatics and related disciplines.

"(2) Recruiting and retaining students to the program involved.

"(3) Acquiring equipment necessary for student instruction in these programs, including the installation of testbed networks for student use.

"(4) Establishing or enhancing bridge programs in the health informatics fields between community colleges and universities.

"(c) PRIORITY.—In providing assistance under subsection (a), the Secretary shall give preference to the following:

"(1) Existing education and training programs.

"(2) Programs designed to be completed in less than six months.

"SEC. 3017. GENERAL GRANT AND LOAN PROVISIONS.

"(a) REPORTS.—The Secretary may require that an entity receiving assistance under this subtitle shall submit to the Secretary, not later than the date that is 1 year after the date of receipt of such assistance, a report that includes—

"(1) an analysis of the effectiveness of the activities for which the entity receives such assistance, as compared to the goals for such activities; and

"(2) an analysis of the impact of the project on health care quality and safety.

"(b) REQUIREMENT TO IMPROVE QUALITY OF CARE AND DECREASE IN COSTS.—The National Coordinator shall annually evaluate the activities conducted under this subtitle and shall, in awarding grants, implement the lessons learned from such evaluation in a manner so that awards made subsequent to each such evaluation are made in a manner that, in the determination of the National Coordinator, will result in the greatest improvement in the quality and efficiency of health care.

"SEC. 3018. AUTHORIZATION FOR APPROPRIATIONS.

"For the purposes of carrying out this subtitle, there is authorized to be appropriated such sums as may be necessary for each of the fiscal years 2009 through 2013.".

Subtitle D—Privacy

SEC. 13400. DEFINITIONS.

In this subtitle, except as specified otherwise:

(1) BREACH.—

(A) IN GENERAL.—The term "breach" means the unauthorized acquisition, access, use, or disclosure of protected health information which compromises the security or privacy of such information, except where an unauthorized person to whom such information is disclosed would not reasonably have been able to retain such information.

(B) EXCEPTIONS.—The term "breach" does not include—

(i) any unintentional acquisition, access, or use of protected health information by an employee or individual acting under the authority of a covered entity or business associate if—

(I) such acquisition, access, or use was made in good faith and within the course and scope of the employment or other professional relationship of such employee or individual, respectively, with the covered entity or business associate; and

(II) such information is not further acquired, accessed, used, or disclosed by any person; or

(ii) any inadvertent disclosure from an individual who is otherwise authorized to access protected health information at a facility operated by a covered entity or business associate to another similarly situated individual at same facility; and

(iii) any such information received as a result of such disclosure is not further acquired, accessed, used, or disclosed without authorization by any person.

(2) BUSINESS ASSOCIATE.—The term "business associate" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(3) COVERED ENTITY.—The term "covered entity" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(4) DISCLOSE.—The terms "disclose" and "disclosure" have the meaning given the term "disclosure" in section 160.103 of title 45, Code of Federal Regulations.

(5) ELECTRONIC HEALTH RECORD.—The term "electronic health record" means an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff.

(6) HEALTH CARE OPERATIONS.—The term "health care operation" has the meaning given such term in section 164.501 of title 45, Code of Federal Regulations.

(7) HEALTH CARE PROVIDER.—The term "health care provider" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(8) HEALTH PLAN.—The term "health plan" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(9) NATIONAL COORDINATOR.—The term "National Coordinator" means the head of the Office of the National Coordinator for Health Information Technology established under section 3001(a) of the Public Health Service Act, as added by section 13101.

(10) PAYMENT.—The term "payment" has the meaning given such term in section 164.501 of title 45, Code of Federal Regulations.

(11) PERSONAL HEALTH RECORD.—The term "personal health record" means an electronic record of PHR identifiable health information (as defined in section 13407(f)(2)) on an individual that can be drawn from multiple sources and that is managed, shared, and controlled by or primarily for the individual.

(12) PROTECTED HEALTH INFORMATION.—The term "protected health information" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(13) SECRETARY.—The term "Secretary" means the Secretary of Health and Human Services.

(14) SECURITY.—The term "security" has the meaning given such term in section 164.304 of title 45, Code of Federal Regulations.

(15) STATE.—The term "State" means each of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

(16) TREATMENT.—The term "treatment" has the meaning given such term in section 164.501 of title 45, Code of Federal Regulations.

(17) USE.—The term "use" has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.

(18) VENDOR OF PERSONAL HEALTH RECORDS.—The term "vendor of personal health records" means an entity, other than a covered entity (as defined in paragraph (3)), that offers or maintains a personal health record.

PART 1—IMPROVED PRIVACY PROVISIONS AND SECURITY PROVISIONS

SEC. 13401. APPLICATION OF SECURITY PROVISIONS AND PENALTIES TO BUSINESS ASSOCIATES OF COVERED ENTITIES; ANNUAL GUIDANCE ON SECURITY PROVISIONS.

(a) APPLICATION OF SECURITY PROVISIONS.—Sections 164.308, 164.310, 164.312, and 164.316 of title 45, Code of Federal Regulations, shall apply to a business associate of a covered entity in the same manner that such sections apply to the covered entity. The additional requirements of this title that relate to security and that are made applicable with respect to covered entities shall also be applicable to such a business associate and shall be incorporated into the business associate agreement between the business associate and the covered entity.

(b) APPLICATION OF CIVIL AND CRIMINAL PENALTIES.—In the case of a business associate that violates any security provision specified in subsection (a), sections 1176 and 1177 of the Social Security Act (42 U.S.C. 1320d–5, 1320d–6) shall apply to the business associate with respect to such violation in the same manner such sections apply to a covered entity that violates such security provision.

(c) ANNUAL GUIDANCE.—For the first year beginning after the date of the enactment of this Act and annually thereafter, the Secretary of Health and Human Services shall, after consultation with stakeholders, annually issue guidance on the most effective and appropriate technical safeguards for use in carrying out the sections referred to in subsection (a) and the security standards in subpart C of part 164 of title 45, Code of Federal Regulations, including the use of standards developed under section 3002(b)(2)(B)(vi) of the Public Health Service Act, as added by section 13101 of this Act, as such provisions are in effect as of the date before the enactment of this Act.

SEC. 13402. NOTIFICATION IN THE CASE OF BREACH.

(a) IN GENERAL.—A covered entity that accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured protected health information (as defined in subsection (h)(1)) shall, in the case of a breach of such information that is discovered by the covered entity, notify each individual whose unsecured protected health information has been, or is reasonably believed by the covered entity to have been, accessed, acquired, or disclosed as a result of such breach.

(b) NOTIFICATION OF COVERED ENTITY BY BUSINESS ASSOCIATE.—A business associate of a covered entity that accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured protected health information shall, following the discovery of a breach of such information, notify the covered entity of such breach. Such notice shall include the identification of each individual whose unsecured protected health information has been, or is reasonably believed by the business associate to have been, accessed, acquired, or disclosed during such breach.

(c) BREACHES TREATED AS DISCOVERED.—For purposes of this section, a breach shall be treated as discovered by a covered entity or by a business associate as of the first day on which such breach is known to such entity or associate, respectively, (including any

person, other than the individual committing the breach, that is an employee, officer, or other agent of such entity or associate, respectively) or should reasonably have been known to such entity or associate (or person) to have occurred.

(d) TIMELINESS OF NOTIFICATION.—

(1) IN GENERAL.—Subject to subsection (g), all notifications required under this section shall be made without unreasonable delay and in no case later than 60 calendar days after the discovery of a breach by the covered entity involved (or business associate involved in the case of a notification required under subsection (b)).

(2) BURDEN OF PROOF.—The covered entity involved (or business associate involved in the case of a notification required under subsection (b)), shall have the burden of demonstrating that all notifications were made as required under this part, including evidence demonstrating the necessity of any delay.

(e) METHODS OF NOTICE.—

(1) INDIVIDUAL NOTICE.—Notice required under this section to be provided to an individual, with respect to a breach, shall be provided promptly and in the following form:

(A) Written notification by first-class mail to the individual (or the next of kin of the individual if the individual is deceased) at the last known address of the individual or the next of kin, respectively, or, if specified as a preference by the individual, by electronic mail. The notification may be provided in one or more mailings as information is available.

(B) In the case in which there is insufficient, or out-of-date contact information (including a phone number, email address, or any other form of appropriate communication) that precludes direct written (or, if specified by the individual under subparagraph (A), electronic) notification to the individual, a substitute form of notice shall be provided, including, in the case that there are 10 or more individuals for which there is insufficient or out-of-date contact information, a conspicuous posting for a period determined by the Secretary on the home page of the Web site of the covered entity involved or notice in major print or broadcast media, including major media in geographic areas where the individuals affected by the breach likely reside. Such a notice in media or web posting will include a toll-free phone number where an individual can learn whether or not the individual's unsecured protected health information is possibly included in the breach.

(C) In any case deemed by the covered entity involved to require urgency because of possible imminent misuse of unsecured protected health information, the covered entity, in addition to notice provided under subparagraph (A), may provide information to individuals by telephone or other means, as appropriate.

(2) MEDIA NOTICE.—Notice shall be provided to prominent media outlets serving a State or jurisdiction, following the discovery of a breach described in subsection (a), if the unsecured protected health information of more than 500 residents of such State or jurisdiction is, or is reasonably believed to have been, accessed, acquired, or disclosed during such breach.

(3) NOTICE TO SECRETARY.—Notice shall be provided to the Secretary by covered entities of unsecured protected health information that has been acquired or disclosed in a breach. If the breach was with respect to 500 or more individuals than such notice must be provided immediately. If the breach was with respect to less than 500 individuals, the covered entity may maintain a log of any such breach occurring and annually submit such a log to the Secretary documenting such breaches occurring during the year involved.

(4) POSTING ON HHS PUBLIC WEBSITE.—The Secretary shall make available to the public on the Internet website of the Department of Health and Human Services a list that identifies each covered entity involved in a breach described in subsection (a) in which the unsecured protected health information of more than 500 individuals is acquired or disclosed.

(f) CONTENT OF NOTIFICATION.—Regardless of the method by which notice is provided to individuals under this section, notice of a breach shall include, to the extent possible, the following:

(1) A brief description of what happened, including the date of the breach and the date of the discovery of the breach, if known.

(2) A description of the types of unsecured protected health information that were involved in the breach (such as full name, Social Security number, date of birth, home address, account number, or disability code).

(3) The steps individuals should take to protect themselves from potential harm resulting from the breach.

(4) A brief description of what the covered entity involved is doing to investigate the breach, to mitigate losses, and to protect against any further breaches.

(5) Contact procedures for individuals to ask questions or learn additional information, which shall include a toll-free telephone number, an e-mail address, Web site, or postal address.

(g) DELAY OF NOTIFICATION AUTHORIZED FOR LAW ENFORCEMENT PURPOSES.—If a law enforcement official determines that a notification, notice, or posting required under this section would impede a criminal investigation or cause damage to national security, such notification, notice, or posting shall be delayed in the same manner as provided under section 164.528(a)(2) of title 45, Code of Federal Regulations, in the case of a disclosure covered under such section.

(h) UNSECURED PROTECTED HEALTH INFORMATION.—

(1) DEFINITION.—

(A) IN GENERAL.—Subject to subparagraph (B), for purposes of this section, the term "unsecured protected health information" means protected health information that is not secured through the use of a technology or methodology specified by the Secretary in the guidance issued under paragraph (2).

(B) EXCEPTION IN CASE TIMELY GUIDANCE NOT ISSUED.—In the case that the Secretary does not issue guidance under paragraph (2) by the date specified in such paragraph, for purposes of this section, the term "unsecured protected health information" shall mean protected health information that is not secured by a technology standard that renders protected health information unusable,

unreadable, or indecipherable to unauthorized individuals and is developed or endorsed by a standards developing organization that is accredited by the American National Standards Institute.

(2) GUIDANCE.—For purposes of paragraph (1) and section 13407(f)(3), not later than the date that is 60 days after the date of the enactment of this Act, the Secretary shall, after consultation with stakeholders, issue (and annually update) guidance specifying the technologies and methodologies that render protected health information unusable, unreadable, or indecipherable to unauthorized individuals, including the use of standards developed under section 3002(b)(2)(B)(vi) of the Public Health Service Act, as added by section 13101 of this Act.

(i) REPORT TO CONGRESS ON BREACHES.—

(1) IN GENERAL.—Not later than 12 months after the date of the enactment of this Act and annually thereafter, the Secretary shall prepare and submit to the Committee on Finance and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means and the Committee on Energy and Commerce of the House of Representatives a report containing the information described in paragraph (2) regarding breaches for which notice was provided to the Secretary under subsection (e)(3).

(2) INFORMATION.—The information described in this paragraph regarding breaches specified in paragraph (1) shall include—

(A) the number and nature of such breaches; and

(B) actions taken in response to such breaches.

(j) REGULATIONS; EFFECTIVE DATE.—To carry out this section, the Secretary of Health and Human Services shall promulgate interim final regulations by not later than the date that is 180 days after the date of the enactment of this title. The provisions of this section shall apply to breaches that are discovered on or after the date that is 30 days after the date of publication of such interim final regulations.

SEC. 13403. EDUCATION ON HEALTH INFORMATION PRIVACY.

(a) REGIONAL OFFICE PRIVACY ADVISORS.—Not later than 6 months after the date of the enactment of this Act, the Secretary shall designate an individual in each regional office of the Department of Health and Human Services to offer guidance and education to covered entities, business associates, and individuals on their rights and responsibilities related to Federal privacy and security requirements for protected health information.

(b) EDUCATION INITIATIVE ON USES OF HEALTH INFORMATION.—Not later than 12 months after the date of the enactment of this Act, the Office for Civil Rights within the Department of Health and Human Services shall develop and maintain a multi-faceted national education initiative to enhance public transparency regarding the uses of protected health information, including programs to educate individuals about the potential uses of their protected health information, the effects of such uses, and the rights of individuals with respect to such uses. Such programs shall be conducted in a variety of languages and present information in a clear and understandable manner.

SEC. 13404. APPLICATION OF PRIVACY PROVISIONS AND PENALTIES TO BUSINESS ASSOCIATES OF COVERED ENTITIES.

(a) APPLICATION OF CONTRACT REQUIREMENTS.—In the case of a business associate of a covered entity that obtains or creates protected health information pursuant to a written contract (or other written arrangement) described in section 164.502(e)(2) of title 45, Code of Federal Regulations, with such covered entity, the business associate may use and disclose such protected health information only if such use or disclosure, respectively, is in compliance with each applicable requirement of section 164.504(e) of such title. The additional requirements of this subtitle that relate to privacy and that are made applicable with respect to covered entities shall also be applicable to such a business associate and shall be incorporated into the business associate agreement between the business associate and the covered entity.

(b) APPLICATION OF KNOWLEDGE ELEMENTS ASSOCIATED WITH CONTRACTS.—Section 164.504(e)(1)(ii) of title 45, Code of Federal Regulations, shall apply to a business associate described in subsection (a), with respect to compliance with such subsection, in the same manner that such section applies to a covered entity, with respect to compliance with the standards in sections 164.502(e) and 164.504(e) of such title, except that in applying such section 164.504(e)(1)(ii) each reference to the business associate, with respect to a contract, shall be treated as a reference to the covered entity involved in such contract.

(c) APPLICATION OF CIVIL AND CRIMINAL PENALTIES.—In the case of a business associate that violates any provision of subsection (a) or (b), the provisions of sections 1176 and 1177 of the Social Security Act (42 U.S.C. 1320d–5, 1320d–6) shall apply to the business associate with respect to such violation in the same manner as such provisions apply to a person who violates a provision of part C of title XI of such Act.

SEC. 13405. RESTRICTIONS ON CERTAIN DISCLOSURES AND SALES OF HEALTH INFORMATION; ACCOUNTING OF CERTAIN PROTECTED HEALTH INFORMATION DISCLOSURES; ACCESS TO CERTAIN INFORMATION IN ELECTRONIC FORMAT.

(a) REQUESTED RESTRICTIONS ON CERTAIN DISCLOSURES OF HEALTH INFORMATION.—In the case that an individual requests under paragraph (a)(1)(i)(A) of section 164.522 of title 45, Code of Federal Regulations, that a covered entity restrict the disclosure of the protected health information of the individual, notwithstanding paragraph (a)(1)(ii) of such section, the covered entity must comply with the requested restriction if—

(1) except as otherwise required by law, the disclosure is to a health plan for purposes of carrying out payment or health care operations (and is not for purposes of carrying out treatment); and

(2) the protected health information pertains solely to a health care item or service for which the health care provider involved has been paid out of pocket in full.

(b) DISCLOSURES REQUIRED TO BE LIMITED TO THE LIMITED DATA SET OR THE MINIMUM NECESSARY.—

(1) IN GENERAL.—

(A) IN GENERAL.—Subject to subparagraph (B), a covered entity shall be treated as being in compliance with

section 164.502(b)(1) of title 45, Code of Federal Regulations, with respect to the use, disclosure, or request of protected health information described in such section, only if the covered entity limits such protected health information, to the extent practicable, to the limited data set (as defined in section 164.514(e)(2) of such title) or, if needed by such entity, to the minimum necessary to accomplish the intended purpose of such use, disclosure, or request, respectively.

(B) GUIDANCE.—Not later than 18 months after the date of the enactment of this section, the Secretary shall issue guidance on what constitutes "minimum necessary" for purposes of subpart E of part 164 of title 45, Code of Federal Regulation. In issuing such guidance the Secretary shall take into consideration the guidance under section 13424(c) and the information necessary to improve patient outcomes and to detect, prevent, and manage chronic disease.

(C) SUNSET.—Subparagraph (A) shall not apply on and after the effective date on which the Secretary issues the guidance under subparagraph (B).

(2) DETERMINATION OF MINIMUM NECESSARY.—For purposes of paragraph (1), in the case of the disclosure of protected health information, the covered entity or business associate disclosing such information shall determine what constitutes the minimum necessary to accomplish the intended purpose of such disclosure.

(3) APPLICATION OF EXCEPTIONS.—The exceptions described in section 164.502(b)(2) of title 45, Code of Federal Regulations, shall apply to the requirement under paragraph (1) as of the effective date described in section 13423 in the same manner that such exceptions apply to section 164.502(b)(1) of such title before such date.

(4) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed as affecting the use, disclosure, or request of protected health information that has been de-identified.

(c) ACCOUNTING OF CERTAIN PROTECTED HEALTH INFORMATION DISCLOSURES REQUIRED IF COVERED ENTITY USES ELECTRONIC HEALTH RECORD.—

"(1) IN GENERAL.—In applying section 164.528 of title 45, Code of Federal Regulations, in the case that a covered entity uses or maintains an electronic health record with respect to protected health information—

"(A) the exception under paragraph (a)(1)(i) of such section shall not apply to disclosures through an electronic health record made by such entity of such information; and

"(B) an individual shall have a right to receive an accounting of disclosures described in such paragraph of such information made by such covered entity during only the three years prior to the date on which the accounting is requested.

"(2) REGULATIONS.—The Secretary shall promulgate regulations on what information shall be collected about each disclosure referred to in paragraph (1), not later than 6 months after the date on which the Secretary adopts standards on accounting for disclosure described in the section

3002(b)(2)(B)(iv) of the Public Health Service Act, as added by section 13101. Such regulations shall only require such information to be collected through an electronic health record in a manner that takes into account the interests of the individuals in learning the circumstances under which their protected health information is being disclosed and takes into account the administrative burden of accounting for such disclosures.

"(3) PROCESS.—In response to an request from an individual for an accounting, a covered entity shall elect to provide either an—

"(A) accounting, as specified under paragraph (1), for disclosures of protected health information that are made by such covered entity and by a business associate acting on behalf of the covered entity; or

"(B) accounting, as specified under paragraph (1), for disclosures that are made by such covered entity and provide a list of all business associates acting on behalf of the covered entity, including contact information for such associates (such as mailing address, phone, and email address).

A business associate included on a list under subparagraph (B) shall provide an accounting of disclosures (as required under paragraph (1) for a covered entity) made by the business associate upon a request made by an individual directly to the business associate for such an accounting.

"(4) EFFECTIVE DATE.—

"(A) CURRENT USERS OF ELECTRONIC RECORDS.—In the case of a covered entity insofar as it acquired an electronic health record as of January 1, 2009, paragraph (1) shall apply to disclosures, with respect to protected health information, made by the covered entity from such a record on and after January 1, 2014.

"(B) OTHERS.—In the case of a covered entity insofar as it acquires an electronic health record after January 1, 2009, paragraph (1) shall apply to disclosures, with respect to protected health information, made by the covered entity from such record on and after the later of the following:

"(i) January 1, 2011; or

"(ii) the date that it acquires an electronic health record.

"(C) LATER DATE.—The Secretary may set an effective date that is later that the date specified under subparagraph (A) or (B) if the Secretary determines that such later date is necessary, but in no case may the date specified under—

"(i) subparagraph (A) be later than 2016; or

"(ii) subparagraph (B) be later than 2013."

(d) PROHIBITION ON SALE OF ELECTRONIC HEALTH RECORDS OR PROTECTED HEALTH INFORMATION.—

(1) IN GENERAL.—Except as provided in paragraph (2), a covered entity or business associate shall not directly or indirectly receive remuneration in exchange for any protected health information of an individual unless the covered entity obtained from the individual, in accordance with section 164.508 of title 45, Code of Federal Regulations, a valid authorization that includes, in accordance with such section, a specification

of whether the protected health information can be further exchanged for remuneration by the entity receiving protected health information of that individual.

(2) EXCEPTIONS.—Paragraph (1) shall not apply in the following cases:

(A) The purpose of the exchange is for public health activities (as described in section 164.512(b) of title 45, Code of Federal Regulations).

(B) The purpose of the exchange is for research (as described in sections 164.501 and 164.512(i) of title 45, Code of Federal Regulations) and the price charged reflects the costs of preparation and transmittal of the data for such purpose.

(C) The purpose of the exchange is for the treatment of the individual, subject to any regulation that the Secretary may promulgate to prevent protected health information from inappropriate access, use, or disclosure.

(D) The purpose of the exchange is the health care operation specifically described in subparagraph (iv) of paragraph (6) of the definition of healthcare operations in section 164.501 of title 45, Code of Federal Regulations.

(E) The purpose of the exchange is for remuneration that is provided by a covered entity to a business associate for activities involving the exchange of protected health information that the business associate undertakes on behalf of and at the specific request of the covered entity pursuant to a business associate agreement.

(F) The purpose of the exchange is to provide an individual with a copy of the individual's protected health information pursuant to section 164.524 of title 45, Code of Federal Regulations.

(G) The purpose of the exchange is otherwise determined by the Secretary in regulations to be similarly necessary and appropriate as the exceptions provided in subparagraphs (A) through (F).

(3) REGULATIONS.—Not later than 18 months after the date of enactment of this title, the Secretary shall promulgate regulations to carry out this subsection. In promulgating such regulations, the Secretary—

(A) shall evaluate the impact of restricting the exception described in paragraph (2)(A) to require that the price charged for the purposes described in such paragraph reflects the costs of the preparation and transmittal of the data for such purpose, on research or public health activities, including those conducted by or for the use of the Food and Drug Administration; and

(B) may further restrict the exception described in paragraph (2)(A) to require that the price charged for the purposes described in such paragraph reflects the costs of the preparation and transmittal of the data for such purpose, if the Secretary finds that such further restriction will not impede such research or public health activities.

(4) EFFECTIVE DATE.—Paragraph (1) shall apply to exchanges occurring on or after the date that is 6 months after the date of the promulgation of final regulations implementing this subsection.

(e) ACCESS TO CERTAIN INFORMATION IN ELECTRONIC FORMAT.—In applying section 164.524 of title 45, Code of Federal Regulations, in the case that a covered entity uses or maintains an electronic health record with respect to protected health information of an individual—

(1) the individual shall have a right to obtain from such covered entity a copy of such information in an electronic format and, if the individual chooses, to direct the covered entity to transmit such copy directly to an entity or person designated by the individual, provided that any such choice is clear, conspicuous, and specific; and

(2) notwithstanding paragraph (c)(4) of such section, any fee that the covered entity may impose for providing such individual with a copy of such information (or a summary or explanation of such information) if such copy (or summary or explanation) is in an electronic form shall not be greater than the entity's labor costs in responding to the request for the copy (or summary or explanation).

SEC. 13406. CONDITIONS ON CERTAIN CONTACTS AS PART OF HEALTH CARE OPERATIONS.

(a) MARKETING.—

(1) IN GENERAL.—A communication by a covered entity or business associate that is about a product or service and that encourages recipients of the communication to purchase or use the product or service shall not be considered a health care operation for purposes of subpart E of part 164 of title 45, Code of Federal Regulations, unless the communication is made as described in subparagraph (i), (ii), or (iii) of paragraph (1) of the definition of marketing in section 164.501 of such title.

(2) PAYMENT FOR CERTAIN COMMUNICATIONS.—A communication by a covered entity or business associate that is described in subparagraph (i), (ii), or (iii) of paragraph (1) of the definition of marketing in section 164.501 of title 45, Code of Federal Regulations, shall not be considered a health care operation for purposes of subpart E of part 164 of title 45, Code of Federal Regulations if the covered entity receives or has received direct or indirect payment in exchange for making such communication, except where—

(A)(i) such communication describes only a drug or biologic that is currently being prescribed for the recipient of the communication; and

(ii) any payment received by such covered entity in exchange for making a communication described in clause (i) is reasonable in amount;

(B) each of the following conditions apply—

(i) the communication is made by the covered entity; and

(ii) the covered entity making such communication obtains from the recipient of the communication, in accordance with section 164.508 of title 45, Code of Federal Regulations, a valid authorization (as described in paragraph (b) of such section) with respect to such communication; or

(C) each of the following conditions apply—

(i) the communication is made by a business associate on behalf of the covered entity; and

(ii) the communication is consistent with the written contract (or other written arrangement described in section 164.502(e)(2) of such title) between such business associate and covered entity.

(3) REASONABLE IN AMOUNT DEFINED.—For purposes of paragraph (2), the term "reasonable in amount" shall have the meaning given such term by the Secretary by regulation.

(4) DIRECT OR INDIRECT PAYMENT.—For purposes of paragraph (2), the term "direct or indirect payment" shall not include any payment for treatment (as defined in section 164.501 of title 45, Code of Federal Regulations) of an individual.

(b) OPPORTUNITY TO OPT OUT OF FUNDRAISING.—The Secretary shall by rule provide that any written fundraising communication that is a healthcare operation as defined under section 164.501 of title 45, Code of Federal Regulations, shall, in a clear and conspicuous manner, provide an opportunity for the recipient of the communications to elect not to receive any further such communication. When an individual elects not to receive any further such communication, such election shall be treated as a revocation of authorization under section 164.508 of title 45, Code of Federal Regulations.

(c) EFFECTIVE DATE.—This section shall apply to written communications occurring on or after the effective date specified under section 13423.

SEC. 13407. TEMPORARY BREACH NOTIFICATION REQUIREMENT FOR VENDORS OF PERSONAL HEALTH RECORDS AND OTHER NON-HIPAA COVERED ENTITIES.

(a) IN GENERAL.—In accordance with subsection (c), each vendor of personal health records, following the discovery of a breach of security of unsecured PHR identifiable health information that is in a personal health record maintained or offered by such vendor, and each entity described in clause (ii), (iii), or (iv) of section 13424(b)(1)(A), following the discovery of a breach of security of such information that is obtained through a product or service provided by such entity, shall—

(1) notify each individual who is a citizen or resident of the United States whose unsecured PHR identifiable health information was acquired by an unauthorized person as a result of such a breach of security; and

(2) notify the Federal Trade Commission.

(b) NOTIFICATION BY THIRD PARTY SERVICE PROVIDERS.—A third party service provider that provides services to a vendor of personal health records or to an entity described in clause (ii), (iii). or (iv) of section 13424(b)(1)(A) in connection with the offering or maintenance of a personal health record or a related product or service and that accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured PHR identifiable health information in such a record as a result of such services shall, following the discovery of a breach of security of such information, notify such vendor or entity, respectively, of such breach. Such notice shall include the identification of each individual whose unsecured PHR identifiable health information

has been, or is reasonably believed to have been, accessed, acquired, or disclosed during such breach.

(c) APPLICATION OF REQUIREMENTS FOR TIMELINESS, METHOD, AND CONTENT OF NOTIFICATIONS.—Subsections (c), (d), (e), and (f) of section 13402 shall apply to a notification required under subsection (a) and a vendor of personal health records, an entity described in subsection (a) and a third party service provider described in subsection (b), with respect to a breach of security under subsection (a) of unsecured PHR identifiable health information in such records maintained or offered by such vendor, in a manner specified by the Federal Trade Commission.

(d) NOTIFICATION OF THE SECRETARY.—Upon receipt of a notification of a breach of security under subsection (a)(2), the Federal Trade Commission shall notify the Secretary of such breach.

(e) ENFORCEMENT.—A violation of subsection (a) or (b) shall be treated as an unfair and deceptive act or practice in violation of a regulation under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57*a*(a)(1)(B)) regarding unfair or deceptive acts or practices.

(f) DEFINITIONS.—For purposes of this section:

(1) BREACH OF SECURITY.—The term "breach of security" means, with respect to unsecured PHR identifiable health information of an individual in a personal health record, acquisition of such information without the authorization of the individual.

(2) PHR IDENTIFIABLE HEALTH INFORMATION.—The term "PHR identifiable health information" means individually identifiable health information, as defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), and includes, with respect to an individual, information—

(A) that is provided by or on behalf of the individual; and

(B) that identifies the individual or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

(3) UNSECURED PHR IDENTIFIABLE HEALTH INFORMATION.—

(A) IN GENERAL.—Subject to subparagraph (B), the term "unsecured PHR identifiable health information" means PHR identifiable health information that is not protected through the use of a technology or methodology specified by the Secretary in the guidance issued under section 13402(h)(2).

(B) EXCEPTION IN CASE TIMELY GUIDANCE NOT ISSUED.—In the case that the Secretary does not issue guidance under section 13402(h)(2) by the date specified in such section, for purposes of this section, the term "unsecured PHR identifiable health information" shall mean PHR identifiable health information that is not secured by a technology standard that renders protected health information unusable, unreadable, or indecipherable to unauthorized individuals and that is developed or endorsed by a standards developing organization that is accredited by the American National Standards Institute.

(g) REGULATIONS; EFFECTIVE DATE; SUNSET.—

(1) REGULATIONS; EFFECTIVE DATE.—To carry out this section, the Federal Trade Commission shall promulgate interim final regulations by not later than the date that is 180 days

after the date of the enactment of this section. The provisions of this section shall apply to breaches of security that are discovered on or after the date that is 30 days after the date of publication of such interim final regulations.

(2) SUNSET.—If Congress enacts new legislation establishing requirements for notification in the case of a breach of security, that apply to entities that are not covered entities or business associates, the provisions of this section shall not apply to breaches of security discovered on or after the effective date of regulations implementing such legislation.

SEC. 13408. BUSINESS ASSOCIATE CONTRACTS REQUIRED FOR CERTAIN ENTITIES.

Each organization, with respect to a covered entity, that provides data transmission of protected health information to such entity (or its business associate) and that requires access on a routine basis to such protected health information, such as a Health Information Exchange Organization, Regional Health Information Organization, E-prescribing Gateway, or each vendor that contracts with a covered entity to allow that covered entity to offer a personal health record to patients as part of its electronic health record, is required to enter into a written contract (or other written arrangement) described in section 164.502(e)(2) of title 45, Code of Federal Regulations and a written contract (or other arrangement) described in section 164.308(b) of such title, with such entity and shall be treated as a business associate of the covered entity for purposes of the provisions of this subtitle and subparts C and E of part 164 of title 45, Code of Federal Regulations, as such provisions are in effect as of the date of enactment of this title.

SEC. 13409. CLARIFICATION OF APPLICATION OF WRONGFUL DISCLOSURES CRIMINAL PENALTIES.

Section 1177(a) of the Social Security Act (42 U.S.C. 1320d–6(a)) is amended by adding at the end the following new sentence: "For purposes of the previous sentence, a person (including an employee or other individual) shall be considered to have obtained or disclosed individually identifiable health information in violation of this part if the information is maintained by a covered entity (as defined in the HIPAA privacy regulation described in section 1180(b)(3)) and the individual obtained or disclosed such information without authorization.".

SEC. 13410. IMPROVED ENFORCEMENT.

(a) IN GENERAL.—

(1) NONCOMPLIANCE DUE TO WILLFUL NEGLECT.—Section 1176 of the Social Security Act (42 U.S.C. 1320d–5) is amended—

(A) in subsection (b)(1), by striking "the act constitutes an offense punishable under section 1177" and inserting "a penalty has been imposed under section 1177 with respect to such act"; and

(B) by adding at the end the following new subsection:

"(c) NONCOMPLIANCE DUE TO WILLFUL NEGLECT.—

"(1) IN GENERAL.—A violation of a provision of this part due to willful neglect is a violation for which the Secretary is required to impose a penalty under subsection (a)(1).

"(2) REQUIRED INVESTIGATION.—For purposes of paragraph (1), the Secretary shall formally investigate any complaint of

a violation of a provision of this part if a preliminary investigation of the facts of the complaint indicate such a possible violation due to willful neglect.".

(2) ENFORCEMENT UNDER SOCIAL SECURITY ACT.—Any violation by a covered entity under thus subtitle is subject to enforcement and penalties under section 1176 and 1177 of the Social Security Act.

(b) EFFECTIVE DATE; REGULATIONS.—

(1) The amendments made by subsection (a) shall apply to penalties imposed on or after the date that is 24 months after the date of the enactment of this title.

(2) Not later than 18 months after the date of the enactment of this title, the Secretary of Health and Human Services shall promulgate regulations to implement such amendments.

(c) DISTRIBUTION OF CERTAIN CIVIL MONETARY PENALTIES COLLECTED.—

(1) IN GENERAL.—Subject to the regulation promulgated pursuant to paragraph (3), any civil monetary penalty or monetary settlement collected with respect to an offense punishable under this subtitle or section 1176 of the Social Security Act (42 U.S.C. 1320d–5) insofar as such section relates to privacy or security shall be transferred to the Office for Civil Rights of the Department of Health and Human Services to be used for purposes of enforcing the provisions of this subtitle and subparts C and E of part 164 of title 45, Code of Federal Regulations, as such provisions are in effect as of the date of enactment of this Act.

(2) GAO REPORT.—Not later than 18 months after the date of the enactment of this title, the Comptroller General shall submit to the Secretary a report including recommendations for a methodology under which an individual who is harmed by an act that constitutes an offense referred to in paragraph (1) may receive a percentage of any civil monetary penalty or monetary settlement collected with respect to such offense.

(3) ESTABLISHMENT OF METHODOLOGY TO DISTRIBUTE PERCENTAGE OF CMPS COLLECTED TO HARMED INDIVIDUALS.—Not later than 3 years after the date of the enactment of this title, the Secretary shall establish by regulation and based on the recommendations submitted under paragraph (2), a methodology under which an individual who is harmed by an act that constitutes an offense referred to in paragraph (1) may receive a percentage of any civil monetary penalty or monetary settlement collected with respect to such offense.

(4) APPLICATION OF METHODOLOGY.—The methodology under paragraph (3) shall be applied with respect to civil monetary penalties or monetary settlements imposed on or after the effective date of the regulation.

(d) TIERED INCREASE IN AMOUNT OF CIVIL MONETARY PENALTIES.—

(1) IN GENERAL.—Section 1176(a)(1) of the Social Security Act (42 U.S.C. 1320d–5(a)(1)) is amended by striking "who violates a provision of this part a penalty of not more than" and all that follows and inserting the following: "who violates a provision of this part—

"(A) in the case of a violation of such provision in which it is established that the person did not know (and

by exercising reasonable diligence would not have known) that such person violated such provision, a penalty for each such violation of an amount that is at least the amount described in paragraph (3)(A) but not to exceed the amount described in paragraph (3)(D);

"(B) in the case of a violation of such provision in which it is established that the violation was due to reasonable cause and not to willful neglect, a penalty for each such violation of an amount that is at least the amount described in paragraph (3)(B) but not to exceed the amount described in paragraph (3)(D); and

"(C) in the case of a violation of such provision in which it is established that the violation was due to willful neglect—

"(i) if the violation is corrected as described in subsection (b)(3)(A), a penalty in an amount that is at least the amount described in paragraph (3)(C) but not to exceed the amount described in paragraph (3)(D); and

"(ii) if the violation is not corrected as described in such subsection, a penalty in an amount that is at least the amount described in paragraph (3)(D).

In determining the amount of a penalty under this section for a violation, the Secretary shall base such determination on the nature and extent of the violation and the nature and extent of the harm resulting from such violation.".

(2) TIERS OF PENALTIES DESCRIBED.—Section 1176(a) of such Act (42 U.S.C. 1320d–5(a)) is further amended by adding at the end the following new paragraph:

"(3) TIERS OF PENALTIES DESCRIBED.—For purposes of paragraph (1), with respect to a violation by a person of a provision of this part—

"(A) the amount described in this subparagraph is $100 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $25,000;

"(B) the amount described in this subparagraph is $1,000 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $100,000;

"(C) the amount described in this subparagraph is $10,000 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $250,000; and

"(D) the amount described in this subparagraph is $50,000 for each such violation, except that the total amount imposed on the person for all such violations of an identical requirement or prohibition during a calendar year may not exceed $1,500,000.".

(3) CONFORMING AMENDMENTS.—Section 1176(b) of such Act (42 U.S.C. 1320d–5(b)) is amended—

(A) by striking paragraph (2) and redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively; and

(B) in paragraph (2), as so redesignated—

(i) in subparagraph (A), by striking "in subparagraph (B), a penalty may not be imposed under subsection (a) if" and all that follows through "the failure to comply is corrected" and inserting "in subparagraph (B) or subsection (a)(1)(C), a penalty may not be imposed under subsection (a) if the failure to comply is corrected"; and

(ii) in subparagraph (B), by striking "(A)(ii)" and inserting "(A)" each place it appears.

(4) EFFECTIVE DATE.—The amendments made by this subsection shall apply to violations occurring after the date of the enactment of this title.

(e) ENFORCEMENT THROUGH STATE ATTORNEYS GENERAL.—

(1) IN GENERAL.—Section 1176 of the Social Security Act (42 U.S.C. 1320d–5) is amended by adding at the end the following new subsection:

"(d) ENFORCEMENT BY STATE ATTORNEYS GENERAL.—

"(1) CIVIL ACTION.—Except as provided in subsection (b), in any case in which the attorney general of a State has reason to believe that an interest of one or more of the residents of that State has been or is threatened or adversely affected by any person who violates a provision of this part, the attorney general of the State, as parens patriae, may bring a civil action on behalf of such residents of the State in a district court of the United States of appropriate jurisdiction—

"(A) to enjoin further such violation by the defendant; or

"(B) to obtain damages on behalf of such residents of the State, in an amount equal to the amount determined under paragraph (2).

"(2) STATUTORY DAMAGES.—

"(A) IN GENERAL.—For purposes of paragraph (1)(B), the amount determined under this paragraph is the amount calculated by multiplying the number of violations by up to $100. For purposes of the preceding sentence, in the case of a continuing violation, the number of violations shall be determined consistent with the HIPAA privacy regulations (as defined in section 1180(b)(3)) for violations of subsection (a).

"(B) LIMITATION.—The total amount of damages imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $25,000.

"(C) REDUCTION OF DAMAGES.—In assessing damages under subparagraph (A), the court may consider the factors the Secretary may consider in determining the amount of a civil money penalty under subsection (a) under the HIPAA privacy regulations.

"(3) ATTORNEY FEES.—In the case of any successful action under paragraph (1), the court, in its discretion, may award the costs of the action and reasonable attorney fees to the State.

"(4) NOTICE TO SECRETARY.—The State shall serve prior written notice of any action under paragraph (1) upon the Secretary and provide the Secretary with a copy of its complaint, except in any case in which such prior notice is not

feasible, in which case the State shall serve such notice immediately upon instituting such action. The Secretary shall have the right—

"(A) to intervene in the action;

"(B) upon so intervening, to be heard on all matters arising therein; and

"(C) to file petitions for appeal.

"(5) CONSTRUCTION.—For purposes of bringing any civil action under paragraph (1), nothing in this section shall be construed to prevent an attorney general of a State from exercising the powers conferred on the attorney general by the laws of that State.

"(6) VENUE; SERVICE OF PROCESS.—

"(A) VENUE.—Any action brought under paragraph (1) may be brought in the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.

"(B) SERVICE OF PROCESS.—In an action brought under paragraph (1), process may be served in any district in which the defendant—

"(i) is an inhabitant; or

"(ii) maintains a physical place of business.

"(7) LIMITATION ON STATE ACTION WHILE FEDERAL ACTION IS PENDING.—If the Secretary has instituted an action against a person under subsection (a) with respect to a specific violation of this part, no State attorney general may bring an action under this subsection against the person with respect to such violation during the pendency of that action.

"(8) APPLICATION OF CMP STATUTE OF LIMITATION.—A civil action may not be instituted with respect to a violation of this part unless an action to impose a civil money penalty may be instituted under subsection (a) with respect to such violation consistent with the second sentence of section 1128A(c)(1).".

(2) CONFORMING AMENDMENTS.—Subsection (b) of such section, as amended by subsection (d)(3), is amended—

(A) in paragraph (1), by striking "A penalty may not be imposed under subsection (a)" and inserting "No penalty may be imposed under subsection (a) and no damages obtained under subsection (d)";

(B) in paragraph (2)(A)—

(i) after "subsection (a)(1)(C),", by striking "a penalty may not be imposed under subsection (a)" and inserting "no penalty may be imposed under subsection (a) and no damages obtained under subsection (d)"; and

(ii) in clause (ii), by inserting "or damages" after "the penalty";

(C) in paragraph (2)(B)(i), by striking "The period" and inserting "With respect to the imposition of a penalty by the Secretary under subsection (a), the period"; and

(D) in paragraph (3), by inserting "and any damages under subsection (d)" after "any penalty under subsection (a)".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to violations occurring after the date of the enactment of this Act.

(f) ALLOWING CONTINUED USE OF CORRECTIVE ACTION.—Such section is further amended by adding at the end the following new subsection:

"(e) ALLOWING CONTINUED USE OF CORRECTIVE ACTION.—Nothing in this section shall be construed as preventing the Office for Civil Rights of the Department of Health and Human Services from continuing, in its discretion, to use corrective action without a penalty in cases where the person did not know (and by exercising reasonable diligence would not have known) of the violation involved.".

SEC. 13411. AUDITS.

The Secretary shall provide for periodic audits to ensure that covered entities and business associates that are subject to the requirements of this subtitle and subparts C and E of part 164 of title 45, Code of Federal Regulations, as such provisions are in effect as of the date of enactment of this Act, comply with such requirements.

PART 2—RELATIONSHIP TO OTHER LAWS; REGULATORY REFERENCES; EFFECTIVE DATE; REPORTS

SEC. 13421. RELATIONSHIP TO OTHER LAWS.

(a) APPLICATION OF HIPAA STATE PREEMPTION.—Section 1178 of the Social Security Act (42 U.S.C. 1320d–7) shall apply to a provision or requirement under this subtitle in the same manner that such section applies to a provision or requirement under part C of title XI of such Act or a standard or implementation specification adopted or established under sections 1172 through 1174 of such Act.

(b) HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT.—The standards governing the privacy and security of individually identifiable health information promulgated by the Secretary under sections 262(a) and 264 of the Health Insurance Portability and Accountability Act of 1996 shall remain in effect to the extent that they are consistent with this subtitle. The Secretary shall by rule amend such Federal regulations as required to make such regulations consistent with this subtitle.

(c) CONSTRUCTION.—Nothing in this subtitle shall constitute a waiver of any privilege otherwise applicable to an individual with respect to the protected health information of such individual.

SEC. 13422. REGULATORY REFERENCES.

Each reference in this subtitle to a provision of the Code of Federal Regulations refers to such provision as in effect on the date of the enactment of this title (or to the most recent update of such provision).

SEC. 13423. EFFECTIVE DATE.

Except as otherwise specifically provided, the provisions of part I shall take effect on the date that is 12 months after the date of the enactment of this title.

SEC. 13424. STUDIES, REPORTS, GUIDANCE.

(a) REPORT ON COMPLIANCE.—

(1) IN GENERAL.—For the first year beginning after the date of the enactment of this Act and annually thereafter, the Secretary shall prepare and submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means and the Committee on Energy and Commerce of the House of Representatives a report concerning complaints of alleged violations of law, including the provisions of this subtitle as well as the provisions of subparts C and E of part 164 of title 45, Code of Federal Regulations, (as such provisions are in effect as of the date of enactment of this Act) relating to privacy and security of health information that are received by the Secretary during the year for which the report is being prepared. Each such report shall include, with respect to such complaints received during the year—

(A) the number of such complaints;

(B) the number of such complaints resolved informally, a summary of the types of such complaints so resolved, and the number of covered entities that received technical assistance from the Secretary during such year in order to achieve compliance with such provisions and the types of such technical assistance provided;

(C) the number of such complaints that have resulted in the imposition of civil monetary penalties or have been resolved through monetary settlements, including the nature of the complaints involved and the amount paid in each penalty or settlement;

(D) the number of compliance reviews conducted and the outcome of each such review;

(E) the number of subpoenas or inquiries issued;

(F) the Secretary's plan for improving compliance with and enforcement of such provisions for the following year; and

(G) the number of audits performed and a summary of audit findings pursuant to section 13411.

(2) AVAILABILITY TO PUBLIC.—Each report under paragraph (1) shall be made available to the public on the Internet website of the Department of Health and Human Services.

(b) STUDY AND REPORT ON APPLICATION OF PRIVACY AND SECURITY REQUIREMENTS TO NON-HIPAA COVERED ENTITIES.—

(1) STUDY.—Not later than one year after the date of the enactment of this title, the Secretary, in consultation with the Federal Trade Commission, shall conduct a study, and submit a report under paragraph (2), on privacy and security requirements for entities that are not covered entities or business associates as of the date of the enactment of this title, including—

(A) requirements relating to security, privacy, and notification in the case of a breach of security or privacy (including the applicability of an exemption to notification in the case of individually identifiable health information that has been rendered unusable, unreadable, or indecipherable through technologies or methodologies recognized by appropriate professional organization or standard setting bodies to provide effective security for the information) that should be applied to—

(i) vendors of personal health records;

(ii) entities that offer products or services through the website of a vendor of personal health records;

(iii) entities that are not covered entities and that offer products or services through the websites of covered entities that offer individuals personal health records;

(iv) entities that are not covered entities and that access information in a personal health record or send information to a personal health record; and

(v) third party service providers used by a vendor or entity described in clause (i), (ii), (iii), or (iv) to assist in providing personal health record products or services;

(B) a determination of which Federal government agency is best equipped to enforce such requirements recommended to be applied to such vendors, entities, and service providers under subparagraph (A); and

(C) a timeframe for implementing regulations based on such findings.

(2) REPORT.—The Secretary shall submit to the Committee on Finance, the Committee on Health, Education, Labor, and Pensions, and the Committee on Commerce of the Senate and the Committee on Ways and Means and the Committee on Energy and Commerce of the House of Representatives a report on the findings of the study under paragraph (1) and shall include in such report recommendations on the privacy and security requirements described in such paragraph.

(c) GUIDANCE ON IMPLEMENTATION SPECIFICATION TO DE-IDENTIFY PROTECTED HEALTH INFORMATION.—Not later than 12 months after the date of the enactment of this title, the Secretary shall, in consultation with stakeholders, issue guidance on how best to implement the requirements for the de-identification of protected health information under section 164.514(b) of title 45, Code of Federal Regulations.

(d) GAO REPORT ON TREATMENT DISCLOSURES.—Not later than one year after the date of the enactment of this title, the Comptroller General of the United States shall submit to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means and the Committee on Energy and Commerce of the House of Representatives a report on the best practices related to the disclosure among health care providers of protected health information of an individual for purposes of treatment of such individual. Such report shall include an examination of the best practices implemented by States and by other entities, such as health information exchanges and regional health information organizations, an examination of the extent to which such best practices are successful with respect to the quality of the resulting health care provided to the individual and with respect to the ability of the health care provider to manage such best practices, and an examination of the use of electronic informed consent for disclosing protected health information for treatment, payment, and health care operations.

(e) REPORT REQUIRED.—Not later than 5 years after the date of enactment of this section, the Government Accountability Office shall submit to Congress and the Secretary of Health and Human Services a report on the impact of any of the provisions of this

Act on health insurance premiums, overall health care costs, adoption of electronic health records by providers, and reduction in medical errors and other quality improvements.

(f) STUDY.—The Secretary shall study the definition of "psychotherapy notes" in section 164.501 of title 45, Code of Federal Regulations, with regard to including test data that is related to direct responses, scores, items, forms, protocols, manuals, or other materials that are part of a mental health evaluation, as determined by the mental health professional providing treatment or evaluation in such definitions and may, based on such study, issue regulations to revise such definition.

TITLE XIV—STATE FISCAL STABILIZATION FUND

DEPARTMENT OF EDUCATION

STATE FISCAL STABILIZATION FUND

For necessary expenses for a State Fiscal Stabilization Fund, $53,600,000,000, which shall be administered by the Department of Education.

GENERAL PROVISIONS—THIS TITLE

SEC. 14001. ALLOCATIONS.

(a) OUTLYING AREAS.—From the amount appropriated to carry out this title, the Secretary of Education shall first allocate up to one-half of 1 percent to the outlying areas on the basis of their respective needs, as determined by the Secretary, in consultation with the Secretary of the Interior, for activities consistent with this title under such terms and conditions as the Secretary may determine.

(b) ADMINISTRATION AND OVERSIGHT.—The Secretary may, in addition, reserve up to $14,000,000 for administration and oversight of this title, including for program evaluation.

(c) RESERVATION FOR ADDITIONAL PROGRAMS.—After reserving funds under subsections (a) and (b), the Secretary shall reserve $5,000,000,000 for grants under sections 14006 and 14007.

(d) STATE ALLOCATIONS.—After carrying out subsections (a), (b), and (c), the Secretary shall allocate the remaining funds made available to carry out this title to the States as follows:

(1) 61 percent on the basis of their relative population of individuals aged 5 through 24.

(2) 39 percent on the basis of their relative total population.

(e) STATE GRANTS.—From funds allocated under subsection (d), the Secretary shall make grants to the Governor of each State.

(f) REALLOCATION.—The Governor shall return to the Secretary any funds received under subsection (e) that the Governor does not award as subgrants or otherwise commit within two years of receiving such funds, and the Secretary shall reallocate such funds to the remaining States in accordance with subsection (d).

SEC. 14002. STATE USES OF FUNDS.

(a) EDUCATION FUND.—

(1) IN GENERAL.—For each fiscal year, the Governor shall use 81.8 percent of the State's allocation under section 14001(d) for the support of elementary, secondary, and postsecondary education and, as applicable, early childhood education programs and services.

(2) RESTORING STATE SUPPORT FOR EDUCATION.—

(A) IN GENERAL.—The Governor shall first use the funds described in paragraph (1)—

(i) to provide the amount of funds, through the State's primary elementary and secondary funding formulae, that is needed—

(I) to restore, in each of fiscal years 2009, 2010, and 2011, the level of State support provided through such formulae to the greater of the fiscal year 2008 or fiscal year 2009 level; and

(II) where applicable, to allow existing State formulae increases to support elementary and secondary education for fiscal years 2010 and 2011 to be implemented and allow funding for phasing in State equity and adequacy adjustments, if such increases were enacted pursuant to State law prior to October 1, 2008.

(ii) to provide, in each of fiscal years 2009, 2010, and 2011, the amount of funds to public institutions of higher education in the State that is needed to restore State support for such institutions (excluding tuition and fees paid by students) to the greater of the fiscal year 2008 or fiscal year 2009 level.

(B) SHORTFALL.—If the Governor determines that the amount of funds available under paragraph (1) is insufficient to support, in each of fiscal years 2009, 2010, and 2011, public elementary, secondary, and higher education at the levels described in clauses (i) and (ii) of subparagraph (A), the Governor shall allocate those funds between those clauses in proportion to the relative shortfall in State support for the education sectors described in those clauses.

(C) FISCAL YEAR.—For purposes of this paragraph, the term "fiscal year" shall have the meaning given such term under State law.

(3) SUBGRANTS TO IMPROVE BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES.—After carrying out paragraph (2), the Governor shall use any funds remaining under paragraph (1) to provide local educational agencies in the State with subgrants based on their relative shares of funding under part A of title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6311 et seq.) for the most recent year for which data are available.

(b) OTHER GOVERNMENT SERVICES.—

(1) IN GENERAL.—The Governor shall use 18.2 percent of the State's allocation under section 14001 for public safety and other government services, which may include assistance for elementary and secondary education and public institutions of higher education, and for modernization, renovation, or repair of public school facilities and institutions of higher education facilities, including modernization, renovation, and repairs that are consistent with a recognized green building rating system.

(2) AVAILABILITY TO ALL INSTITUTIONS OF HIGHER EDUCATION.—A Governor shall not consider the type or mission of an institution of higher education, and shall consider any institution for funding for modernization, renovation, and repairs within the State that—

(A) qualifies as an institution of higher education, as defined in subsection 14013(3); and

(B) continues to be eligible to participate in the programs under title IV of the Higher Education Act of 1965.

(c) RULE OF CONSTRUCTION.—Nothing in this section shall allow a local educational agency to engage in school modernization, renovation, or repair that is inconsistent with State law.

SEC. 14003. USES OF FUNDS BY LOCAL EDUCATIONAL AGENCIES.

(a) IN GENERAL.—A local educational agency that receives funds under this title may use the funds for any activity authorized by the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.) ("ESEA"), the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) ("IDEA"), the Adult and Family Literacy Act (20 U.S.C. 1400 et seq.), or the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.) ("the Perkins Act") or for modernization, renovation, or repair of public school facilities, including modernization, renovation, and repairs that are consistent with a recognized green building rating system.

(b) PROHIBITION.—A local educational agency may not use funds received under this title for—

(1) payment of maintenance costs;

(2) stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public;

(3) purchase or upgrade of vehicles; or

(4) improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities.

(c) RULE OF CONSTRUCTION.—Nothing in this section shall allow a local educational agency to engage in school modernization, renovation, or repair that is inconsistent with State law.

SEC. 14004. USES OF FUNDS BY INSTITUTIONS OF HIGHER EDUCATION.

(a) IN GENERAL.—A public institution of higher education that receives funds under this title shall use the funds for education and general expenditures, and in such a way as to mitigate the need to raise tuition and fees for in-State students, or for modernization, renovation, or repair of institution of higher education facilities that are primarily used for instruction, research, or student housing, including modernization, renovation, and repairs that are consistent with a recognized green building rating system.

(b) PROHIBITION.—An institution of higher education may not use funds received under this title to increase its endowment.

(c) ADDITIONAL PROHIBITION.—No funds awarded under this title may be used for—

(1) the maintenance of systems, equipment, or facilities;

(2) modernization, renovation, or repair of stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public; or

(3) modernization, renovation, or repair of facilities—

(A) used for sectarian instruction or religious worship; or

(B) in which a substantial portion of the functions of the facilities are subsumed in a religious mission.

SEC. 14005. STATE APPLICATIONS.

(a) IN GENERAL.—The Governor of a State desiring to receive an allocation under section 14001 shall submit an application at such time, in such manner, and containing such information as the Secretary may reasonably require.

(b) APPLICATION.—In such application, the Governor shall—

(1) include the assurances described in subsection (d);

(2) provide baseline data that demonstrates the State's current status in each of the areas described in such assurances; and

(3) describe how the State intends to use its allocation, including whether the State will use such allocation to meet maintenance of effort requirements under the ESEA and IDEA and, in such cases, what amount will be used to meet such requirements.

(c) INCENTIVE GRANT APPLICATION.—The Governor of a State seeking a grant under section 14006 shall—

(1) submit an application for consideration;

(2) describe the status of the State's progress in each of the areas described in subsection (d), and the strategies the State is employing to help ensure that students in the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (20 U.S.C. 6311(b)(2)(C)(v)(II)) who have not met the State's proficiency targets continue making progress toward meeting the State's student academic achievement standards;

(3) describe the achievement and graduation rates (as described in section 1111(b)(2)(C)(vi) of the ESEA (20 U.S.C. 6311(b)(2)(C)(vi)) and as clarified in section 200.19(b)(1) of title 34, Code of Federal Regulations) of public elementary and secondary school students in the State, and the strategies the State is employing to help ensure that all subgroups of students identified in section 1111(b)(2) of the ESEA (20 U.S.C. 6311(b)(2)) in the State continue making progress toward meeting the State's student academic achievement standards;

(4) describe how the State would use its grant funding to improve student academic achievement in the State, including how it will allocate the funds to give priority to high-need local educational agencies; and

(5) include a plan for evaluating the State's progress in closing achievement gaps.

(d) ASSURANCES.—An application under subsection (b) shall include the following assurances:

(1) MAINTENANCE OF EFFORT.—

(A) ELEMENTARY AND SECONDARY EDUCATION.—The State will, in each of fiscal years 2009, 2010, and 2011, maintain State support for elementary and secondary education at least at the level of such support in fiscal year 2006.

(B) HIGHER EDUCATION.—The State will, in each of fiscal years 2009, 2010, and 2011, maintain State support for public institutions of higher education (not including support for capital projects or for research and development

or tuition and fees paid by students) at least at the level of such support in fiscal year 2006.

(2) ACHIEVING EQUITY IN TEACHER DISTRIBUTION.—The State will take actions to improve teacher effectiveness and comply with section 1111(b)(8)(C) of the ESEA (20 U.S.C. 6311(b)(8)(C)) in order to address inequities in the distribution of highly qualified teachers between high- and low-poverty schools, and to ensure that low-income and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers.

(3) IMPROVING COLLECTION AND USE OF DATA.—The State will establish a longitudinal data system that includes the elements described in section 6401(e)(2)(D) of the America COMPETES Act (20 U.S.C. 9871).

(4) STANDARDS AND ASSESSMENTS.—The State—

(A) will enhance the quality of the academic assessments it administers pursuant to section 1111(b)(3) of the ESEA (20 U.S.C. 6311(b)(3)) through activities such as those described in section 6112(a) of such Act (20 U.S.C. 7301a(a));

(B) will comply with the requirements of paragraphs (3)(C)(ix) and (6) of section 1111(b) of the ESEA (20 U.S.C. 6311(b)) and section 612(a)(16) of the IDEA (20 U.S.C. 1412(a)(16)) related to the inclusion of children with disabilities and limited English proficient students in State assessments, the development of valid and reliable assessments for those students, and the provision of accommodations that enable their participation in State assessments; and

(C) will take steps to improve State academic content standards and student academic achievement standards consistent with section 6401(e)(1)(9)(A)(ii) of the America COMPETES Act.

(5) SUPPORTING STRUGGLING SCHOOLS.—The State will ensure compliance with the requirements of section 1116(a)(7)(C)(iv) and section 1116(a)(8)(B) of the ESEA with respect to schools identified under such sections.

SEC. 14006. STATE INCENTIVE GRANTS.

(a) IN GENERAL.—

(1) RESERVATION.—From the total amount reserved under section 14001(c) that is not used for section 14007, the Secretary may reserve up to 1 percent for technical assistance to States to assist them in meeting the objectives of paragraphs (2), (3), (4), and (5) of section 14005(d).

(2) REMAINDER.—Of the remaining funds, the Secretary shall, in fiscal year 2010, make grants to States that have made significant progress in meeting the objectives of paragraphs (2), (3), (4), and (5) of section 14005(d).

(b) BASIS FOR GRANTS.—The Secretary shall determine which States receive grants under this section, and the amount of those grants, on the basis of information provided in State applications under section 14005 and such other criteria as the Secretary determines appropriate, which may include a State's need for assistance to help meet the objective of paragraphs (2), (3), (4), and (5) of section 14005(d).

(c) SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES.—Each State receiving a grant under this section shall use at least 50 percent of the grant to provide local educational agencies in the State with subgrants based on their relative shares of funding under part A of title I of the ESEA (20 U.S.C. 6311 et seq.) for the most recent year.

SEC. 14007. INNOVATION FUND.

(a) IN GENERAL.—

(1) ELIGIBLE ENTITIES.—For the purposes of this section, the term "eligible entity" means—

(A) a local educational agency; or

(B) a partnership between a nonprofit organization and—

(i) one or more local educational agencies; or

(ii) a consortium of schools.

(2) PROGRAM ESTABLISHED.—From the total amount reserved under section 14001(c), the Secretary may reserve up to $650,000,000 to establish an Innovation Fund, which shall consist of academic achievement awards that recognize eligible entities that meet the requirements described in subsection (b).

(3) BASIS FOR AWARDS.—The Secretary shall make awards to eligible entities that have made significant gains in closing the achievement gap as described in subsection (b)(1)—

(A) to allow such eligible entities to expand their work and serve as models for best practices;

(B) to allow such eligible entities to work in partnership with the private sector and the philanthropic community; and

(C) to identify and document best practices that can be shared, and taken to scale based on demonstrated success.

(b) ELIGIBILITY.—To be eligible for such an award, an eligible entity shall—

(1) have significantly closed the achievement gaps between groups of students described in section 1111(b)(2) of the ESEA (20 U.S.C. 6311(b)(2));

(2) have exceeded the State's annual measurable objectives consistent with such section 1111(b)(2) for 2 or more consecutive years or have demonstrated success in significantly increasing student academic achievement for all groups of students described in such section through another measure, such as measures described in section 1111(c)(2) of the ESEA;

(3) have made significant improvement in other areas, such as graduation rates or increased recruitment and placement of high-quality teachers and school leaders, as demonstrated with meaningful data; and

(4) demonstrate that they have established partnerships with the private sector, which may include philanthropic organizations, and that the private sector will provide matching funds in order to help bring results to scale.

(c) SPECIAL RULE.—In the case of an eligible entity that includes a nonprofit organization, the eligible entity shall be considered to have met the eligibility requirements of paragraphs (1), (2), (3) of subsection (b) if such nonprofit organization has a record of meeting such requirements.

SEC. 14008. STATE REPORTS.

For each year of the program under this title, a State receiving funds under this title shall submit a report to the Secretary, at such time and in such manner as the Secretary may require, that describes—

(1) the uses of funds provided under this title within the State;

(2) how the State distributed the funds it received under this title;

(3) the number of jobs that the Governor estimates were saved or created with funds the State received under this title;

(4) tax increases that the Governor estimates were averted because of the availability of funds from this title;

(5) the State's progress in reducing inequities in the distribution of highly qualified teachers, in implementing a State longitudinal data system, and in developing and implementing valid and reliable assessments for limited English proficient students and children with disabilities;

(6) the tuition and fee increases for in-State students imposed by public institutions of higher education in the State during the period of availability of funds under this title, and a description of any actions taken by the State to limit those increases;

(7) the extent to which public institutions of higher education maintained, increased, or decreased enrollment of in-State students, including students eligible for Pell Grants or other need-based financial assistance; and

(8) a description of each modernization, renovation and repair project funded, which shall include the amounts awarded and project costs.

SEC. 14009. EVALUATION.

The Comptroller General of the United States shall conduct evaluations of the programs under sections 14006 and 14007 which shall include, but not be limited to, the criteria used for the awards made, the States selected for awards, award amounts, how each State used the award received, and the impact of this funding on the progress made toward closing achievement gaps.

SEC. 14010. SECRETARY'S REPORT TO CONGRESS.

The Secretary shall submit a report to the Committee on Education and Labor of the House of Representatives, the Committee on Health, Education, Labor, and Pensions of the Senate, and the Committees on Appropriations of the House of Representatives and of the Senate, not less than 6 months following the submission of State reports, that evaluates the information provided in the State reports under section 14008 and the information required by section 14005(b)(3) including State-by-State information.

SEC. 14011. PROHIBITION ON PROVISION OF CERTAIN ASSISTANCE.

No recipient of funds under this title shall use such funds to provide financial assistance to students to attend private elementary or secondary schools.

SEC. 14012. FISCAL RELIEF.

(a) IN GENERAL.—For the purpose of relieving fiscal burdens on States and local educational agencies that have experienced

a precipitous decline in financial resources, the Secretary of Education may waive or modify any requirement of this title relating to maintaining fiscal effort.

(b) DURATION.—A waiver or modification under this section shall be for any of fiscal year 2009, fiscal year 2010, or fiscal year 2011, as determined by the Secretary.

(c) CRITERIA.—The Secretary shall not grant a waiver or modification under this section unless the Secretary determines that the State or local educational agency receiving such waiver or modification will not provide for elementary and secondary education, for the fiscal year under consideration, a smaller percentage of the total revenues available to the State or local educational agency than the amount provided for such purpose in the preceding fiscal year.

(d) MAINTENANCE OF EFFORT.—Upon prior approval from the Secretary, a State or local educational agency that receives funds under this title may treat any portion of such funds that is used for elementary, secondary, or postsecondary education as non-Federal funds for the purpose of any requirement to maintain fiscal effort under any other program, including part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431 et seq.), administered by the Secretary.

(e) SUBSEQUENT LEVEL OF EFFORT.—Notwithstanding (d), the level of effort required by a State or local educational agency for the following fiscal year shall not be reduced.

SEC. 14013. DEFINITIONS.

Except as otherwise provided in this title, as used in this title—

(1) the terms "elementary education" and "secondary education" have the meaning given such terms under State law;

(2) the term "high-need local educational agency" means a local educational agency—

(A) that serves not fewer than 10,000 children from families with incomes below the poverty line; or

(B) for which not less than 20 percent of the children served by the agency are from families with incomes below the poverty line;

(3) the term "institution of higher education" has the meaning given such term in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001);

(4) the term "Secretary" means the Secretary of Education;

(5) the term "State" means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico; and

(6) any other term used that is defined in section 9101 of the ESEA (20 U.S.C. 7801) shall have the meaning given the term in such section.

TITLE XV—ACCOUNTABILITY AND TRANSPARENCY

SEC. 1501. DEFINITIONS.

In this title:

(1) AGENCY.—The term "agency" has the meaning given under section 551 of title 5, United States Code.

(2) BOARD.—The term "Board" means the Recovery Accountability and Transparency Board established in section 1521.

(3) CHAIRPERSON.—The term "Chairperson" means the Chairperson of the Board.

(4) COVERED FUNDS.—The term "covered funds" means any funds that are expended or obligated from appropriations made under this Act.

(5) PANEL.—The term "Panel" means the Recovery Independent Advisory Panel established in section 1541.

Subtitle A—Transparency and Oversight Requirements

SEC. 1511. CERTIFICATIONS.

With respect to covered funds made available to State or local governments for infrastructure investments, the Governor, mayor, or other chief executive, as appropriate, shall certify that the infrastructure investment has received the full review and vetting required by law and that the chief executive accepts responsibility that the infrastructure investment is an appropriate use of taxpayer dollars. Such certification shall include a description of the investment, the estimated total cost, and the amount of covered funds to be used, and shall be posted on a website and linked to the website established by section 1526. A State or local agency may not receive infrastructure investment funding from funds made available in this Act unless this certification is made and posted.

SEC. 1512. REPORTS ON USE OF FUNDS.

(a) SHORT TITLE.—This section may be cited as the "Jobs Accountability Act".

(b) DEFINITIONS.—In this section:

(1) RECIPIENT.—The term "recipient"—

(A) means any entity that receives recovery funds directly from the Federal Government (including recovery funds received through grant, loan, or contract) other than an individual; and

(B) includes a State that receives recovery funds.

(2) RECOVERY FUNDS.—The term "recovery funds" means any funds that are made available from appropriations made under this Act.

(c) RECIPIENT REPORTS.—Not later than 10 days after the end of each calendar quarter, each recipient that received recovery funds from a Federal agency shall submit a report to that agency that contains—

(1) the total amount of recovery funds received from that agency;

(2) the amount of recovery funds received that were expended or obligated to projects or activities; and

(3) a detailed list of all projects or activities for which recovery funds were expended or obligated, including—

(A) the name of the project or activity;

(B) a description of the project or activity;

(C) an evaluation of the completion status of the project or activity;

(D) an estimate of the number of jobs created and the number of jobs retained by the project or activity; and

(E) for infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under this Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment.

(4) Detailed information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109–282), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

(d) AGENCY REPORTS.—Not later than 30 days after the end of each calendar quarter, each agency that made recovery funds available to any recipient shall make the information in reports submitted under subsection (c) publicly available by posting the information on a website.

(e) OTHER REPORTS.—The Congressional Budget Office and the Government Accountability Office shall comment on the information described in subsection (c)(3)(D) for any reports submitted under subsection (c). Such comments shall be due within 45 days after such reports are submitted.

(f) COMPLIANCE.—Within 180 days of enactment, as a condition of receipt of funds under this Act, Federal agencies shall require any recipient of such funds to provide the information required under subsection (c).

(g) GUIDANCE.—Federal agencies, in coordination with the Director of the Office of Management and Budget, shall provide for user-friendly means for recipients of covered funds to meet the requirements of this section.

(h) REGISTRATION.—Funding recipients required to report information per subsection (c)(4) must register with the Central Contractor Registration database or complete other registration requirements as determined by the Director of the Office of Management and Budget.

SEC. 1513. REPORTS OF THE COUNCIL OF ECONOMIC ADVISERS.

(a) IN GENERAL.—In consultation with the Director of the Office of Management and Budget and the Secretary of the Treasury, the Chairperson of the Council of Economic Advisers shall submit quarterly reports to the Committees on Appropriations of the Senate and House of Representatives that detail the impact of programs funded through covered funds on employment, estimated economic growth, and other key economic indicators.

(b) SUBMISSION OF REPORTS.—

(1) FIRST REPORT.—The first report submitted under subsection (a) shall be submitted not later than 45 days after the end of the first full quarter following the date of enactment of this Act.

(2) LAST REPORT.—The last report required to be submitted under subsection (a) shall apply to the quarter in which the Board terminates under section 1530.

SEC. 1514. INSPECTOR GENERAL REVIEWS.

(a) REVIEWS.—Any inspector general of a Federal department or executive agency shall review, as appropriate, any concerns raised by the public about specific investments using funds made available in this Act. Any findings of such reviews not related to an ongoing criminal proceeding shall be relayed immediately to the head of the department or agency concerned. In addition, the findings of such reviews, along with any audits conducted by any inspector general of funds made available in this Act, shall be posted on the inspector general's website and linked to the website established by section 1526, except that portions of reports may be redacted to the extent the portions would disclose information that is protected from public disclosure under sections 552 and 552a of title 5, United States Code.

SEC. 1515. ACCESS OF OFFICES OF INSPECTOR GENERAL TO CERTAIN RECORDS AND EMPLOYEES.

(a) ACCESS.—With respect to each contract or grant awarded using covered funds, any representative of an appropriate inspector general appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), is authorized—

(1) to examine any records of the contractor or grantee, any of its subcontractors or subgrantees, or any State or local agency administering such contract, that pertain to, and involve transactions relating to, the contract, subcontract, grant, or subgrant; and

(2) to interview any officer or employee of the contractor, grantee, subgrantee, or agency regarding such transactions.

(b) RELATIONSHIP TO EXISTING AUTHORITY.—Nothing in this section shall be interpreted to limit or restrict in any way any existing authority of an inspector general.

Subtitle B—Recovery Accountability and Transparency Board

SEC. 1521. ESTABLISHMENT OF THE RECOVERY ACCOUNTABILITY AND TRANSPARENCY BOARD.

There is established the Recovery Accountability and Transparency Board to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse.

SEC. 1522. COMPOSITION OF BOARD.

(a) CHAIRPERSON.—

(1) DESIGNATION OR APPOINTMENT.—The President shall—

(A) designate the Deputy Director for Management of the Office of Management and Budget to serve as Chairperson of the Board;

(B) designate another Federal officer who was appointed by the President to a position that required the advice and consent of the Senate, to serve as Chairperson of the Board; or

(C) appoint an individual as the Chairperson of the Board, by and with the advice and consent of the Senate.

(2) COMPENSATION.—

(A) DESIGNATION OF FEDERAL OFFICER.—If the President designates a Federal officer under paragraph (1)(A) or (B) to serve as Chairperson, that Federal officer may not receive additional compensation for services performed as Chairperson.

(B) APPOINTMENT OF NON-FEDERAL OFFICER.—If the President appoints an individual as Chairperson under paragraph (1)(C), that individual shall be compensated at the rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(b) MEMBERS.—The members of the Board shall include—

(1) the Inspectors General of the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Homeland Security, Justice, Transportation, Treasury, and the Treasury Inspector General for Tax Administration; and

(2) any other Inspector General as designated by the President from any agency that expends or obligates covered funds.

SEC. 1523. FUNCTIONS OF THE BOARD.

(a) FUNCTIONS.—

(1) IN GENERAL.—The Board shall coordinate and conduct oversight of covered funds in order to prevent fraud, waste, and abuse.

(2) SPECIFIC FUNCTIONS.—The functions of the Board shall include—

(A) reviewing whether the reporting of contracts and grants using covered funds meets applicable standards and specifies the purpose of the contract or grant and measures of performance;

(B) reviewing whether competition requirements applicable to contracts and grants using covered funds have been satisfied;

(C) auditing or reviewing covered funds to determine whether wasteful spending, poor contract or grant management, or other abuses are occurring and referring matters it considers appropriate for investigation to the inspector general for the agency that disbursed the covered funds;

(D) reviewing whether there are sufficient qualified acquisition and grant personnel overseeing covered funds;

(E) reviewing whether personnel whose duties involve acquisitions or grants made with covered funds receive adequate training; and

(F) reviewing whether there are appropriate mechanisms for interagency collaboration relating to covered funds, including coordinating and collaborating to the extent practicable with the Inspectors General Council on Integrity and Efficiency established by the Inspector General Reform Act of 2008 (Public Law 110–409).

(b) REPORTS.—

(1) FLASH AND OTHER REPORTS.—The Board shall submit to the President and Congress, including the Committees on Appropriations of the Senate and House of Representatives, reports, to be known as "flash reports", on potential management and funding problems that require immediate attention. The Board also shall submit to Congress such other reports as the Board considers appropriate on the use and benefits of funds made available in this Act.

(2) QUARTERLY REPORTS.—The Board shall submit quarterly reports to the President and Congress, including the Committees on Appropriations of the Senate and House of Representatives, summarizing the findings of the Board and the findings of inspectors general of agencies. The Board may submit additional reports as appropriate.

(3) ANNUAL REPORTS.—The Board shall submit annual reports to the President and Congress, including the Committees on Appropriations of the Senate and House of Representatives, consolidating applicable quarterly reports on the use of covered funds.

(4) PUBLIC AVAILABILITY.—

(A) IN GENERAL.—All reports submitted under this subsection shall be made publicly available and posted on the website established by section 1526.

(B) REDACTIONS.—Any portion of a report submitted under this subsection may be redacted when made publicly available, if that portion would disclose information that is not subject to disclosure under sections 552 and 552a of title 5, United States Code.

(c) RECOMMENDATIONS.—

(1) IN GENERAL.—The Board shall make recommendations to agencies on measures to prevent fraud, waste, and abuse relating to covered funds.

(2) RESPONSIVE REPORTS.—Not later than 30 days after receipt of a recommendation under paragraph (1), an agency shall submit a report to the President, the congressional committees of jurisdiction, including the Committees on Appropriations of the Senate and House of Representatives, and the Board on—

(A) whether the agency agrees or disagrees with the recommendations; and

(B) any actions the agency will take to implement the recommendations.

SEC. 1524. POWERS OF THE BOARD.

(a) IN GENERAL.—The Board shall conduct audits and reviews of spending of covered funds and coordinate on such activities with the inspectors general of the relevant agency to avoid duplication and overlap of work.

(b) AUDITS AND REVIEWS.—The Board may—

(1) conduct its own independent audits and reviews relating to covered funds; and

(2) collaborate on audits and reviews relating to covered funds with any inspector general of an agency.

(c) AUTHORITIES.—

(1) AUDITS AND REVIEWS.—In conducting audits and reviews, the Board shall have the authorities provided under section 6 of the Inspector General Act of 1978 (5 U.S.C. App.). Additionally, the Board may issue subpoenas to compel the testimony of persons who are not Federal officers or employees and may enforce such subpoenas in the same manner as provided for inspector general subpoenas under section 6 of the Inspector General Act of 1978 (5 U.S.C. App.).

(2) STANDARDS AND GUIDELINES.—The Board shall carry out the powers under subsections (a) and (b) in accordance

with section 4(b)(1) of the Inspector General Act of 1978 (5 U.S.C. App.).

(d) PUBLIC HEARINGS.—The Board may hold public hearings and Board personnel may conduct necessary inquiries. The head of each agency shall make all officers and employees of that agency available to provide testimony to the Board and Board personnel. The Board may issue subpoenas to compel the testimony of persons who are not Federal officers or employees at such public hearings. Any such subpoenas may be enforced in the same manner as provided for inspector general subpoenas under section 6 of the Inspector General Act of 1978 (5 U.S.C. App.).

(e) CONTRACTS.—The Board may enter into contracts to enable the Board to discharge its duties under this subtitle, including contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and make such payments as may be necessary to carry out the duties of the Board.

(f) TRANSFER OF FUNDS.—The Board may transfer funds appropriated to the Board for expenses to support administrative support services and audits, reviews, or other activities related to oversight by the Board of covered funds to any office of inspector general, the Office of Management and Budget, the General Services Administration, and the Panel.

SEC. 1525. EMPLOYMENT, PERSONNEL, AND RELATED AUTHORITIES.

(a) EMPLOYMENT AND PERSONNEL AUTHORITIES.—

(1) IN GENERAL.—

(A) AUTHORITIES.—Subject to paragraph (2), the Board may exercise the authorities of subsections (b) through (i) of section 3161 of title 5, United States Code (without regard to subsection (a) of that section).

(B) APPLICATION.—For purposes of exercising the authorities described under subparagraph (A), the term "Chairperson of the Board" shall be substituted for the term "head of a temporary organization".

(C) CONSULTATION.—In exercising the authorities described under subparagraph (A), the Chairperson shall consult with members of the Board.

(2) EMPLOYMENT AUTHORITIES.—In exercising the employment authorities under subsection (b) of section 3161 of title 5, United States Code, as provided under paragraph (1) of this subsection—

(A) paragraph (2) of subsection (b) of section 3161 of that title (relating to periods of appointments) shall not apply; and

(B) no period of appointment may exceed the date on which the Board terminates under section 1530.

(b) INFORMATION AND ASSISTANCE.—

(1) IN GENERAL.—Upon request of the Board for information or assistance from any agency or other entity of the Federal Government, the head of such entity shall, insofar as is practicable and not in contravention of any existing law, furnish such information or assistance to the Board, or an authorized designee.

(2) REPORT OF REFUSALS.—Whenever information or assistance requested by the Board is, in the judgment of the Board, unreasonably refused or not provided, the Board shall report

the circumstances to the congressional committees of jurisdiction, including the Committees on Appropriations of the Senate and House of Representatives, without delay.

(c) ADMINISTRATIVE SUPPORT.—The General Services Administration shall provide the Board with administrative support services, including the provision of office space and facilities.

SEC. 1526. BOARD WEBSITE.

(a) ESTABLISHMENT.—The Board shall establish and maintain, no later than 30 days after enactment of this Act, a user-friendly, public-facing website to foster greater accountability and transparency in the use of covered funds.

(b) PURPOSE.—The website established and maintained under subsection (a) shall be a portal or gateway to key information relating to this Act and provide connections to other Government websites with related information.

(c) CONTENT AND FUNCTION.—In establishing the website established and maintained under subsection (a), the Board shall ensure the following:

(1) The website shall provide materials explaining what this Act means for citizens. The materials shall be easy to understand and regularly updated.

(2) The website shall provide accountability information, including findings from audits, inspectors general, and the Government Accountability Office.

(3) The website shall provide data on relevant economic, financial, grant, and contract information in user-friendly visual presentations to enhance public awareness of the use of covered funds.

(4) The website shall provide detailed data on contracts awarded by the Federal Government that expend covered funds, including information about the competitiveness of the contracting process, information about the process that was used for the award of contracts, and for contracts over $500,000 a summary of the contract.

(5) The website shall include printable reports on covered funds obligated by month to each State and congressional district.

(6) The website shall provide a means for the public to give feedback on the performance of contracts that expend covered funds.

(7) The website shall include detailed information on Federal Government contracts and grants that expend covered funds, to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109–282), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

(8) The website shall provide a link to estimates of the jobs sustained or created by the Act.

(9) The website shall provide a link to information about announcements of grant competitions and solicitations for contracts to be awarded.

(10) The website shall include appropriate links to other government websites with information concerning covered funds, including Federal agency and State websites.

(11) The website shall include a plan from each Federal agency for using funds made available in this Act to the agency.

(12) The website shall provide information on Federal allocations of formula grants and awards of competitive grants using covered funds.

(13) The website shall provide information on Federal allocations of mandatory and other entitlement programs by State, county, or other appropriate geographical unit.

(14) To the extent practical, the website shall provide, organized by the location of the job opportunities involved, links to and information about how to access job opportunities, including, if possible, links to or information about local employment agencies, job banks operated by State workforce agencies, the Department of Labor's CareerOneStop website, State, local and other public agencies receiving Federal funding, and private firms contracted to perform work with Federal funding, in order to direct job seekers to job opportunities created by this Act.

(15) The website shall be enhanced and updated as necessary to carry out the purposes of this subtitle.

(d) WAIVER.—The Board may exclude posting contractual or other information on the website on a case-by-case basis when necessary to protect national security or to protect information that is not subject to disclosure under sections 552 and 552a of title 5, United States Code.

SEC. 1527. INDEPENDENCE OF INSPECTORS GENERAL.

(a) INDEPENDENT AUTHORITY.—Nothing in this subtitle shall affect the independent authority of an inspector general to determine whether to conduct an audit or investigation of covered funds.

(b) REQUESTS BY BOARD.—If the Board requests that an inspector general conduct or refrain from conducting an audit or investigation and the inspector general rejects the request in whole or in part, the inspector general shall, not later than 30 days after rejecting the request, submit a report to the Board, the head of the applicable agency, and the congressional committees of jurisdiction, including the Committees on Appropriations of the Senate and House of Representatives. The report shall state the reasons that the inspector general has rejected the request in whole or in part. The inspector general's decision shall be final.

SEC. 1528. COORDINATION WITH THE COMPTROLLER GENERAL AND STATE AUDITORS.

The Board shall coordinate its oversight activities with the Comptroller General of the United States and State auditors.

SEC. 1529. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as necessary to carry out this subtitle.

SEC. 1530. TERMINATION OF THE BOARD.

The Board shall terminate on September 30, 2013.

Subtitle C—Recovery Independent Advisory Panel

SEC. 1541. ESTABLISHMENT OF RECOVERY INDEPENDENT ADVISORY PANEL.

(a) ESTABLISHMENT.—There is established the Recovery Independent Advisory Panel.

(b) MEMBERSHIP.—The Panel shall be composed of 5 members who shall be appointed by the President.

(c) QUALIFICATIONS.—Members shall be appointed on the basis of expertise in economics, public finance, contracting, accounting, or any other relevant field.

(d) INITIAL MEETING.—Not later than 30 days after the date on which all members of the Panel have been appointed, the Panel shall hold its first meeting.

(e) MEETINGS.—The Panel shall meet at the call of the Chairperson of the Panel.

(f) QUORUM.—A majority of the members of the Panel shall constitute a quorum, but a lesser number of members may hold hearings.

(g) CHAIRPERSON AND VICE CHAIRPERSON.—The Panel shall select a Chairperson and Vice Chairperson from among its members.

SEC. 1542. DUTIES OF THE PANEL.

The Panel shall make recommendations to the Board on actions the Board could take to prevent fraud, waste, and abuse relating to covered funds.

SEC. 1543. POWERS OF THE PANEL.

(a) HEARINGS.—The Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Panel considers advisable to carry out this subtitle.

(b) INFORMATION FROM FEDERAL AGENCIES.—The Panel may secure directly from any agency such information as the Panel considers necessary to carry out this subtitle. Upon request of the Chairperson of the Panel, the head of such agency shall furnish such information to the Panel.

(c) POSTAL SERVICES.—The Panel may use the United States mails in the same manner and under the same conditions as agencies of the Federal Government.

(d) GIFTS.—The Panel may accept, use, and dispose of gifts or donations of services or property.

SEC. 1544. PANEL PERSONNEL MATTERS.

(a) COMPENSATION OF MEMBERS.—Each member of the Panel who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which such member is engaged in the performance of the duties of the Panel. All members of the Panel who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(b) TRAVEL EXPENSES.—The members of the Panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Panel.

(c) STAFF.—

(1) IN GENERAL.—The Chairperson of the Panel may, without regard to the civil service laws and regulations, appoint and terminate an executive director and such other additional personnel as may be necessary to enable the Panel to perform its duties. The employment of an executive director shall be subject to confirmation by the Panel.

(2) COMPENSATION.—The Chairperson of the Panel may fix the compensation of the executive director and other personnel without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates, except that the rate of pay for the executive director and other personnel may not exceed the rate payable for level V of the Executive Schedule under section 5316 of such title.

(3) PERSONNEL AS FEDERAL EMPLOYEES.—

(A) IN GENERAL.—The executive director and any personnel of the Panel who are employees shall be employees under section 2105 of title 5, United States Code, for purposes of chapters 63, 81, 83, 84, 85, 87, 89, 89A, 89B, and 90 of that title.

(B) MEMBERS OF PANEL.—Subparagraph (A) shall not be construed to apply to members of the Panel.

(d) DETAIL OF GOVERNMENT EMPLOYEES.—Any Federal Government employee may be detailed to the Panel without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(e) PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES.—The Chairperson of the Panel may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

(f) ADMINISTRATIVE SUPPORT.—The General Services Administration shall provide the Panel with administrative support services, including the provision of office space and facilities.

SEC. 1545. TERMINATION OF THE PANEL.

The Panel shall terminate on September 30, 2013.

SEC. 1546. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as necessary to carry out this subtitle.

Subtitle D—Additional Accountability and Transparency Requirements

SEC. 1551. AUTHORITY TO ESTABLISH SEPARATE FUNDING ACCOUNTS.

Although this Act provides supplemental appropriations for programs, projects, and activities in existing Treasury accounts,

to facilitate tracking these funds through Treasury and agency accounting systems, the Secretary of the Treasury shall ensure that all funds appropriated in this Act shall be established in separate Treasury accounts, unless a waiver from this provision is approved by the Director of the Office of Management and Budget.

SEC. 1552. SET-ASIDE FOR STATE AND LOCAL GOVERNMENT REPORTING AND RECORDKEEPING.

Federal agencies receiving funds under this Act, may, after following the notice and comment rulemaking requirements under the Administrative Procedures Act (5 U.S.C. 500), reasonably adjust applicable limits on administrative expenditures for Federal awards to help award recipients defray the costs of data collection requirements initiated pursuant to this Act.

SEC. 1553. PROTECTING STATE AND LOCAL GOVERNMENT AND CONTRACTOR WHISTLEBLOWERS.

(a) PROHIBITION OF REPRISALS.—An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of—

(1) gross mismanagement of an agency contract or grant relating to covered funds;

(2) a gross waste of covered funds;

(3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;

(4) an abuse of authority related to the implementation or use of covered funds; or

(5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

(b) INVESTIGATION OF COMPLAINTS.—

(1) IN GENERAL.—A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint regarding the reprisal to the appropriate inspector general. Except as provided under paragraph (3), unless the inspector general determines that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint, the inspector general shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the person's employer, the head of the appropriate agency, and the Board.

(2) TIME LIMITATIONS FOR ACTIONS.—

(A) IN GENERAL.—Except as provided under subparagraph (B), the inspector general shall, not later than 180 days after receiving a complaint under paragraph (1)—

(i) make a determination that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint; or

(ii) submit a report under paragraph (1).

(B) EXTENSIONS.—

(i) VOLUNTARY EXTENSION AGREED TO BETWEEN INSPECTOR GENERAL AND COMPLAINANT.—If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A) and the person submitting the complaint agrees to an extension of time, the inspector general shall submit a report under paragraph (1) within such additional period of time as shall be agreed upon between the inspector general and the person submitting the complaint.

(ii) EXTENSION GRANTED BY INSPECTOR GENERAL.—If the inspector general is unable to complete an investigation under this section in time to submit a report within the 180-day period specified under subparagraph (A), the inspector general may extend the period for not more than 180 days without agreeing with the person submitting the complaint to such extension, provided that the inspector general provides a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for the decision, which shall be provided to both the person submitting the complaint and the non-Federal employer.

(iii) SEMI-ANNUAL REPORT ON EXTENSIONS.—The inspector general shall include in semi-annual reports to Congress a list of those investigations for which the inspector general received an extension.

(3) DISCRETION NOT TO INVESTIGATE COMPLAINTS.—

(A) IN GENERAL.—The inspector general may decide not to conduct or continue an investigation under this section upon providing to the person submitting the complaint and the non-Federal employer a written explanation (subject to the authority to exclude information under paragraph (4)(C)) for such decision.

(B) ASSUMPTION OF RIGHTS TO CIVIL REMEDY.—Upon receipt of an explanation of a decision not to conduct or continue an investigation under subparagraph (A), the person submitting a complaint shall immediately assume the right to a civil remedy under subsection (c)(3) as if the 210-day period specified under such subsection has already passed.

(C) SEMI-ANNUAL REPORT.—The inspector general shall include in semi-annual reports to Congress a list of those investigations the inspector general decided not to conduct or continue under this paragraph.

(4) ACCESS TO INVESTIGATIVE FILE OF INSPECTOR GENERAL.—

(A) IN GENERAL.—The person alleging a reprisal under this section shall have access to the investigation file of

the appropriate inspector general in accordance with section 552a of title 5, United States Code (commonly referred to as the "Privacy Act"). The investigation of the inspector general shall be deemed closed for purposes of disclosure under such section when an employee files an appeal to an agency head or a court of competent jurisdiction.

(B) CIVIL ACTION.—In the event the person alleging the reprisal brings suit under subsection (c)(3), the person alleging the reprisal and the non-Federal employer shall have access to the investigative file of the inspector general in accordance with the Privacy Act.

(C) EXCEPTION.—The inspector general may exclude from disclosure—

(i) information protected from disclosure by a provision of law; and

(ii) any additional information the inspector general determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the inspector general determines that disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(5) PRIVACY OF INFORMATION.—An inspector general investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(c) REMEDY AND ENFORCEMENT AUTHORITY.—

(1) BURDEN OF PROOF.—

(A) DISCLOSURE AS CONTRIBUTING FACTOR IN REPRISAL.—

(i) IN GENERAL.—A person alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates that a disclosure described in subsection (a) was a contributing factor in the reprisal.

(ii) USE OF CIRCUMSTANTIAL EVIDENCE.—A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

(I) evidence that the official undertaking the reprisal knew of the disclosure; or

(II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(B) OPPORTUNITY FOR REBUTTAL.—The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under subparagraph (A) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(2) AGENCY ACTION.—Not later than 30 days after receiving an inspector general report under subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief in whole or in part or shall take 1 or more of the following actions:

(A) Order the employer to take affirmative action to abate the reprisal.

(B) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency or a court of competent jurisdiction.

(3) CIVIL ACTION.—If the head of an agency issues an order denying relief in whole or in part under paragraph (1), has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under subsection (b)(2)(B)(i), within 30 days after the expiration of the extension of time, or decides under subsection (b)(3) not to investigate or to discontinue an investigation, and there is no showing that such delay or decision is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(4) JUDICIAL ENFORCEMENT OF ORDER.—Whenever a person fails to comply with an order issued under paragraph (2), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(5) JUDICIAL REVIEW.—Any person adversely affected or aggrieved by an order issued under paragraph (2) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5, United States Code.

(d) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

(1) WAIVER OF RIGHTS AND REMEDIES.—Except as provided under paragraph (3), the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—Except as provided under paragraph (3), no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising under this section.

(3) EXCEPTION FOR COLLECTIVE BARGAINING AGREEMENTS.—Notwithstanding paragraphs (1) and (2), an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under the collective bargaining agreement.

(e) REQUIREMENT TO POST NOTICE OF RIGHTS AND REMEDIES.—Any employer receiving covered funds shall post notice of the rights and remedies provided under this section.

(f) RULES OF CONSTRUCTION.—

(1) NO IMPLIED AUTHORITY TO RETALIATE FOR NON-PROTECTED DISCLOSURES.—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

(2) RELATIONSHIP TO STATE LAWS.—Nothing in this section may be construed to preempt, preclude, or limit the protections provided for public or private employees under State whistleblower laws.

(g) DEFINITIONS.—In this section:

(1) ABUSE OF AUTHORITY.—The term "abuse of authority" means an arbitrary and capricious exercise of authority by a contracting official or employee that adversely affects the rights of any person, or that results in personal gain or advantage to the official or employee or to preferred other persons.

(2) COVERED FUNDS.—The term "covered funds" means any contract, grant, or other payment received by any non-Federal employer if—

(A) the Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(B) at least some of the funds are appropriated or otherwise made available by this Act.

(3) EMPLOYEE.—The term "employee"—

(A) except as provided under subparagraph (B), means an individual performing services on behalf of an employer; and

(B) does not include any Federal employee or member of the uniformed services (as that term is defined in section 101(a)(5) of title 10, United States Code).

(4) NON-FEDERAL EMPLOYER.—The term "non-Federal employer"—

(A) means any employer—

(i) with respect to covered funds—

(I) the contractor, subcontractor, grantee, or recipient, as the case may be, if the contractor, subcontractor, grantee, or recipient is an employer; and

(II) any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds; or

(ii) with respect to covered funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor of the State or local government; and

(B) does not mean any department, agency, or other entity of the Federal Government.

(5) STATE OR LOCAL GOVERNMENT.—The term "State or local government" means—

(A) the government of each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, or any other territory or possession of the United States; or

(B) the government of any political subdivision of a government listed in subparagraph (A).

SEC. 1554. SPECIAL CONTRACTING PROVISIONS.

To the maximum extent possible, contracts funded under this Act shall be awarded as fixed-price contracts through the use of competitive procedures. A summary of any contract awarded with such funds that is not fixed-price and not awarded using competitive procedures shall be posted in a special section of the website established in section 1526.

TITLE XVI—GENERAL PROVISIONS—THIS ACT

RELATIONSHIP TO OTHER APPROPRIATIONS

SEC. 1601. Each amount appropriated or made available in this Act is in addition to amounts otherwise appropriated for the fiscal year involved. Enactment of this Act shall have no effect on the availability of amounts under the Continuing Appropriations Resolution, 2009 (division A of Public Law 110–329).

PREFERENCE FOR QUICK-START ACTIVITIES

SEC. 1602. In using funds made available in this Act for infrastructure investment, recipients shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of the enactment of this Act. Recipients shall also use grant funds in a manner that maximizes job creation and economic benefit.

PERIOD OF AVAILABILITY

SEC. 1603. All funds appropriated in this Act shall remain available for obligation until September 30, 2010, unless expressly provided otherwise in this Act.

LIMIT ON FUNDS

SEC. 1604. None of the funds appropriated or otherwise made available in this Act may be used by any State or local government, or any private entity, for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.

BUY AMERICAN

SEC. 1605. USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS. (a) None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

(b) Subsection (a) shall not apply in any case or category of cases in which the head of the Federal department or agency involved finds that—

(1) applying subsection (a) would be inconsistent with the public interest;

(2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

(c) If the head of a Federal department or agency determines that it is necessary to waive the application of subsection (a) based on a finding under subsection (b), the head of the department or agency shall publish in the Federal Register a detailed written justification as to why the provision is being waived.

(d) This section shall be applied in a manner consistent with United States obligations under international agreements.

WAGE RATE REQUIREMENTS

SEC. 1606. Notwithstanding any other provision of law and in a manner consistent with other provisions in this Act, all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267; 5 U.S.C. App.) and section 3145 of title 40, United States Code.

ADDITIONAL FUNDING DISTRIBUTION AND ASSURANCE OF APPROPRIATE USE OF FUNDS

SEC. 1607. (a) CERTIFICATION BY GOVERNOR.—Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) the State will request and use funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.

(b) ACCEPTANCE BY STATE LEGISLATURE.—If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State.

(c) DISTRIBUTION.—After the adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State's discretion.

ECONOMIC STABILIZATION CONTRACTING

SEC. 1608. REFORM OF CONTRACTING PROCEDURES UNDER EESA. Section 107(b) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5217(b)) is amended by inserting "and individuals with disabilities and businesses owned by individuals with disabilities (for purposes of this subsection the term 'individual with disability' has the same meaning as the term 'handicapped individual' as that term is defined in section 3(f) of the Small Business Act (15 U.S.C. 632(f)),'' after "(12 U.S.C. 1441a(r)(4)),".

SEC. 1609. (a) FINDINGS.—

(1) The National Environmental Policy Act protects public health, safety and environmental quality: by ensuring transparency, accountability and public involvement in federal actions and in the use of public funds;

(2) When President Nixon signed the National Environmental Policy Act into law on January 1, 1970, he said that the Act provided the "direction" for the country to "regain a productive harmony between man and nature";

(3) The National Environmental Policy Act helps to provide an orderly process for considering federal actions and funding decisions and prevents ligation and delay that would otherwise be inevitable and existed prior to the establishment of the National Environmental Policy Act.

(b) Adequate resources within this bill must be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act are completed on an expeditious basis and that the shortest existing applicable process under the National Environmental Policy Act shall be utilized.

(c) The President shall report to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days following the date of enactment until September 30, 2011 on the status and progress of projects and activities funded by this Act with respect to compliance with National Environmental Policy Act requirements and documentation.

SEC. 1610. (a) None of the funds appropriated or otherwise made available by this Act, for projects initiated after the effective date of this Act, may be used by an executive agency to enter into any Federal contract unless such contract is entered into in accordance with the Federal Property and Administrative Services Act (41 U.S.C. 253) or chapter 137 of title 10, United States Code, and the Federal Acquisition Regulation, unless such contract is otherwise authorized by statute to be entered into without regard to the above referenced statutes.

(b) All projects to be conducted under the authority of the Indian Self-Determination and Education Assistance Act, the Tribally-Controlled Schools Act, the Sanitation and Facilities Act, the

Native American Housing and Self-Determination Assistance Act and the Buy-Indian Act shall be identified by the appropriate Secretary and the appropriate Secretary shall incorporate provisions to ensure that the agreement conforms with the provisions of this Act regarding the timing for use of funds and transparency, oversight, reporting, and accountability, including review by the Inspectors General, the Accountability and Transparency Board, and Government Accountability Office, consistent with the objectives of this Act.

SEC. 1611. HIRING AMERICAN WORKERS IN COMPANIES RECEIVING TARP FUNDING. (a) SHORT TITLE.—This section may be cited as the "Employ American Workers Act".

(b) PROHIBITION.—

(1) IN GENERAL.—Notwithstanding any other provision of law, it shall be unlawful for any recipient of funding under title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110–343) or section 13 of the Federal Reserve Act (12 U.S.C. 342 et seq.) to hire any nonimmigrant described in section 101(a)(15)(h)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(h)(i)(b)) unless the recipient is in compliance with the requirements for an H–1B dependent employer (as defined in section 212(n)(3) of such Act (8 U.S.C. 1182(n)(3))), except that the second sentence of section 212(n)(1)(E)(ii) of such Act shall not apply.

(2) DEFINED TERM.—In this subsection, the term "hire" means to permit a new employee to commence a period of employment.

(c) SUNSET PROVISION.—This section shall be effective during the 2-year period beginning on the date of the enactment of this Act.

SEC. 1612. During the current fiscal year not to exceed 1 percent of any appropriation made available by this Act may be transferred by an agency head between such appropriations funded in this Act of that department or agency: *Provided,* That such appropriations shall be merged with and available for the same purposes, and for the same time period, as the appropriation to which transferred: *Provided further,* That the agency head shall notify the Committees on Appropriations of the Senate and House of Representatives of the transfer 15 days in advance: *Provided further,* That notice of any transfer made pursuant to this authority be posted on the website established by the Recovery Act Accountability and Transparency Board 15 days following such transfer: *Provided further,* That the authority contained in this section is in addition to transfer authorities otherwise available under current law: *Provided further,* That the authority provided in this section shall not apply to any appropriation that is subject to transfer provisions included elsewhere in this Act.

DIVISION B—TAX, UNEMPLOYMENT, HEALTH, STATE FISCAL RELIEF, AND OTHER PROVISIONS

TITLE I—TAX PROVISIONS

SEC. 1000. SHORT TITLE, ETC.

(a) SHORT TITLE.—This title may be cited as the "American Recovery and Reinvestment Tax Act of 2009".

(b) REFERENCE.—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.

(c) TABLE OF CONTENTS.—The table of contents for this title is as follows:

Subtitle A—Tax Relief for Individuals and Families

PART I—GENERAL TAX RELIEF

SEC. 1001. MAKING WORK PAY CREDIT.

(a) IN GENERAL.—Subpart C of part IV of subchapter A of chapter 1 is amended by inserting after section 36 the following new section:

"SEC. 36A. MAKING WORK PAY CREDIT.

"(a) ALLOWANCE OF CREDIT.—In the case of an eligible individual, there shall be allowed as a credit against the tax imposed

by this subtitle for the taxable year an amount equal to the lesser of—

"(1) 6.2 percent of earned income of the taxpayer, or

"(2) $400 ($800 in the case of a joint return).

"(b) LIMITATION BASED ON MODIFIED ADJUSTED GROSS INCOME.—

"(1) IN GENERAL.—The amount allowable as a credit under subsection (a) (determined without regard to this paragraph and subsection (c)) for the taxable year shall be reduced (but not below zero) by 2 percent of so much of the taxpayer's modified adjusted gross income as exceeds $75,000 ($150,000 in the case of a joint return).

"(2) MODIFIED ADJUSTED GROSS INCOME.—For purposes of subparagraph (A), the term 'modified adjusted gross income' means the adjusted gross income of the taxpayer for the taxable year increased by any amount excluded from gross income under section 911, 931, or 933.

"(c) REDUCTION FOR CERTAIN OTHER PAYMENTS.—The credit allowed under subsection (a) for any taxable year shall be reduced by the amount of any payments received by the taxpayer during such taxable year under section 2201, and any credit allowed to the taxpayer under section 2202, of the American Recovery and Reinvestment Tax Act of 2009.

"(d) DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

"(1) ELIGIBLE INDIVIDUAL.—

"(A) IN GENERAL.—The term 'eligible individual' means any individual other than—

"(i) any nonresident alien individual,

"(ii) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, and

"(iii) an estate or trust.

"(B) IDENTIFICATION NUMBER REQUIREMENT.—Such term shall not include any individual who does not include on the return of tax for the taxable year—

"(i) such individual's social security account number, and

"(ii) in the case of a joint return, the social security account number of one of the taxpayers on such return.

For purposes of the preceding sentence, the social security account number shall not include a TIN issued by the Internal Revenue Service.

"(2) EARNED INCOME.—The term 'earned income' has the meaning given such term by section 32(c)(2), except that such term shall not include net earnings from self-employment which are not taken into account in computing taxable income. For purposes of the preceding sentence, any amount excluded from gross income by reason of section 112 shall be treated as earned income which is taken into account in computing taxable income for the taxable year.

"(e) TERMINATION.—This section shall not apply to taxable years beginning after December 31, 2010.".

(b) TREATMENT OF POSSESSIONS.—

(1) PAYMENTS TO POSSESSIONS.—

(A) MIRROR CODE POSSESSION.—The Secretary of the Treasury shall pay to each possession of the United States with a mirror code tax system amounts equal to the loss to that possession by reason of the amendments made by this section with respect to taxable years beginning in 2009 and 2010. Such amounts shall be determined by the Secretary of the Treasury based on information provided by the government of the respective possession.

(B) OTHER POSSESSIONS.—The Secretary of the Treasury shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury as being equal to the aggregate benefits that would have been provided to residents of such possession by reason of the amendments made by this section for taxable years beginning in 2009 and 2010 if a mirror code tax system had been in effect in such possession. The preceding sentence shall not apply with respect to any possession of the United States unless such possession has a plan, which has been approved by the Secretary of the Treasury, under which such possession will promptly distribute such payments to the residents of such possession.

(2) COORDINATION WITH CREDIT ALLOWED AGAINST UNITED STATES INCOME TAXES.—No credit shall be allowed against United States income taxes for any taxable year under section 36A of the Internal Revenue Code of 1986 (as added by this section) to any person—

(A) to whom a credit is allowed against taxes imposed by the possession by reason of the amendments made by this section for such taxable year, or

(B) who is eligible for a payment under a plan described in paragraph (1)(B) with respect to such taxable year.

(3) DEFINITIONS AND SPECIAL RULES.—

(A) POSSESSION OF THE UNITED STATES.—For purposes of this subsection, the term "possession of the United States" includes the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands.

(B) MIRROR CODE TAX SYSTEM.—For purposes of this subsection, the term "mirror code tax system" means, with respect to any possession of the United States, the income tax system of such possession if the income tax liability of the residents of such possession under such system is determined by reference to the income tax laws of the United States as if such possession were the United States.

(C) TREATMENT OF PAYMENTS.—For purposes of section 1324(b)(2) of title 31, United States Code, the payments under this subsection shall be treated in the same manner as a refund due from the credit allowed under section 36A of the Internal Revenue Code of 1986 (as added by this section).

(c) REFUNDS DISREGARDED IN THE ADMINISTRATION OF FEDERAL PROGRAMS AND FEDERALLY ASSISTED PROGRAMS.—Any credit or refund allowed or made to any individual by reason of section 36A of the Internal Revenue Code of 1986 (as added by this section) or by reason of subsection (b) of this section shall not be taken into account as income and shall not be taken into account as resources for the month of receipt and the following 2 months,

for purposes of determining the eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds.

(d) AUTHORITY RELATING TO CLERICAL ERRORS.—Section 6213(g)(2) is amended by striking "and" at the end of subparagraph (L)(ii), by striking the period at the end of subparagraph (M) and inserting ", and", and by adding at the end the following new subparagraph:

"(N) an omission of the reduction required under section 36A(c) with respect to the credit allowed under section 36A or an omission of the correct social security account number required under section 36A(d)(1)(B).".

(e) CONFORMING AMENDMENTS.—

(1) Section 6211(b)(4)(A) is amended by inserting "36A," after "36,".

(2) Section 1324(b)(2) of title 31, United States Code, is amended by inserting "36A," after "36,".

(3) The table of sections for subpart C of part IV of subchapter A of chapter 1 is amended by inserting after the item relating to section 36 the following new item:

"Sec. 36A. Making work pay credit.".

(f) EFFECTIVE DATE.—This section, and the amendments made by this section, shall apply to taxable years beginning after December 31, 2008.

SEC. 1002. TEMPORARY INCREASE IN EARNED INCOME TAX CREDIT.

(a) IN GENERAL.—Subsection (b) of section 32 is amended by adding at the end the following new paragraph:

"(3) SPECIAL RULES FOR 2009 AND 2010.—In the case of any taxable year beginning in 2009 or 2010—

"(A) INCREASED CREDIT PERCENTAGE FOR 3 OR MORE QUALIFYING CHILDREN.—In the case of a taxpayer with 3 or more qualifying children, the credit percentage is 45 percent.

"(B) REDUCTION OF MARRIAGE PENALTY.—

"(i) IN GENERAL.—The dollar amount in effect under paragraph (2)(B) shall be $5,000.

"(ii) INFLATION ADJUSTMENT.—In the case of any taxable year beginning in 2010, the $5,000 amount in clause (i) shall be increased by an amount equal to—

"(I) such dollar amount, multiplied by

"(II) the cost of living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins determined by substituting 'calendar year 2008' for 'calendar year 1992' in subparagraph (B) thereof.

"(iii) ROUNDING.—Subparagraph (A) of subsection (j)(2) shall apply after taking into account any increase under clause (ii).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. 1003. TEMPORARY INCREASE OF REFUNDABLE PORTION OF CHILD CREDIT.

(a) IN GENERAL.—Paragraph (4) of section 24(d) is amended to read as follows:

"(4) SPECIAL RULE FOR 2009 AND 2010.—Notwithstanding paragraph (3), in the case of any taxable year beginning in 2009 or 2010, the dollar amount in effect for such taxable year under paragraph (1)(B)(i) shall be $3,000.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. 1004. AMERICAN OPPORTUNITY TAX CREDIT.

(a) IN GENERAL.—Section 25A (relating to Hope scholarship credit) is amended by redesignating subsection (i) as subsection (j) and by inserting after subsection (h) the following new subsection:

"(i) AMERICAN OPPORTUNITY TAX CREDIT.—In the case of any taxable year beginning in 2009 or 2010—

"(1) INCREASE IN CREDIT.—The Hope Scholarship Credit shall be an amount equal to the sum of—

"(A) 100 percent of so much of the qualified tuition and related expenses paid by the taxpayer during the taxable year (for education furnished to the eligible student during any academic period beginning in such taxable year) as does not exceed $2,000, plus

"(B) 25 percent of such expenses so paid as exceeds $2,000 but does not exceed $4,000.

"(2) CREDIT ALLOWED FOR FIRST 4 YEARS OF POST-SECONDARY EDUCATION.—Subparagraphs (A) and (C) of subsection (b)(2) shall be applied by substituting '4' for '2'.

"(3) QUALIFIED TUITION AND RELATED EXPENSES TO INCLUDE REQUIRED COURSE MATERIALS.—Subsection (f)(1)(A) shall be applied by substituting 'tuition, fees, and course materials' for 'tuition and fees'.

"(4) INCREASE IN AGI LIMITS FOR HOPE SCHOLARSHIP CREDIT.—In lieu of applying subsection (d) with respect to the Hope Scholarship Credit, such credit (determined without regard to this paragraph) shall be reduced (but not below zero) by the amount which bears the same ratio to such credit (as so determined) as—

"(A) the excess of—

"(i) the taxpayer's modified adjusted gross income (as defined in subsection (d)(3)) for such taxable year, over

"(ii) $80,000 ($160,000 in the case of a joint return), bears to

"(B) $10,000 ($20,000 in the case of a joint return).

"(5) CREDIT ALLOWED AGAINST ALTERNATIVE MINIMUM TAX.—In the case of a taxable year to which section 26(a)(2) does not apply, so much of the credit allowed under subsection (a) as is attributable to the Hope Scholarship Credit shall not exceed the excess of—

"(A) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

"(B) the sum of the credits allowable under this subpart (other than this subsection and sections 23, 25D, and 30D) and section 27 for the taxable year.

Any reference in this section or section 24, 25, 26, 25B, 904, or 1400C to a credit allowable under this subsection shall be treated as a reference to so much of the credit allowable under subsection (a) as is attributable to the Hope Scholarship Credit.

"(6) PORTION OF CREDIT MADE REFUNDABLE.—40 percent of so much of the credit allowed under subsection (a) as is attributable to the Hope Scholarship Credit (determined after application of paragraph (4) and without regard to this paragraph and section 26(a)(2) or paragraph (5), as the case may be) shall be treated as a credit allowable under subpart C (and not allowed under subsection (a)). The preceding sentence shall not apply to any taxpayer for any taxable year if such taxpayer is a child to whom subsection (g) of section 1 applies for such taxable year.

"(7) COORDINATION WITH MIDWESTERN DISASTER AREA BENEFITS.—In the case of a taxpayer with respect to whom section 702(a)(1)(B) of the Heartland Disaster Tax Relief Act of 2008 applies for any taxable year, such taxpayer may elect to waive the application of this subsection to such taxpayer for such taxable year.".

(b) CONFORMING AMENDMENTS.—

(1) Section 24(b)(3)(B) is amended by inserting "25A(i)," after "23,".

(2) Section 25(e)(1)(C)(ii) is amended by inserting "25A(i)," after "24,".

(3) Section 26(a)(1) is amended by inserting "25A(i)," after "24,".

(4) Section 25B(g)(2) is amended by inserting "25A(i)," after "23,".

(5) Section 904(i) is amended by inserting "25A(i)," after "24,".

(6) Section 1400C(d)(2) is amended by inserting "25A(i)," after "24,".

(7) Section 6211(b)(4)(A) is amended by inserting "25A by reason of subsection (i)(6) thereof," after "24(d),".

(8) Section 1324(b)(2) of title 31, United States Code, is amended by inserting "25A," before "35".

(c) TREATMENT OF POSSESSIONS.—

(1) PAYMENTS TO POSSESSIONS.—

(A) MIRROR CODE POSSESSION.—The Secretary of the Treasury shall pay to each possession of the United States with a mirror code tax system amounts equal to the loss to that possession by reason of the application of section 25A(i)(6) of the Internal Revenue Code of 1986 (as added by this section) with respect to taxable years beginning in 2009 and 2010. Such amounts shall be determined by the Secretary of the Treasury based on information provided by the government of the respective possession.

(B) OTHER POSSESSIONS.—The Secretary of the Treasury shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury as being equal to the aggregate benefits that would have been provided to residents of such possession by reason of the application of section 25A(i)(6) of such Code (as so added) for taxable years beginning in 2009 and 2010 if a mirror code tax

system had been in effect in such possession. The preceding sentence shall not apply with respect to any possession of the United States unless such possession has a plan, which has been approved by the Secretary of the Treasury, under which such possession will promptly distribute such payments to the residents of such possession.

(2) COORDINATION WITH CREDIT ALLOWED AGAINST UNITED STATES INCOME TAXES.—Section 25A(i)(6) of such Code (as added by this section) shall not apply to a bona fide resident of any possession of the United States.

(3) DEFINITIONS AND SPECIAL RULES.—

(A) POSSESSION OF THE UNITED STATES.—For purposes of this subsection, the term "possession of the United States" includes the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands.

(B) MIRROR CODE TAX SYSTEM.—For purposes of this subsection, the term "mirror code tax system" means, with respect to any possession of the United States, the income tax system of such possession if the income tax liability of the residents of such possession under such system is determined by reference to the income tax laws of the United States as if such possession were the United States.

(C) TREATMENT OF PAYMENTS.—For purposes of section 1324(b)(2) of title 31, United States Code, the payments under this subsection shall be treated in the same manner as a refund due from the credit allowed under section 25A of the Internal Revenue Code of 1986 by reason of subsection (i)(6) of such section (as added by this section).

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

(e) APPLICATION OF EGTRRA SUNSET.—The amendment made by subsection (b)(1) shall be subject to title IX of the Economic Growth and Tax Relief Reconciliation Act of 2001 in the same manner as the provision of such Act to which such amendment relates.

(f) TREASURY STUDIES REGARDING EDUCATION INCENTIVES.—

(1) STUDY REGARDING COORDINATION WITH NON-TAX STUDENT FINANCIAL ASSISTANCE.—The Secretary of the Treasury and the Secretary of Education, or their delegates, shall—

(A) study how to coordinate the credit allowed under section 25A of the Internal Revenue Code of 1986 with the Federal Pell Grant program under section 401 of the Higher Education Act of 1965 to maximize their effectiveness at promoting college affordability, and

(B) examine ways to expedite the delivery of the tax credit.

(2) STUDY REGARDING INCLUSION OF COMMUNITY SERVICE REQUIREMENTS.—The Secretary of the Treasury and the Secretary of Education, or their delegates, shall study the feasibility of requiring including community service as a condition of taking their tuition and related expenses into account under section 25A of the Internal Revenue Code of 1986.

(3) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary of the Treasury, or the Secretary's delegate, shall report to Congress on the results of the studies conducted under this paragraph.

SEC. 1005. COMPUTER TECHNOLOGY AND EQUIPMENT ALLOWED AS A QUALIFIED HIGHER EDUCATION EXPENSE FOR SECTION 529 ACCOUNTS IN 2009 AND 2010.

(a) IN GENERAL.—Section 529(e)(3)(A) is amended by striking "and" at the end of clause (i), by striking the period at the end of clause (ii), and by adding at the end the following:

"(iii) expenses paid or incurred in 2009 or 2010 for the purchase of any computer technology or equipment (as defined in section 170(e)(6)(F)(i)) or Internet access and related services, if such technology, equipment, or services are to be used by the beneficiary and the beneficiary's family during any of the years the beneficiary is enrolled at an eligible educational institution.

Clause (iii) shall not include expenses for computer software designed for sports, games, or hobbies unless the software is predominantly educational in nature.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to expenses paid or incurred after December 31, 2008.

SEC. 1006. EXTENSION OF AND INCREASE IN FIRST-TIME HOMEBUYER CREDIT; WAIVER OF REQUIREMENT TO REPAY.

(a) EXTENSION.—

(1) IN GENERAL.—Section 36(h) is amended by striking "July 1, 2009" and inserting "December 1, 2009".

(2) CONFORMING AMENDMENT.—Section 36(g) is amended by striking "July 1, 2009" and inserting "December 1, 2009".

(b) INCREASE.—

(1) IN GENERAL.—Section 36(b) is amended by striking "$7,500" each place it appears and inserting "$8,000".

(2) CONFORMING AMENDMENT.—Section 36(b)(1)(B) is amended by striking "$3,750" and inserting "$4,000".

(c) WAIVER OF RECAPTURE.—

(1) IN GENERAL.—Paragraph (4) of section 36(f) is amended by adding at the end the following new subparagraph:

"(D) WAIVER OF RECAPTURE FOR PURCHASES IN 2009.—In the case of any credit allowed with respect to the purchase of a principal residence after December 31, 2008, and before December 1, 2009—

"(i) paragraph (1) shall not apply, and

"(ii) paragraph (2) shall apply only if the disposition or cessation described in paragraph (2) with respect to such residence occurs during the 36-month period beginning on the date of the purchase of such residence by the taxpayer.".

(2) CONFORMING AMENDMENT.—Subsection (g) of section 36 is amended by striking "subsection (c)" and inserting "subsections (c) and (f)(4)(D)".

(d) COORDINATION WITH FIRST-TIME HOMEBUYER CREDIT FOR DISTRICT OF COLUMBIA.—

(1) IN GENERAL.—Subsection (e) of section 1400C is amended by adding at the end the following new paragraph:

"(4) COORDINATION WITH NATIONAL FIRST-TIME HOMEBUYERS CREDIT.—No credit shall be allowed under this section to any taxpayer with respect to the purchase of a residence after December 31, 2008, and before December 1, 2009, if a credit

under section 36 is allowable to such taxpayer (or the taxpayer's spouse) with respect to such purchase.".

(2) CONFORMING AMENDMENT.—Section 36(d) is amended by striking paragraph (1).

(e) REMOVAL OF PROHIBITION ON FINANCING BY MORTGAGE REVENUE BONDS.—Section 36(d), as amended by subsection (c)(2), is amended by striking paragraph (2) and by redesignating paragraphs (3) and (4) as paragraphs (1) and (2), respectively.

(f) EFFECTIVE DATE.—The amendments made by this section shall apply to residences purchased after December 31, 2008.

SEC. 1007. SUSPENSION OF TAX ON PORTION OF UNEMPLOYMENT COMPENSATION.

(a) IN GENERAL.—Section 85 of the Internal Revenue Code of 1986 (relating to unemployment compensation) is amended by adding at the end the following new subsection:

"(c) SPECIAL RULE FOR 2009.—In the case of any taxable year beginning in 2009, gross income shall not include so much of the unemployment compensation received by an individual as does not exceed $2,400.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. 1008. ADDITIONAL DEDUCTION FOR STATE SALES TAX AND EXCISE TAX ON THE PURCHASE OF CERTAIN MOTOR VEHICLES.

(a) IN GENERAL.—Subsection (a) of section 164 is amended by inserting after paragraph (5) the following new paragraph:

"(6) Qualified motor vehicle taxes.".

(b) QUALIFIED MOTOR VEHICLE TAXES.—Subsection (b) of section 164 is amended by adding at the end the following new paragraph:

"(6) QUALIFIED MOTOR VEHICLE TAXES.—

"(A) IN GENERAL.—For purposes of this section, the term 'qualified motor vehicle taxes' means any State or local sales or excise tax imposed on the purchase of a qualified motor vehicle.

"(B) LIMITATION BASED ON VEHICLE PRICE.—The amount of any State or local sales or excise tax imposed on the purchase of a qualified motor vehicle taken into account under subparagraph (A) shall not exceed the portion of such tax attributable to so much of the purchase price as does not exceed $49,500.

"(C) INCOME LIMITATION.—The amount otherwise taken into account under subparagraph (A) (after the application of subparagraph (B)) for any taxable year shall be reduced (but not below zero) by the amount which bears the same ratio to the amount which is so treated as—

"(i) the excess (if any) of—

"(I) the taxpayer's modified adjusted gross income for such taxable year, over

"(II) $125,000 ($250,000 in the case of a joint return), bears to

"(ii) $10,000.

For purposes of the preceding sentence, the term 'modified adjusted gross income' means the adjusted gross income of the taxpayer for the taxable year (determined without regard to sections 911, 931, and 933).

"(D) QUALIFIED MOTOR VEHICLE.—For purposes of this paragraph—

"(i) IN GENERAL.—The term 'qualified motor vehicle' means—

"(I) a passenger automobile or light truck which is treated as a motor vehicle for purposes of title II of the Clean Air Act, the gross vehicle weight rating of which is not more than 8,500 pounds, and the original use of which commences with the taxpayer,

"(II) a motorcycle the gross vehicle weight rating of which is not more than 8,500 pounds and the original use of which commences with the taxpayer, and

"(III) a motor home the original use of which commences with the taxpayer.

"(ii) OTHER TERMS.—The terms 'motorcycle' and 'motor home' have the meanings given such terms under section 571.3 of title 49, Code of Federal Regulations (as in effect on the date of the enactment of this paragraph).

"(E) QUALIFIED MOTOR VEHICLE TAXES NOT INCLUDED IN COST OF ACQUIRED PROPERTY.—The last sentence of subsection (a) shall not apply to any qualified motor vehicle taxes.

"(F) COORDINATION WITH GENERAL SALES TAX.—This paragraph shall not apply in the case of a taxpayer who makes an election under paragraph (5) for the taxable year.

"(G) TERMINATION.—This paragraph shall not apply to purchases after December 31, 2009.".

(c) DEDUCTION ALLOWED TO NONITEMIZERS.—

(1) IN GENERAL.—Paragraph (1) of section 63(c) is amended by striking "and" at the end of subparagraph (C), by striking the period at the end of subparagraph (D) and inserting ", and", and by adding at the end the following new subparagraph:

"(E) the motor vehicle sales tax deduction.".

(2) DEFINITION.—Section 63(c) is amended by adding at the end the following new paragraph:

"(9) MOTOR VEHICLE SALES TAX DEDUCTION.—For purposes of paragraph (1), the term 'motor vehicle sales tax deduction' means the amount allowable as a deduction under section 164(a)(6). Such term shall not include any amount taken into account under section 62(a).".

(d) TREATMENT OF DEDUCTION UNDER ALTERNATIVE MINIMUM TAX.—The last sentence of section 56(b)(1)(E) is amended by striking "section 63(c)(1)(D)" and inserting "subparagraphs (D) and (E) of section 63(c)(1)".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to purchases on or after the date of the enactment of this Act in taxable years ending after such date.

PART II—ALTERNATIVE MINIMUM TAX RELIEF

SEC. 1011. EXTENSION OF ALTERNATIVE MINIMUM TAX RELIEF FOR NONREFUNDABLE PERSONAL CREDITS.

(a) IN GENERAL.—Paragraph (2) of section 26(a) (relating to special rule for taxable years 2000 through 2008) is amended—

(1) by striking "or 2008" and inserting "2008, or 2009", and

(2) by striking "**2008**" in the heading thereof and inserting "**2009**".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. 1012. EXTENSION OF INCREASED ALTERNATIVE MINIMUM TAX EXEMPTION AMOUNT.

(a) IN GENERAL.—Paragraph (1) of section 55(d) (relating to exemption amount) is amended—

(1) by striking "($69,950 in the case of taxable years beginning in 2008)" in subparagraph (A) and inserting "($70,950 in the case of taxable years beginning in 2009)", and

(2) by striking "($46,200 in the case of taxable years beginning in 2008)" in subparagraph (B) and inserting "($46,700 in the case of taxable years beginning in 2009)".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

Subtitle B—Energy Incentives

PART I—RENEWABLE ENERGY INCENTIVES

SEC. 1101. EXTENSION OF CREDIT FOR ELECTRICITY PRODUCED FROM CERTAIN RENEWABLE RESOURCES.

(a) IN GENERAL.—Subsection (d) of section 45 is amended—

(1) by striking "2010" in paragraph (1) and inserting "2013",

(2) by striking "2011" each place it appears in paragraphs (2), (3), (4), (6), (7) and (9) and inserting "2014", and

(3) by striking "2012" in paragraph (11)(B) and inserting "2014".

(b) TECHNICAL AMENDMENT.—Paragraph (5) of section 45(d) is amended by striking "and before" and all that follows and inserting " and before October 3, 2008.".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by subsection (a) shall apply to property placed in service after the date of the enactment of this Act.

(2) TECHNICAL AMENDMENT.—The amendment made by subsection (b) shall take effect as if included in section 102 of the Energy Improvement and Extension Act of 2008.

SEC. 1102. ELECTION OF INVESTMENT CREDIT IN LIEU OF PRODUCTION CREDIT.

(a) IN GENERAL.—Subsection (a) of section 48 is amended by adding at the end the following new paragraph:

"(5) ELECTION TO TREAT QUALIFIED FACILITIES AS ENERGY PROPERTY.—

"(A) IN GENERAL.—In the case of any qualified property which is part of a qualified investment credit facility—

"(i) such property shall be treated as energy property for purposes of this section, and

"(ii) the energy percentage with respect to such property shall be 30 percent.

"(B) DENIAL OF PRODUCTION CREDIT.—No credit shall be allowed under section 45 for any taxable year with respect to any qualified investment credit facility.

"(C) QUALIFIED INVESTMENT CREDIT FACILITY.—For purposes of this paragraph, the term 'qualified investment credit facility' means any of the following facilities if no credit has been allowed under section 45 with respect to such facility and the taxpayer makes an irrevocable election to have this paragraph apply to such facility:

"(i) WIND FACILITIES.—Any qualified facility (within the meaning of section 45) described in paragraph (1) of section 45(d) if such facility is placed in service in 2009, 2010, 2011, or 2012.

"(ii) OTHER FACILITIES.—Any qualified facility (within the meaning of section 45) described in paragraph (2), (3), (4), (6), (7), (9), or (11) of section 45(d) if such facility is placed in service in 2009, 2010, 2011, 2012, or 2013.

"(D) QUALIFIED PROPERTY.—For purposes of this paragraph, the term 'qualified property' means property—

"(i) which is—

"(I) tangible personal property, or

"(II) other tangible property (not including a building or its structural components), but only if such property is used as an integral part of the qualified investment credit facility, and

"(ii) with respect to which depreciation (or amortization in lieu of depreciation) is allowable.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to facilities placed in service after December 31, 2008.

SEC. 1103. REPEAL OF CERTAIN LIMITATIONS ON CREDIT FOR RENEWABLE ENERGY PROPERTY.

(a) REPEAL OF LIMITATION ON CREDIT FOR QUALIFIED SMALL WIND ENERGY PROPERTY.—Paragraph (4) of section 48(c) is amended by striking subparagraph (B) and by redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C).

(b) REPEAL OF LIMITATION ON PROPERTY FINANCED BY SUBSIDIZED ENERGY FINANCING.—

(1) IN GENERAL.—Section 48(a)(4) is amended by adding at the end the following new subparagraph:

"(D) TERMINATION.—This paragraph shall not apply to periods after December 31, 2008, under rules similar to the rules of section 48(m) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).".

(2) CONFORMING AMENDMENTS.—

(A) Section 25C(e)(1) is amended by striking "(8), and (9)" and inserting "and (8)".

(B) Section 25D(e) is amended by striking paragraph (9).

(C) Section 48A(b)(2) is amended by inserting "(without regard to subparagraph (D) thereof)" after "section 48(a)(4)".

(D) Section 48B(b)(2) is amended by inserting "(without regard to subparagraph (D) thereof)" after "section 48(a)(4)".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendment made by this section shall apply to periods after December 31, 2008, under rules similar to the rules of section 48(m) of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

(2) CONFORMING AMENDMENTS.—The amendments made by subparagraphs (A) and (B) of subsection (b)(2) shall apply to taxable years beginning after December 31, 2008.

SEC. 1104. COORDINATION WITH RENEWABLE ENERGY GRANTS.

Section 48 is amended by adding at the end the following new subsection:

"(d) COORDINATION WITH DEPARTMENT OF TREASURY GRANTS.—In the case of any property with respect to which the Secretary makes a grant under section 1603 of the American Recovery and Reinvestment Tax Act of 2009—

"(1) DENIAL OF PRODUCTION AND INVESTMENT CREDITS.—No credit shall be determined under this section or section 45 with respect to such property for the taxable year in which such grant is made or any subsequent taxable year.

"(2) RECAPTURE OF CREDITS FOR PROGRESS EXPENDITURES MADE BEFORE GRANT.—If a credit was determined under this section with respect to such property for any taxable year ending before such grant is made—

"(A) the tax imposed under subtitle A on the taxpayer for the taxable year in which such grant is made shall be increased by so much of such credit as was allowed under section 38,

"(B) the general business carryforwards under section 39 shall be adjusted so as to recapture the portion of such credit which was not so allowed, and

"(C) the amount of such grant shall be determined without regard to any reduction in the basis of such property by reason of such credit.

"(3) TREATMENT OF GRANTS.—Any such grant shall—

"(A) not be includible in the gross income of the taxpayer, but

"(B) shall be taken into account in determining the basis of the property to which such grant relates, except that the basis of such property shall be reduced under section 50(c) in the same manner as a credit allowed under subsection (a).".

PART II—INCREASED ALLOCATIONS OF NEW CLEAN RENEWABLE ENERGY BONDS AND QUALIFIED ENERGY CONSERVATION BONDS

SEC. 1111. INCREASED LIMITATION ON ISSUANCE OF NEW CLEAN RENEWABLE ENERGY BONDS.

Subsection (c) of section 54C is amended by adding at the end the following new paragraph:

"(4) ADDITIONAL LIMITATION.—The national new clean renewable energy bond limitation shall be increased by $1,600,000,000. Such increase shall be allocated by the Secretary consistent with the rules of paragraphs (2) and (3).".

SEC. 1112. INCREASED LIMITATION ON ISSUANCE OF QUALIFIED ENERGY CONSERVATION BONDS.

(a) IN GENERAL.—Section 54D(d) is amended by striking "$800,000,000" and inserting "$3,200,000,000".

(b) CLARIFICATION WITH RESPECT TO GREEN COMMUNITY PROGRAMS.—

(1) IN GENERAL.—Clause (ii) of section 54D(f)(1)(A) is amended by inserting "(including the use of loans, grants, or other repayment mechanisms to implement such programs)" after "green community programs".

(2) SPECIAL RULES FOR BONDS FOR IMPLEMENTING GREEN COMMUNITY PROGRAMS.—Subsection (e) of section 54D is amended by adding at the end the following new paragraph:

"(4) SPECIAL RULES FOR BONDS TO IMPLEMENT GREEN COMMUNITY PROGRAMS.—In the case of any bond issued for the purpose of providing loans, grants, or other repayment mechanisms for capital expenditures to implement green community programs, such bond shall not be treated as a private activity bond for purposes of paragraph (3).".

PART III—ENERGY CONSERVATION INCENTIVES

SEC. 1121. EXTENSION AND MODIFICATION OF CREDIT FOR NONBUSINESS ENERGY PROPERTY.

(a) IN GENERAL.—Section 25C is amended by striking subsections (a) and (b) and inserting the following new subsections:

"(a) ALLOWANCE OF CREDIT.—In the case of an individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to 30 percent of the sum of—

"(1) the amount paid or incurred by the taxpayer during such taxable year for qualified energy efficiency improvements, and

"(2) the amount of the residential energy property expenditures paid or incurred by the taxpayer during such taxable year.

"(b) LIMITATION.—The aggregate amount of the credits allowed under this section for taxable years beginning in 2009 and 2010 with respect to any taxpayer shall not exceed $1,500.".

(b) MODIFICATIONS OF STANDARDS FOR ENERGY-EFFICIENT BUILDING PROPERTY.—

(1) ELECTRIC HEAT PUMPS.—Subparagraph (B) of section 25C(d)(3) is amended to read as follows:

"(B) an electric heat pump which achieves the highest efficiency tier established by the Consortium for Energy Efficiency, as in effect on January 1, 2009.".

(2) CENTRAL AIR CONDITIONERS.—Subparagraph (C) of section 25C(d)(3) is amended by striking "2006" and inserting "2009".

(3) WATER HEATERS.—Subparagraph (D) of section 25C(d)(3) is amended to read as follows:

"(D) a natural gas, propane, or oil water heater which has either an energy factor of at least 0.82 or a thermal efficiency of at least 90 percent.".

(4) WOOD STOVES.—Subparagraph (E) of section 25C(d)(3) is amended by inserting ", as measured using a lower heating value" after "75 percent".

(c) MODIFICATIONS OF STANDARDS FOR OIL FURNACES AND HOT WATER BOILERS.—

(1) IN GENERAL.—Paragraph (4) of section 25C(d) is amended to read as follows:

"(4) QUALIFIED NATURAL GAS, PROPANE, AND OIL FURNACES AND HOT WATER BOILERS.—

"(A) QUALIFIED NATURAL GAS FURNACE.—The term 'qualified natural gas furnace' means any natural gas furnace which achieves an annual fuel utilization efficiency rate of not less than 95.

"(B) QUALIFIED NATURAL GAS HOT WATER BOILER.—The term 'qualified natural gas hot water boiler' means any natural gas hot water boiler which achieves an annual fuel utilization efficiency rate of not less than 90.

"(C) QUALIFIED PROPANE FURNACE.—The term 'qualified propane furnace' means any propane furnace which achieves an annual fuel utilization efficiency rate of not less than 95.

"(D) QUALIFIED PROPANE HOT WATER BOILER.—The term 'qualified propane hot water boiler' means any propane hot water boiler which achieves an annual fuel utilization efficiency rate of not less than 90.

"(E) QUALIFIED OIL FURNACES.—The term 'qualified oil furnace' means any oil furnace which achieves an annual fuel utilization efficiency rate of not less than 90.

"(F) QUALIFIED OIL HOT WATER BOILER.—The term 'qualified oil hot water boiler' means any oil hot water boiler which achieves an annual fuel utilization efficiency rate of not less than 90.".

(2) CONFORMING AMENDMENT.—Clause (ii) of section 25C(d)(2)(A) is amended to read as follows:

"(ii) any qualified natural gas furnace, qualified propane furnace, qualified oil furnace, qualified natural gas hot water boiler, qualified propane hot water boiler, or qualified oil hot water boiler, or".

(d) MODIFICATIONS OF STANDARDS FOR QUALIFIED ENERGY EFFICIENCY IMPROVEMENTS.—

(1) QUALIFICATIONS FOR EXTERIOR WINDOWS, DOORS, AND SKYLIGHTS.—Subsection (c) of section 25C is amended by adding at the end the following new paragraph:

"(4) QUALIFICATIONS FOR EXTERIOR WINDOWS, DOORS, AND SKYLIGHTS.—Such term shall not include any component described in subparagraph (B) or (C) of paragraph (2) unless such component is equal to or below a U factor of 0.30 and SHGC of 0.30.".

(2) ADDITIONAL QUALIFICATION FOR INSULATION.—Subparagraph (A) of section 25C(c)(2) is amended by inserting "and meets the prescriptive criteria for such material or system established by the 2009 International Energy Conservation Code, as such Code (including supplements) is in effect on the date of the enactment of the American Recovery and Reinvestment Tax Act of 2009" after "such dwelling unit".

(e) EXTENSION.—Section 25C(g)(2) is amended by striking "December 31, 2009" and inserting "December 31, 2010".

(f) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to taxable years beginning after December 31, 2008.

(2) EFFICIENCY STANDARDS.—The amendments made by paragraphs (1), (2), and (3) of subsection (b) and subsections (c) and (d) shall apply to property placed in service after the date of the enactment of this Act.

SEC. 1122. MODIFICATION OF CREDIT FOR RESIDENTIAL ENERGY EFFICIENT PROPERTY.

(a) REMOVAL OF CREDIT LIMITATION FOR PROPERTY PLACED IN SERVICE.—

(1) IN GENERAL.—Paragraph (1) of section 25D(b) is amended to read as follows:

"(1) MAXIMUM CREDIT FOR FUEL CELLS.—In the case of any qualified fuel cell property expenditure, the credit allowed under subsection (a) (determined without regard to subsection (c)) for any taxable year shall not exceed $500 with respect to each half kilowatt of capacity of the qualified fuel cell property (as defined in section 48(c)(1)) to which such expenditure relates.".

(2) CONFORMING AMENDMENT.—Paragraph (4) of section 25D(e) is amended—

(A) by striking all that precedes subparagraph (B) and inserting the following:

"(4) FUEL CELL EXPENDITURE LIMITATIONS IN CASE OF JOINT OCCUPANCY.—In the case of any dwelling unit with respect to which qualified fuel cell property expenditures are made and which is jointly occupied and used during any calendar year as a residence by two or more individuals, the following rules shall apply:

"(A) MAXIMUM EXPENDITURES FOR FUEL CELLS.—The maximum amount of such expenditures which may be taken into account under subsection (a) by all such individuals with respect to such dwelling unit during such calendar year shall be $1,667 in the case of each half kilowatt of capacity of qualified fuel cell property (as defined in section 48(c)(1)) with respect to which such expenditures relate.", and

(B) by striking subparagraph (C).

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. 1123. TEMPORARY INCREASE IN CREDIT FOR ALTERNATIVE FUEL VEHICLE REFUELING PROPERTY.

(a) IN GENERAL.—Section 30C(e) is amended by adding at the end the following new paragraph:

"(6) SPECIAL RULE FOR PROPERTY PLACED IN SERVICE DURING 2009 AND 2010.—In the case of property placed in service in taxable years beginning after December 31, 2008, and before January 1, 2011—

"(A) in the case of any such property which does not relate to hydrogen—

"(i) subsection (a) shall be applied by substituting '50 percent' for '30 percent',

"(ii) subsection (b)(1) shall be applied by substituting '$50,000' for '$30,000', and

"(iii) subsection (b)(2) shall be applied by substituting '$2,000' for '$1,000', and

"(B) in the case of any such property which relates to hydrogen, subsection (b)(1) shall be applied by substituting '$200,000' for '$30,000'.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2008.

PART IV—MODIFICATION OF CREDIT FOR CARBON DIOXIDE SEQUESTRATION

SEC. 1131. APPLICATION OF MONITORING REQUIREMENTS TO CARBON DIOXIDE USED AS A TERTIARY INJECTANT.

(a) IN GENERAL.—Section 45Q(a)(2) is amended by striking "and" at the end of subparagraph (A), by striking the period at the end of subparagraph (B) and inserting ", and", and by adding at the end the following new subparagraph:

"(C) disposed of by the taxpayer in secure geological storage.".

(b) CONFORMING AMENDMENTS.—

(1) Section 45Q(d)(2) is amended—

(A) by striking "subsection (a)(1)(B)" and inserting "paragraph (1)(B) or (2)(C) of subsection (a)",

(B) by striking "and unminable coal seems" and inserting ", oil and gas reservoirs, and unminable coal seams", and

(C) by inserting "the Secretary of Energy, and the Secretary of the Interior," after "Environmental Protection Agency".

(2) Section 45Q(a)(1)(B) is amended by inserting "and not used by the taxpayer as described in paragraph (2)(B)" after "storage".

(3) Section 45Q(e) is amended by striking "captured and disposed of or used as a tertiary injectant" and inserting "taken into account in accordance with subsection (a)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to carbon dioxide captured after the date of the enactment of this Act.

PART V—PLUG-IN ELECTRIC DRIVE MOTOR VEHICLES

SEC. 1141. CREDIT FOR NEW QUALIFIED PLUG-IN ELECTRIC DRIVE MOTOR VEHICLES.

(a) IN GENERAL.—Section 30D is amended to read as follows:

"SEC. 30D. NEW QUALIFIED PLUG-IN ELECTRIC DRIVE MOTOR VEHICLES.

"(a) ALLOWANCE OF CREDIT.—There shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of the credit amounts determined under subsection (b) with respect to each new qualified plug-in electric drive motor vehicle placed in service by the taxpayer during the taxable year.

"(b) PER VEHICLE DOLLAR LIMITATION.—

"(1) IN GENERAL.—The amount determined under this subsection with respect to any new qualified plug-in electric drive motor vehicle is the sum of the amounts determined under paragraphs (2) and (3) with respect to such vehicle.

"(2) BASE AMOUNT.—The amount determined under this paragraph is $2,500.

"(3) BATTERY CAPACITY.—In the case of a vehicle which draws propulsion energy from a battery with not less than 5 kilowatt hours of capacity, the amount determined under this paragraph is $417, plus $417 for each kilowatt hour of capacity in excess of 5 kilowatt hours. The amount determined under this paragraph shall not exceed $5,000.

"(c) APPLICATION WITH OTHER CREDITS.—

"(1) BUSINESS CREDIT TREATED AS PART OF GENERAL BUSINESS CREDIT.—So much of the credit which would be allowed under subsection (a) for any taxable year (determined without regard to this subsection) that is attributable to property of a character subject to an allowance for depreciation shall be treated as a credit listed in section 38(b) for such taxable year (and not allowed under subsection (a)).

"(2) PERSONAL CREDIT.—

"(A) IN GENERAL.—For purposes of this title, the credit allowed under subsection (a) for any taxable year (determined after application of paragraph (1)) shall be treated as a credit allowable under subpart A for such taxable year.

"(B) LIMITATION BASED ON AMOUNT OF TAX.—In the case of a taxable year to which section 26(a)(2) does not apply, the credit allowed under subsection (a) for any taxable year (determined after application of paragraph (1)) shall not exceed the excess of—

"(i) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

"(ii) the sum of the credits allowable under subpart A (other than this section and sections 23 and 25D) and section 27 for the taxable year.

"(d) NEW QUALIFIED PLUG-IN ELECTRIC DRIVE MOTOR VEHICLE.—For purposes of this section—

"(1) IN GENERAL.—The term 'new qualified plug-in electric drive motor vehicle' means a motor vehicle—

"(A) the original use of which commences with the taxpayer,

"(B) which is acquired for use or lease by the taxpayer and not for resale,

"(C) which is made by a manufacturer,

"(D) which is treated as a motor vehicle for purposes of title II of the Clean Air Act,

"(E) which has a gross vehicle weight rating of less than 14,000 pounds, and

"(F) which is propelled to a significant extent by an electric motor which draws electricity from a battery which—

"(i) has a capacity of not less than 4 kilowatt hours, and

"(ii) is capable of being recharged from an external source of electricity.

"(2) MOTOR VEHICLE.—The term 'motor vehicle' means any vehicle which is manufactured primarily for use on public streets, roads, and highways (not including a vehicle operated exclusively on a rail or rails) and which has at least 4 wheels.

"(3) MANUFACTURER.—The term 'manufacturer' has the meaning given such term in regulations prescribed by the Administrator of the Environmental Protection Agency for purposes of the administration of title II of the Clean Air Act (42 U.S.C. 7521 et seq.).

"(4) BATTERY CAPACITY.—The term 'capacity' means, with respect to any battery, the quantity of electricity which the battery is capable of storing, expressed in kilowatt hours, as measured from a 100 percent state of charge to a 0 percent state of charge.

"(e) LIMITATION ON NUMBER OF NEW QUALIFIED PLUG-IN ELECTRIC DRIVE MOTOR VEHICLES ELIGIBLE FOR CREDIT.—

"(1) IN GENERAL.—In the case of a new qualified plug-in electric drive motor vehicle sold during the phaseout period, only the applicable percentage of the credit otherwise allowable under subsection (a) shall be allowed.

"(2) PHASEOUT PERIOD.—For purposes of this subsection, the phaseout period is the period beginning with the second calendar quarter following the calendar quarter which includes the first date on which the number of new qualified plug-in electric drive motor vehicles manufactured by the manufacturer of the vehicle referred to in paragraph (1) sold for use in the United States after December 31, 2009, is at least 200,000.

"(3) APPLICABLE PERCENTAGE.—For purposes of paragraph (1), the applicable percentage is—

"(A) 50 percent for the first 2 calendar quarters of the phaseout period,

"(B) 25 percent for the 3d and 4th calendar quarters of the phaseout period, and

"(C) 0 percent for each calendar quarter thereafter.

"(4) CONTROLLED GROUPS.—Rules similar to the rules of section 30B(f)(4) shall apply for purposes of this subsection.

"(f) SPECIAL RULES.—

"(1) BASIS REDUCTION.—For purposes of this subtitle, the basis of any property for which a credit is allowable under

subsection (a) shall be reduced by the amount of such credit so allowed.

"(2) NO DOUBLE BENEFIT.—The amount of any deduction or other credit allowable under this chapter for a new qualified plug-in electric drive motor vehicle shall be reduced by the amount of credit allowed under subsection (a) for such vehicle.

"(3) PROPERTY USED BY TAX-EXEMPT ENTITY.—In the case of a vehicle the use of which is described in paragraph (3) or (4) of section 50(b) and which is not subject to a lease, the person who sold such vehicle to the person or entity using such vehicle shall be treated as the taxpayer that placed such vehicle in service, but only if such person clearly discloses to such person or entity in a document the amount of any credit allowable under subsection (a) with respect to such vehicle (determined without regard to subsection (c)).

"(4) PROPERTY USED OUTSIDE UNITED STATES NOT QUALIFIED.—No credit shall be allowable under subsection (a) with respect to any property referred to in section 50(b)(1).

"(5) RECAPTURE.—The Secretary shall, by regulations, provide for recapturing the benefit of any credit allowable under subsection (a) with respect to any property which ceases to be property eligible for such credit.

"(6) ELECTION NOT TO TAKE CREDIT.—No credit shall be allowed under subsection (a) for any vehicle if the taxpayer elects to not have this section apply to such vehicle.

"(7) INTERACTION WITH AIR QUALITY AND MOTOR VEHICLE SAFETY STANDARDS.—A motor vehicle shall not be considered eligible for a credit under this section unless such vehicle is in compliance with—

"(A) the applicable provisions of the Clean Air Act for the applicable make and model year of the vehicle (or applicable air quality provisions of State law in the case of a State which has adopted such provision under a waiver under section 209(b) of the Clean Air Act), and

"(B) the motor vehicle safety provisions of sections 30101 through 30169 of title 49, United States Code.".

(b) CONFORMING AMENDMENTS.—

(1) Section 30B(d)(3)(D) is amended by striking "subsection (d) thereof" and inserting "subsection (c) thereof".

(2) Section 38(b)(35) is amended by striking "30D(d)(1)" and inserting "30D(c)(1)".

(3) Section 1016(a)(25) is amended by striking "section 30D(e)(4)" and inserting "section 30D(f)(1)".

(4) Section 6501(m) is amended by striking "section 30D(e)(9)" and inserting "section 30D(e)(4)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to vehicles acquired after December 31, 2009.

SEC. 1142. CREDIT FOR CERTAIN PLUG-IN ELECTRIC VEHICLES.

(a) IN GENERAL.—Section 30 is amended to read as follows:

"SEC. 30. CERTAIN PLUG-IN ELECTRIC VEHICLES.

"(a) ALLOWANCE OF CREDIT.—There shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to 10 percent of the cost of any qualified plug-in electric vehicle placed in service by the taxpayer during the taxable year.

"(b) PER VEHICLE DOLLAR LIMITATION.—The amount of the credit allowed under subsection (a) with respect to any vehicle shall not exceed $2,500.

"(c) APPLICATION WITH OTHER CREDITS.—

"(1) BUSINESS CREDIT TREATED AS PART OF GENERAL BUSINESS CREDIT.—So much of the credit which would be allowed under subsection (a) for any taxable year (determined without regard to this subsection) that is attributable to property of a character subject to an allowance for depreciation shall be treated as a credit listed in section 38(b) for such taxable year (and not allowed under subsection (a)).

"(2) PERSONAL CREDIT.—

"(A) IN GENERAL.—For purposes of this title, the credit allowed under subsection (a) for any taxable year (determined after application of paragraph (1)) shall be treated as a credit allowable under subpart A for such taxable year.

"(B) LIMITATION BASED ON AMOUNT OF TAX.—In the case of a taxable year to which section 26(a)(2) does not apply, the credit allowed under subsection (a) for any taxable year (determined after application of paragraph (1)) shall not exceed the excess of—

"(i) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

"(ii) the sum of the credits allowable under subpart A (other than this section and sections 23, 25D, and 30D) and section 27 for the taxable year.

"(d) QUALIFIED PLUG-IN ELECTRIC VEHICLE.—For purposes of this section—

"(1) IN GENERAL.—The term 'qualified plug-in electric vehicle' means a specified vehicle—

"(A) the original use of which commences with the taxpayer,

"(B) which is acquired for use or lease by the taxpayer and not for resale,

"(C) which is made by a manufacturer,

"(D) which is manufactured primarily for use on public streets, roads, and highways,

"(E) which has a gross vehicle weight rating of less than 14,000 pounds, and

"(F) which is propelled to a significant extent by an electric motor which draws electricity from a battery which—

"(i) has a capacity of not less than 4 kilowatt hours (2.5 kilowatt hours in the case of a vehicle with 2 or 3 wheels), and

"(ii) is capable of being recharged from an external source of electricity.

"(2) SPECIFIED VEHICLE.—The term 'specified vehicle' means any vehicle which—

"(A) is a low speed vehicle within the meaning of section 571.3 of title 49, Code of Federal Regulations (as in effect on the date of the enactment of the American Recovery and Reinvestment Tax Act of 2009), or

"(B) has 2 or 3 wheels.

"(3) MANUFACTURER.—The term 'manufacturer' has the meaning given such term in regulations prescribed by the Administrator of the Environmental Protection Agency for purposes of the administration of title II of the Clean Air Act (42 U.S.C. 7521 et seq.).

"(4) BATTERY CAPACITY.—The term 'capacity' means, with respect to any battery, the quantity of electricity which the battery is capable of storing, expressed in kilowatt hours, as measured from a 100 percent state of charge to a 0 percent state of charge.

"(e) SPECIAL RULES.—

"(1) BASIS REDUCTION.—For purposes of this subtitle, the basis of any property for which a credit is allowable under subsection (a) shall be reduced by the amount of such credit so allowed.

"(2) NO DOUBLE BENEFIT.—The amount of any deduction or other credit allowable under this chapter for a new qualified plug-in electric drive motor vehicle shall be reduced by the amount of credit allowable under subsection (a) for such vehicle.

"(3) PROPERTY USED BY TAX-EXEMPT ENTITY.—In the case of a vehicle the use of which is described in paragraph (3) or (4) of section 50(b) and which is not subject to a lease, the person who sold such vehicle to the person or entity using such vehicle shall be treated as the taxpayer that placed such vehicle in service, but only if such person clearly discloses to such person or entity in a document the amount of any credit allowable under subsection (a) with respect to such vehicle (determined without regard to subsection (c)).

"(4) PROPERTY USED OUTSIDE UNITED STATES NOT QUALIFIED.—No credit shall be allowable under subsection (a) with respect to any property referred to in section 50(b)(1).

"(5) RECAPTURE.—The Secretary shall, by regulations, provide for recapturing the benefit of any credit allowable under subsection (a) with respect to any property which ceases to be property eligible for such credit.

"(6) ELECTION NOT TO TAKE CREDIT.—No credit shall be allowed under subsection (a) for any vehicle if the taxpayer elects to not have this section apply to such vehicle.

"(f) TERMINATION.—This section shall not apply to any vehicle acquired after December 31, 2011.".

(b) CONFORMING AMENDMENTS.—

(1)(A) Section 24(b)(3)(B) is amended by inserting "30," after "25D,".

(B) Section 25(e)(1)(C)(ii) is amended by inserting "30," after "25D,".

(C) Section 25B(g)(2) is amended by inserting "30," after "25D,".

(D) Section 26(a)(1) is amended by inserting "30," after "25D,".

(E) Section 904(i) is amended by striking "and 25B" and inserting "25B, 30, and 30D".

(F) Section 1400C(d)(2) is amended by striking "and 25D" and inserting "25D, and 30".

(2) Paragraph (1) of section 30B(h) is amended to read as follows:

"(1) MOTOR VEHICLE.—The term 'motor vehicle' means any vehicle which is manufactured primarily for use on public

streets, roads, and highways (not including a vehicle operated exclusively on a rail or rails) and which has at least 4 wheels.".

(3) Section 30C(d)(2)(A) is amended by striking ", 30,".

(4)(A) Section 53(d)(1)(B) is amended by striking clause (iii) and redesignating clause (iv) as clause (iii).

(B) Subclause (II) of section 53(d)(1)(B)(iii), as so redesignated, is amended by striking "increased in the manner provided in clause (iii)".

(5) Section 55(c)(3) is amended by striking "30(b)(3),".

(6) Section 1016(a)(25) is amended by striking "section 30(d)(1)" and inserting "section 30(e)(1)".

(7) Section 6501(m) is amended by striking "section 30(d)(4)" and inserting "section 30(e)(6)".

(8) The item in the table of sections for subpart B of part IV of subchapter A of chapter 1 is amended to read as follows:

"Sec. 30. Certain plug-in electric vehicles.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to vehicles acquired after the date of the enactment of this Act.

(d) TRANSITIONAL RULE.—In the case of a vehicle acquired after the date of the enactment of this Act and before January 1, 2010, no credit shall be allowed under section 30 of the Internal Revenue Code of 1986, as added by this section, if credit is allowable under section 30D of such Code with respect to such vehicle.

(e) APPLICATION OF EGTRRA SUNSET.—The amendment made by subsection (b)(1)(A) shall be subject to title IX of the Economic Growth and Tax Relief Reconciliation Act of 2001 in the same manner as the provision of such Act to which such amendment relates.

SEC. 1143. CONVERSION KITS.

(a) IN GENERAL.—Section 30B (relating to alternative motor vehicle credit) is amended by redesignating subsections (i) and (j) as subsections (j) and (k), respectively, and by inserting after subsection (h) the following new subsection:

"(i) PLUG-IN CONVERSION CREDIT.—

"(1) IN GENERAL.—For purposes of subsection (a), the plug-in conversion credit determined under this subsection with respect to any motor vehicle which is converted to a qualified plug-in electric drive motor vehicle is 10 percent of so much of the cost of the converting such vehicle as does not exceed $40,000.

"(2) QUALIFIED PLUG-IN ELECTRIC DRIVE MOTOR VEHICLE.—For purposes of this subsection, the term 'qualified plug-in electric drive motor vehicle' means any new qualified plug-in electric drive motor vehicle (as defined in section 30D, determined without regard to whether such vehicle is made by a manufacturer or whether the original use of such vehicle commences with the taxpayer).

"(3) CREDIT ALLOWED IN ADDITION TO OTHER CREDITS.—The credit allowed under this subsection shall be allowed with respect to a motor vehicle notwithstanding whether a credit has been allowed with respect to such motor vehicle under this section (other than this subsection) in any preceding taxable year.

"(4) TERMINATION.—This subsection shall not apply to conversions made after December 31, 2011.".

(b) CREDIT TREATED AS PART OF ALTERNATIVE MOTOR VEHICLE CREDIT.—Section 30B(a) is amended by striking "and" at the end of paragraph (3), by striking the period at the end of paragraph (4) and inserting ", and", and by adding at the end the following new paragraph:

"(5) the plug-in conversion credit determined under subsection (i).".

(c) NO RECAPTURE FOR VEHICLES CONVERTED TO QUALIFIED PLUG-IN ELECTRIC DRIVE MOTOR VEHICLES.—Paragraph (8) of section 30B(h) is amended by adding at the end the following: ", except that no benefit shall be recaptured if such property ceases to be eligible for such credit by reason of conversion to a qualified plug-in electric drive motor vehicle.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to property placed in service after the date of the enactment of this Act.

SEC. 1144. TREATMENT OF ALTERNATIVE MOTOR VEHICLE CREDIT AS A PERSONAL CREDIT ALLOWED AGAINST AMT.

(a) IN GENERAL.—Paragraph (2) of section 30B(g) is amended to read as follows:

"(2) PERSONAL CREDIT.—

"(A) IN GENERAL.—For purposes of this title, the credit allowed under subsection (a) for any taxable year (determined after application of paragraph (1)) shall be treated as a credit allowable under subpart A for such taxable year.

"(B) LIMITATION BASED ON AMOUNT OF TAX.—In the case of a taxable year to which section 26(a)(2) does not apply, the credit allowed under subsection (a) for any taxable year (determined after application of paragraph (1)) shall not exceed the excess of—

"(i) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

"(ii) the sum of the credits allowable under subpart A (other than this section and sections 23, 25D, 30, and 30D) and section 27 for the taxable year.".

(b) CONFORMING AMENDMENTS.—

(1)(A) Section 24(b)(3)(B), as amended by this Act, is amended by inserting "30B," after "30,".

(B) Section 25(e)(1)(C)(ii), as amended by this Act, is amended by inserting "30B," after "30,".

(C) Section 25B(g)(2), as amended by this Act, is amended by inserting "30B," after "30,".

(D) Section 26(a)(1), as amended by this Act, is amended by inserting "30B," after "30,".

(E) Section 904(i), as amended by this Act, is amended by inserting "30B," after "30".

(F) Section 1400C(d)(2), as amended by this Act, is amended by striking "and 30" and inserting "30, and 30B".

(2) Section 30C(d)(2)(A), as amended by this Act, is amended by striking "sections 27 and 30B" and inserting "section 27".

(3) Section 55(c)(3) is amended by striking "30B(g)(2),".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

(d) APPLICATION OF EGTRRA SUNSET.—The amendment made by subsection (b)(1)(A) shall be subject to title IX of the Economic Growth and Tax Relief Reconciliation Act of 2001 in the same manner as the provision of such Act to which such amendment relates.

PART VI—PARITY FOR TRANSPORTATION FRINGE BENEFITS

SEC. 1151. INCREASED EXCLUSION AMOUNT FOR COMMUTER TRANSIT BENEFITS AND TRANSIT PASSES.

(a) IN GENERAL.—Paragraph (2) of section 132(f) is amended by adding at the end the following flush sentence:

"In the case of any month beginning on or after the date of the enactment of this sentence and before January 1, 2011, subparagraph (A) shall be applied as if the dollar amount therein were the same as the dollar amount in effect for such month under subparagraph (B).".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to months beginning on or after the date of the enactment of this section.

Subtitle C—Tax Incentives for Business

PART I—TEMPORARY INVESTMENT INCENTIVES

SEC. 1201. SPECIAL ALLOWANCE FOR CERTAIN PROPERTY ACQUIRED DURING 2009.

(a) EXTENSION OF SPECIAL ALLOWANCE.—

(1) IN GENERAL.—Paragraph (2) of section 168(k) is amended—

(A) by striking "January 1, 2010" and inserting "January 1, 2011", and

(B) by striking "January 1, 2009" each place it appears and inserting "January 1, 2010".

(2) CONFORMING AMENDMENTS.—

(A) The heading for subsection (k) of section 168 is amended by striking "JANUARY 1, 2009" and inserting "JANUARY 1, 2010".

(B) The heading for clause (ii) of section 168(k)(2)(B) is amended by striking "PRE-JANUARY 1, 2009" and inserting "PRE-JANUARY 1, 2010".

(C) Subparagraph (B) of section 168(l)(5) is amended by striking "January 1, 2009" and inserting "January 1, 2010".

(D) Subparagraph (C) of section 168(n)(2) is amended by striking "January 1, 2009" and inserting "January 1, 2010".

(E) Subparagraph (B) of section 1400N(d)(3) is amended by striking "January 1, 2009" and inserting "January 1, 2010".

(3) TECHNICAL AMENDMENTS.—

(A) Subparagraph (D) of section 168(k)(4) is amended—

(i) by striking "and" at the end of clause (i),

(ii) by redesignating clause (ii) as clause (iii), and

(iii) by inserting after clause (i) the following new clause:

"(ii) 'April 1, 2008' shall be substituted for 'January 1, 2008' in subparagraph (A)(iii)(I) thereof, and".

(B) Subparagraph (A) of section 6211(b)(4) is amended by inserting "168(k)(4)," after "53(e),".

(b) EXTENSION OF ELECTION TO ACCELERATE THE AMT AND RESEARCH CREDITS IN LIEU OF BONUS DEPRECIATION.—

(1) IN GENERAL.—Section 168(k)(4) (relating to election to accelerate the AMT and research credits in lieu of bonus depreciation) is amended—

(A) by striking "2009" and inserting "2010"in subparagraph (D)(iii) (as redesignated by subsection (a)(3)), and

(B) by adding at the end the following new subparagraph:

"(H) SPECIAL RULES FOR EXTENSION PROPERTY.—

"(i) TAXPAYERS PREVIOUSLY ELECTING ACCELERATION.—In the case of a taxpayer who made the election under subparagraph (A) for its first taxable year ending after March 31, 2008—

"(I) the taxpayer may elect not to have this paragraph apply to extension property, but

"(II) if the taxpayer does not make the election under subclause (I), in applying this paragraph to the taxpayer a separate bonus depreciation amount, maximum amount, and maximum increase amount shall be computed and applied to eligible qualified property which is extension property and to eligible qualified property which is not extension property.

"(ii) TAXPAYERS NOT PREVIOUSLY ELECTING ACCELERATION.—In the case of a taxpayer who did not make the election under subparagraph (A) for its first taxable year ending after March 31, 2008—

"(I) the taxpayer may elect to have this paragraph apply to its first taxable year ending after December 31, 2008, and each subsequent taxable year, and

"(II) if the taxpayer makes the election under subclause (I), this paragraph shall only apply to eligible qualified property which is extension property.

"(iii) EXTENSION PROPERTY.—For purposes of this subparagraph, the term 'extension property' means property which is eligible qualified property solely by reason of the extension of the application of the special allowance under paragraph (1) pursuant to the amendments made by section 1201(a) of the American Recovery and Reinvestment Tax Act of 2009 (and the application of such extension to this paragraph pursuant to the amendment made by section 1201(b)(1) of such Act).".

(2) TECHNICAL AMENDMENT.—Section 6211(b)(4)(A) is amended by inserting "168(k)(4)," after "53(e),".

(c) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to property placed in service after December 31, 2008, in taxable years ending after such date.

(2) TECHNICAL AMENDMENTS.—The amendments made by subsections (a)(3) and (b)(2) shall apply to taxable years ending after March 31, 2008.

SEC. 1202. TEMPORARY INCREASE IN LIMITATIONS ON EXPENSING OF CERTAIN DEPRECIABLE BUSINESS ASSETS.

(a) IN GENERAL.—Paragraph (7) of section 179(b) is amended—

(1) by striking "2008" and inserting "2008, or 2009", and

(2) by striking "2008" in the heading thereof and inserting "2008, AND 2009".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

PART II—SMALL BUSINESS PROVISIONS

SEC. 1211. 5-YEAR CARRYBACK OF OPERATING LOSSES OF SMALL BUSINESSES.

(a) IN GENERAL.—Subparagraph (H) of section 172(b)(1) is amended to read as follows:

"(H) CARRYBACK FOR 2008 NET OPERATING LOSSES OF SMALL BUSINESSES.—

"(i) IN GENERAL.—If an eligible small business elects the application of this subparagraph with respect to an applicable 2008 net operating loss—

"(I) subparagraph (A)(i) shall be applied by substituting any whole number elected by the taxpayer which is more than 2 and less than 6 for '2',

"(II) subparagraph (E)(ii) shall be applied by substituting the whole number which is one less than the whole number substituted under subclause (I) for '2', and

"(III) subparagraph (F) shall not apply.

"(ii) APPLICABLE 2008 NET OPERATING LOSS.—For purposes of this subparagraph, the term 'applicable 2008 net operating loss' means—

"(I) the taxpayer's net operating loss for any taxable year ending in 2008, or

"(II) if the taxpayer elects to have this subclause apply in lieu of subclause (I), the taxpayer's net operating loss for any taxable year beginning in 2008.

"(iii) ELECTION.—Any election under this subparagraph shall be made in such manner as may be prescribed by the Secretary, and shall be made by the due date (including extension of time) for filing the taxpayer's return for the taxable year of the net operating loss. Any such election, once made, shall be irrevocable. Any election under this subparagraph may be made only with respect to 1 taxable year.

"(iv) ELIGIBLE SMALL BUSINESS.—For purposes of this subparagraph, the term 'eligible small business' has the meaning given such term by subparagraph (F)(iii), except that in applying such subparagraph, section 448(c) shall be applied by substituting '$15,000,000' for '$5,000,000' each place it appears.".

(b) CONFORMING AMENDMENT.—Section 172 is amended by striking subsection (k) and by redesignating subsection (l) as subsection (k).

(c) ANTI-ABUSE RULES.—The Secretary of Treasury or the Secretary's designee shall prescribe such rules as are necessary to prevent the abuse of the purposes of the amendments made by this section, including anti-stuffing rules, anti-churning rules (including rules relating to sale-leasebacks), and rules similar to the rules under section 1091 of the Internal Revenue Code of 1986 relating to losses from wash sales.

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall apply to net operating losses arising in taxable years ending after December 31, 2007.

(2) TRANSITIONAL RULE.—In the case of a net operating loss for a taxable year ending before the date of the enactment of this Act—

(A) any election made under section 172(b)(3) of the Internal Revenue Code of 1986 with respect to such loss may (notwithstanding such section) be revoked before the applicable date,

(B) any election made under section 172(b)(1)(H) of such Code with respect to such loss shall (notwithstanding such section) be treated as timely made if made before the applicable date, and

(C) any application under section 6411(a) of such Code with respect to such loss shall be treated as timely filed if filed before the applicable date.

For purposes of this paragraph, the term "applicable date" means the date which is 60 days after the date of the enactment of this Act.

SEC. 1212. DECREASED REQUIRED ESTIMATED TAX PAYMENTS IN 2009 FOR CERTAIN SMALL BUSINESSES.

Paragraph (1) of section 6654(d) is amended by adding at the end the following new subparagraph:

"(D) SPECIAL RULE FOR 2009.—

"(i) IN GENERAL.—Notwithstanding subparagraph (C), in the case of any taxable year beginning in 2009, clause (ii) of subparagraph (B) shall be applied to any qualified individual by substituting '90 percent' for '100 percent'.

"(ii) QUALIFIED INDIVIDUAL.—For purposes of this subparagraph, the term 'qualified individual' means any individual if—

"(I) the adjusted gross income shown on the return of such individual for the preceding taxable year is less than $500,000, and

"(II) such individual certifies that more than 50 percent of the gross income shown on the return of such individual for the preceding taxable year was income from a small business.

A certification under subclause (II) shall be in such form and manner and filed at such time as the Secretary may by regulations prescribe.

"(iii) INCOME FROM A SMALL BUSINESS.—For purposes of clause (ii), income from a small business means, with respect to any individual, income from a trade or business the average number of employees of which was less than 500 employees for the calendar year ending with or within the preceding taxable year of the individual.

"(iv) SEPARATE RETURNS.—In the case of a married individual (within the meaning of section 7703) who files a separate return for the taxable year for which the amount of the installment is being determined, clause (ii)(I) shall be applied by substituting '$250,000' for '$500,000'.

"(v) ESTATES AND TRUSTS.—In the case of an estate or trust, adjusted gross income shall be determined as provided in section 67(e).".

PART III—INCENTIVES FOR NEW JOBS

SEC. 1221. INCENTIVES TO HIRE UNEMPLOYED VETERANS AND DISCONNECTED YOUTH.

(a) IN GENERAL.—Subsection (d) of section 51 is amended by adding at the end the following new paragraph:

"(14) CREDIT ALLOWED FOR UNEMPLOYED VETERANS AND DISCONNECTED YOUTH HIRED IN 2009 OR 2010.—

"(A) IN GENERAL.—Any unemployed veteran or disconnected youth who begins work for the employer during 2009 or 2010 shall be treated as a member of a targeted group for purposes of this subpart.

"(B) DEFINITIONS.—For purposes of this paragraph—

"(i) UNEMPLOYED VETERAN.—The term 'unemployed veteran' means any veteran (as defined in paragraph (3)(B), determined without regard to clause (ii) thereof) who is certified by the designated local agency as—

"(I) having been discharged or released from active duty in the Armed Forces at any time during the 5-year period ending on the hiring date, and

"(II) being in receipt of unemployment compensation under State or Federal law for not less than 4 weeks during the 1-year period ending on the hiring date.

"(ii) DISCONNECTED YOUTH.—The term 'disconnected youth' means any individual who is certified by the designated local agency—

"(I) as having attained age 16 but not age 25 on the hiring date,

"(II) as not regularly attending any secondary, technical, or post-secondary school during the 6-month period preceding the hiring date,

"(III) as not regularly employed during such 6-month period, and

"(IV) as not readily employable by reason of lacking a sufficient number of basic skills.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to individuals who begin work for the employer after December 31, 2008.

PART IV—RULES RELATING TO DEBT INSTRUMENTS

SEC. 1231. DEFERRAL AND RATABLE INCLUSION OF INCOME ARISING FROM BUSINESS INDEBTEDNESS DISCHARGED BY THE REACQUISITION OF A DEBT INSTRUMENT.

(a) IN GENERAL.—Section 108 (relating to income from discharge of indebtedness) is amended by adding at the end the following new subsection:

"(i) DEFERRAL AND RATABLE INCLUSION OF INCOME ARISING FROM BUSINESS INDEBTEDNESS DISCHARGED BY THE REACQUISITION OF A DEBT INSTRUMENT.—

"(1) IN GENERAL.—At the election of the taxpayer, income from the discharge of indebtedness in connection with the reacquisition after December 31, 2008, and before January 1, 2011, of an applicable debt instrument shall be includible in gross income ratably over the 5-taxable-year period beginning with—

"(A) in the case of a reacquisition occurring in 2009, the fifth taxable year following the taxable year in which the reacquisition occurs, and

"(B) in the case of a reacquisition occurring in 2010, the fourth taxable year following the taxable year in which the reacquisition occurs.

"(2) DEFERRAL OF DEDUCTION FOR ORIGINAL ISSUE DISCOUNT IN DEBT FOR DEBT EXCHANGES.—

"(A) IN GENERAL.—If, as part of a reacquisition to which paragraph (1) applies, any debt instrument is issued for the applicable debt instrument being reacquired (or is treated as so issued under subsection (e)(4) and the regulations thereunder) and there is any original issue discount determined under subpart A of part V of subchapter P of this chapter with respect to the debt instrument so issued—

"(i) except as provided in clause (ii), no deduction otherwise allowable under this chapter shall be allowed to the issuer of such debt instrument with respect to the portion of such original issue discount which—

"(I) accrues before the 1st taxable year in the 5-taxable-year period in which income from the discharge of indebtedness attributable to the reacquisition of the debt instrument is includible under paragraph (1), and

"(II) does not exceed the income from the discharge of indebtedness with respect to the debt instrument being reacquired, and

"(ii) the aggregate amount of deductions disallowed under clause (i) shall be allowed as a deduction ratably over the 5-taxable-year period described in clause (i)(I).

If the amount of the original issue discount accruing before such 1st taxable year exceeds the income from the discharge of indebtedness with respect to the applicable debt

instrument being reacquired, the deductions shall be disallowed in the order in which the original issue discount is accrued.

"(B) DEEMED DEBT FOR DEBT EXCHANGES.—For purposes of subparagraph (A), if any debt instrument is issued by an issuer and the proceeds of such debt instrument are used directly or indirectly by the issuer to reacquire an applicable debt instrument of the issuer, the debt instrument so issued shall be treated as issued for the debt instrument being reacquired. If only a portion of the proceeds from a debt instrument are so used, the rules of subparagraph (A) shall apply to the portion of any original issue discount on the newly issued debt instrument which is equal to the portion of the proceeds from such instrument used to reacquire the outstanding instrument.

"(3) APPLICABLE DEBT INSTRUMENT.—For purposes of this subsection—

"(A) APPLICABLE DEBT INSTRUMENT.—The term 'applicable debt instrument' means any debt instrument which was issued by—

"(i) a C corporation, or

"(ii) any other person in connection with the conduct of a trade or business by such person.

"(B) DEBT INSTRUMENT.—The term 'debt instrument' means a bond, debenture, note, certificate, or any other instrument or contractual arrangement constituting indebtedness (within the meaning of section 1275(a)(1)).

"(4) REACQUISITION.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'reacquisition' means, with respect to any applicable debt instrument, any acquisition of the debt instrument by—

"(i) the debtor which issued (or is otherwise the obligor under) the debt instrument, or

"(ii) a related person to such debtor.

"(B) ACQUISITION.—The term 'acquisition' shall, with respect to any applicable debt instrument, include an acquisition of the debt instrument for cash, the exchange of the debt instrument for another debt instrument (including an exchange resulting from a modification of the debt instrument), the exchange of the debt instrument for corporate stock or a partnership interest, and the contribution of the debt instrument to capital. Such term shall also include the complete forgiveness of the indebtedness by the holder of the debt instrument.

"(5) OTHER DEFINITIONS AND RULES.—For purposes of this subsection—

"(A) RELATED PERSON.—The determination of whether a person is related to another person shall be made in the same manner as under subsection (e)(4).

"(B) ELECTION.—

"(i) IN GENERAL.—An election under this subsection with respect to any applicable debt instrument shall be made by including with the return of tax imposed by chapter 1 for the taxable year in which the reacquisition of the debt instrument occurs a statement which—

"(I) clearly identifies such instrument, and

"(II) includes the amount of income to which paragraph (1) applies and such other information as the Secretary may prescribe.

"(ii) ELECTION IRREVOCABLE.—Such election, once made, is irrevocable.

"(iii) PASS-THRU ENTITIES.—In the case of a partnership, S corporation, or other pass-thru entity, the election under this subsection shall be made by the partnership, the S corporation, or other entity involved.

"(C) COORDINATION WITH OTHER EXCLUSIONS.—If a taxpayer elects to have this subsection apply to an applicable debt instrument, subparagraphs (A), (B), (C), and (D) of subsection (a)(1) shall not apply to the income from the discharge of such indebtedness for the taxable year of the election or any subsequent taxable year.

"(D) ACCELERATION OF DEFERRED ITEMS.—

"(i) IN GENERAL.—In the case of the death of the taxpayer, the liquidation or sale of substantially all the assets of the taxpayer (including in a title 11 or similar case), the cessation of business by the taxpayer, or similar circumstances, any item of income or deduction which is deferred under this subsection (and has not previously been taken into account) shall be taken into account in the taxable year in which such event occurs (or in the case of a title 11 or similar case, the day before the petition is filed).

"(ii) SPECIAL RULE FOR PASS-THRU ENTITIES.—The rule of clause (i) shall also apply in the case of the sale or exchange or redemption of an interest in a partnership, S corporation, or other pass- thru entity by a partner, shareholder, or other person holding an ownership interest in such entity.

"(6) SPECIAL RULE FOR PARTNERSHIPS.—In the case of a partnership, any income deferred under this subsection shall be allocated to the partners in the partnership immediately before the discharge in the manner such amounts would have been included in the distributive shares of such partners under section 704 if such income were recognized at such time. Any decrease in a partner's share of partnership liabilities as a result of such discharge shall not be taken into account for purposes of section 752 at the time of the discharge to the extent it would cause the partner to recognize gain under section 731. Any decrease in partnership liabilities deferred under the preceding sentence shall be taken into account by such partner at the same time, and to the extent remaining in the same amount, as income deferred under this subsection is recognized.

"(7) SECRETARIAL AUTHORITY.—The Secretary may prescribe such regulations, rules, or other guidance as may be necessary or appropriate for purposes of applying this subsection, including—

"(A) extending the application of the rules of paragraph (5)(D) to other circumstances where appropriate,

"(B) requiring reporting of the election (and such other information as the Secretary may require) on returns of tax for subsequent taxable years, and

"(C) rules for the application of this subsection to partnerships, S corporations, and other pass-thru entities, including for the allocation of deferred deductions.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to discharges in taxable years ending after December 31, 2008.

SEC. 1232. MODIFICATIONS OF RULES FOR ORIGINAL ISSUE DISCOUNT ON CERTAIN HIGH YIELD OBLIGATIONS.

(a) SUSPENSION OF SPECIAL RULES.—Section 163(e)(5) (relating to special rules for original issue discount on certain high yield obligations) is amended by redesignating subparagraph (F) as subparagraph (G) and by inserting after subparagraph (E) the following new subparagraph:

"(F) SUSPENSION OF APPLICATION OF PARAGRAPH.—

"(i) TEMPORARY SUSPENSION.—This paragraph shall not apply to any applicable high yield discount obligation issued during the period beginning on September 1, 2008, and ending on December 31, 2009, in exchange (including an exchange resulting from a modification of the debt instrument) for an obligation which is not an applicable high yield discount obligation and the issuer (or obligor) of which is the same as the issuer (or obligor) of such applicable high yield discount obligation. The preceding sentence shall not apply to any obligation the interest on which is interest described in section 871(h)(4) (without regard to subparagraph (D) thereof) or to any obligation issued to a related person (within the meaning of section 108(e)(4)).

"(ii) SUCCESSIVE APPLICATION.—Any obligation to which clause (i) applies shall not be treated as an applicable high yield discount obligation for purposes of applying this subparagraph to any other obligation issued in exchange for such obligation.

"(iii) SECRETARIAL AUTHORITY TO SUSPEND APPLICATION.—The Secretary may apply this paragraph with respect to debt instruments issued in periods following the period described in clause (i) if the Secretary determines that such application is appropriate in light of distressed conditions in the debt capital markets.".

(b) INTEREST RATE USED IN DETERMINING HIGH YIELD OBLIGATIONS.—The last sentence of section 163(i)(1) is amended—

(1) by inserting "(i)" after "regulation", and

(2) by inserting ", or (ii) permit, on a temporary basis, a rate to be used with respect to any debt instrument which is higher than the applicable Federal rate if the Secretary determines that such rate is appropriate in light of distressed conditions in the debt capital markets" before the period at the end.

(c) EFFECTIVE DATE.—

(1) SUSPENSION.—The amendments made by subsection (a) shall apply to obligations issued after August 31, 2008, in taxable years ending after such date.

(2) INTEREST RATE AUTHORITY.—The amendments made by subsection (b) shall apply to obligations issued after December 31, 2009, in taxable years ending after such date.

PART V—QUALIFIED SMALL BUSINESS STOCK

SEC. 1241. SPECIAL RULES APPLICABLE TO QUALIFIED SMALL BUSINESS STOCK FOR 2009 AND 2010.

(a) IN GENERAL.—Section 1202(a) is amended by adding at the end the following new paragraph:

"(3) SPECIAL RULES FOR 2009 AND 2010.—In the case of qualified small business stock acquired after the date of the enactment of this paragraph and before January 1, 2011—

"(A) paragraph (1) shall be applied by substituting '75 percent' for '50 percent', and

"(B) paragraph (2) shall not apply.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to stock acquired after the date of the enactment of this Act.

PART VI—S CORPORATIONS

SEC. 1251. TEMPORARY REDUCTION IN RECOGNITION PERIOD FOR BUILT-IN GAINS TAX.

(a) IN GENERAL.—Paragraph (7) of section 1374(d) (relating to definitions and special rules) is amended to read as follows:

"(7) RECOGNITION PERIOD.—

"(A) IN GENERAL.—The term 'recognition period' means the 10-year period beginning with the 1st day of the 1st taxable year for which the corporation was an S corporation.

"(B) SPECIAL RULE FOR 2009 AND 2010.—In the case of any taxable year beginning in 2009 or 2010, no tax shall be imposed on the net recognized built-in gain of an S corporation if the 7th taxable year in the recognition period preceded such taxable year. The preceding sentence shall be applied separately with respect to any asset to which paragraph (8) applies.

"(C) SPECIAL RULE FOR DISTRIBUTIONS TO SHAREHOLDERS.—For purposes of applying this section to any amount includible in income by reason of distributions to shareholders pursuant to section 593(e)—

"(i) subparagraph (A) shall be applied without regard to the phrase '10-year', and

"(ii) subparagraph (B) shall not apply.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2008.

PART VII—RULES RELATING TO OWNERSHIP CHANGES

SEC. 1261. CLARIFICATION OF REGULATIONS RELATED TO LIMITATIONS ON CERTAIN BUILT-IN LOSSES FOLLOWING AN OWNERSHIP CHANGE.

(a) FINDINGS.—Congress finds as follows:

(1) The delegation of authority to the Secretary of the Treasury under section 382(m) of the Internal Revenue Code of 1986 does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers.

(2) Internal Revenue Service Notice 2008–83 is inconsistent with the congressional intent in enacting such section 382(m).

(3) The legal authority to prescribe Internal Revenue Service Notice 2008–83 is doubtful.

(4) However, as taxpayers should generally be able to rely on guidance issued by the Secretary of the Treasury legislation is necessary to clarify the force and effect of Internal Revenue Service Notice 2008–83 and restore the proper application under the Internal Revenue Code of 1986 of the limitation on built-in losses following an ownership change of a bank.

(b) DETERMINATION OF FORCE AND EFFECT OF INTERNAL REVENUE SERVICE NOTICE 2008–83 EXEMPTING BANKS FROM LIMITATION ON CERTAIN BUILT–IN LOSSES FOLLOWING OWNERSHIP CHANGE.—

(1) IN GENERAL.—Internal Revenue Service Notice 2008–83—

(A) shall be deemed to have the force and effect of law with respect to any ownership change (as defined in section 382(g) of the Internal Revenue Code of 1986) occurring on or before January 16, 2009, and

(B) shall have no force or effect with respect to any ownership change after such date.

(2) BINDING CONTRACTS.—Notwithstanding paragraph (1), Internal Revenue Service Notice 2008–83 shall have the force and effect of law with respect to any ownership change (as so defined) which occurs after January 16, 2009, if such change—

(A) is pursuant to a written binding contract entered into on or before such date, or

(B) is pursuant to a written agreement entered into on or before such date and such agreement was described on or before such date in a public announcement or in a filing with the Securities and Exchange Commission required by reason of such ownership change.

SEC. 1262. TREATMENT OF CERTAIN OWNERSHIP CHANGES FOR PURPOSES OF LIMITATIONS ON NET OPERATING LOSS CARRYFORWARDS AND CERTAIN BUILT-IN LOSSES.

(a) IN GENERAL.—Section 382 is amended by adding at the end the following new subsection:

"(n) SPECIAL RULE FOR CERTAIN OWNERSHIP CHANGES.—

"(1) IN GENERAL.—The limitation contained in subsection (a) shall not apply in the case of an ownership change which is pursuant to a restructuring plan of a taxpayer which—

"(A) is required under a loan agreement or a commitment for a line of credit entered into with the Department of the Treasury under the Emergency Economic Stabilization Act of 2008, and

"(B) is intended to result in a rationalization of the costs, capitalization, and capacity with respect to the manufacturing workforce of, and suppliers to, the taxpayer and its subsidiaries.

"(2) SUBSEQUENT ACQUISITIONS.—Paragraph (1) shall not apply in the case of any subsequent ownership change unless such ownership change is described in such paragraph.

"(3) LIMITATION BASED ON CONTROL IN CORPORATION.—

"(A) IN GENERAL.—Paragraph (1) shall not apply in the case of any ownership change if, immediately after such ownership change, any person (other than a voluntary employees' beneficiary association under section 501(c)(9)) owns stock of the new loss corporation possessing 50 percent or more of the total combined voting power of all classes of stock entitled to vote, or of the total value of the stock of such corporation.

"(B) TREATMENT OF RELATED PERSONS.—

"(i) IN GENERAL.—Related persons shall be treated as a single person for purposes of this paragraph.

"(ii) RELATED PERSONS.—For purposes of clause (i), a person shall be treated as related to another person if—

"(I) such person bears a relationship to such other person described in section 267(b) or 707(b), or

"(II) such persons are members of a group of persons acting in concert.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to ownership changes after the date of the enactment of this Act.

Subtitle D—Manufacturing Recovery Provisions

SEC. 1301. TEMPORARY EXPANSION OF AVAILABILITY OF INDUSTRIAL DEVELOPMENT BONDS TO FACILITIES MANUFACTURING INTANGIBLE PROPERTY.

(a) IN GENERAL.—Subparagraph (C) of section 144(a)(12) is amended—

(1) by striking "For purposes of this paragraph, the term" and inserting "For purposes of this paragraph—

"(i) IN GENERAL.—The term", and

(2) by striking the last sentence and inserting the following new clauses:

"(ii) CERTAIN FACILITIES INCLUDED.—Such term includes facilities which are directly related and ancillary to a manufacturing facility (determined without regard to this clause) if—

"(I) such facilities are located on the same site as the manufacturing facility, and

"(II) not more than 25 percent of the net proceeds of the issue are used to provide such facilities.

"(iii) SPECIAL RULES FOR BONDS ISSUED IN 2009 AND 2010.—In the case of any issue made after the date of enactment of this clause and before January 1, 2011, clause (ii) shall not apply and the net proceeds from a bond shall be considered to be used to provide a manufacturing facility if such proceeds are used to provide—

"(I) a facility which is used in the creation or production of intangible property which is described in section 197(d)(1)(C)(iii), or

"(II) a facility which is functionally related and subordinate to a manufacturing facility (determined without regard to this subclause) if such facility is located on the same site as the manufacturing facility.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after the date of the enactment of this Act.

SEC. 1302. CREDIT FOR INVESTMENT IN ADVANCED ENERGY FACILITIES.

(a) IN GENERAL.—Section 46 (relating to amount of credit) is amended by striking "and" at the end of paragraph (3), by striking the period at the end of paragraph (4), and by adding at the end the following new paragraph:

"(5) the qualifying advanced energy project credit.".

(b) AMOUNT OF CREDIT.—Subpart E of part IV of subchapter A of chapter 1 (relating to rules for computing investment credit) is amended by inserting after section 48B the following new section:

"SEC. 48C. QUALIFYING ADVANCED ENERGY PROJECT CREDIT.

"(a) IN GENERAL.—For purposes of section 46, the qualifying advanced energy project credit for any taxable year is an amount equal to 30 percent of the qualified investment for such taxable year with respect to any qualifying advanced energy project of the taxpayer.

"(b) QUALIFIED INVESTMENT.—

"(1) IN GENERAL.—For purposes of subsection (a), the qualified investment for any taxable year is the basis of eligible property placed in service by the taxpayer during such taxable year which is part of a qualifying advanced energy project.

"(2) CERTAIN QUALIFIED PROGRESS EXPENDITURES RULES MADE APPLICABLE.—Rules similar to the rules of subsections (c)(4) and (d) of section 46 (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of this section.

"(3) LIMITATION.—The amount which is treated for all taxable years with respect to any qualifying advanced energy project shall not exceed the amount designated by the Secretary as eligible for the credit under this section.

"(c) DEFINITIONS.—

"(1) QUALIFYING ADVANCED ENERGY PROJECT.—

"(A) IN GENERAL.—The term 'qualifying advanced energy project' means a project—

"(i) which re-equips, expands, or establishes a manufacturing facility for the production of—

"(I) property designed to be used to produce energy from the sun, wind, geothermal deposits (within the meaning of section 613(e)(2)), or other renewable resources,

"(II) fuel cells, microturbines, or an energy storage system for use with electric or hybrid-electric motor vehicles,

"(III) electric grids to support the transmission of intermittent sources of renewable energy, including storage of such energy,

"(IV) property designed to capture and sequester carbon dioxide emissions,

"(V) property designed to refine or blend renewable fuels or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies),

"(VI) new qualified plug-in electric drive motor vehicles (as defined by section 30D), qualified plug-in electric vehicles (as defined by section 30(d)), or components which are designed specifically for use with such vehicles, including electric motors, generators, and power control units, or

"(VII) other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary, and

"(ii) any portion of the qualified investment of which is certified by the Secretary under subsection (d) as eligible for a credit under this section.

"(B) EXCEPTION.—Such term shall not include any portion of a project for the production of any property which is used in the refining or blending of any transportation fuel (other than renewable fuels).

"(2) ELIGIBLE PROPERTY.—The term 'eligible property' means any property—

"(A) which is necessary for the production of property described in paragraph (1)(A)(i),

"(B) which is—

"(i) tangible personal property, or

"(ii) other tangible property (not including a building or its structural components), but only if such property is used as an integral part of the qualified investment credit facility, and

"(C) with respect to which depreciation (or amortization in lieu of depreciation) is allowable.

"(d) QUALIFYING ADVANCED ENERGY PROJECT PROGRAM.—

"(1) ESTABLISHMENT.—

"(A) IN GENERAL.—Not later than 180 days after the date of enactment of this section, the Secretary, in consultation with the Secretary of Energy, shall establish a qualifying advanced energy project program to consider and award certifications for qualified investments eligible for credits under this section to qualifying advanced energy project sponsors.

"(B) LIMITATION.—The total amount of credits that may be allocated under the program shall not exceed $2,300,000,000.

"(2) CERTIFICATION.—

"(A) APPLICATION PERIOD.—Each applicant for certification under this paragraph shall submit an application containing such information as the Secretary may require during the 2-year period beginning on the date the Secretary establishes the program under paragraph (1).

"(B) TIME TO MEET CRITERIA FOR CERTIFICATION.—Each applicant for certification shall have 1 year from the date of acceptance by the Secretary of the application during which to provide to the Secretary evidence that the requirements of the certification have been met.

"(C) PERIOD OF ISSUANCE.—An applicant which receives a certification shall have 3 years from the date of issuance

of the certification in order to place the project in service and if such project is not placed in service by that time period, then the certification shall no longer be valid.

"(3) SELECTION CRITERIA.—In determining which qualifying advanced energy projects to certify under this section, the Secretary—

"(A) shall take into consideration only those projects where there is a reasonable expectation of commercial viability, and

"(B) shall take into consideration which projects—

"(i) will provide the greatest domestic job creation (both direct and indirect) during the credit period,

"(ii) will provide the greatest net impact in avoiding or reducing air pollutants or anthropogenic emissions of greenhouse gases,

"(iii) have the greatest potential for technological innovation and commercial deployment,

"(iv) have the lowest levelized cost of generated or stored energy, or of measured reduction in energy consumption or greenhouse gas emission (based on costs of the full supply chain), and

"(v) have the shortest project time from certification to completion.

"(4) REVIEW AND REDISTRIBUTION.—

"(A) REVIEW.—Not later than 4 years after the date of enactment of this section, the Secretary shall review the credits allocated under this section as of such date.

"(B) REDISTRIBUTION.—The Secretary may reallocate credits awarded under this section if the Secretary determines that—

"(i) there is an insufficient quantity of qualifying applications for certification pending at the time of the review, or

"(ii) any certification made pursuant to paragraph (2) has been revoked pursuant to paragraph (2)(B) because the project subject to the certification has been delayed as a result of third party opposition or litigation to the proposed project.

"(C) REALLOCATION.—If the Secretary determines that credits under this section are available for reallocation pursuant to the requirements set forth in paragraph (2), the Secretary is authorized to conduct an additional program for applications for certification.

"(5) DISCLOSURE OF ALLOCATIONS.—The Secretary shall, upon making a certification under this subsection, publicly disclose the identity of the applicant and the amount of the credit with respect to such applicant.

"(e) DENIAL OF DOUBLE BENEFIT.—A credit shall not be allowed under this section for any qualified investment for which a credit is allowed under section 48, 48A, or 48B.".

(c) CONFORMING AMENDMENTS.—

(1) Section 49(a)(1)(C) is amended by striking "and" at the end of clause (iii), by striking the period at the end of clause (iv) and inserting ", and", and by adding after clause (iv) the following new clause:

"(v) the basis of any property which is part of a qualifying advanced energy project under section 48C.".

(2) The table of sections for subpart E of part IV of subchapter A of chapter 1 is amended by inserting after the item relating to section 48B the following new item:

"48C. Qualifying advanced energy project credit.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to periods after the date of the enactment of this Act, under rules similar to the rules of section 48(m) of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

Subtitle E—Economic Recovery Tools

SEC. 1401. RECOVERY ZONE BONDS.

(a) IN GENERAL.—Subchapter Y of chapter 1 is amended by adding at the end the following new part:

"PART III—RECOVERY ZONE BONDS

"SEC. 1400U–1. ALLOCATION OF RECOVERY ZONE BONDS.

"(a) ALLOCATIONS.—

"(1) IN GENERAL.—

"(A) GENERAL ALLOCATION.—The Secretary shall allocate the national recovery zone economic development bond limitation and the national recovery zone facility bond limitation among the States in the proportion that each such State's 2008 State employment decline bears to the aggregate of the 2008 State employment declines for all of the States.

"(B) MINIMUM ALLOCATION.—The Secretary shall adjust the allocations under subparagraph (A) for any calendar year for each State to the extent necessary to ensure that no State receives less than 0.9 percent of the national recovery zone economic development bond limitation and 0.9 percent of the national recovery zone facility bond limitation.

"(2) 2008 STATE EMPLOYMENT DECLINE.—For purposes of this subsection, the term '2008 State employment decline' means, with respect to any State, the excess (if any) of—

"(A) the number of individuals employed in such State determined for December 2007, over

"(B) the number of individuals employed in such State determined for December 2008.

"(3) ALLOCATIONS BY STATES.—

"(A) IN GENERAL.—Each State with respect to which an allocation is made under paragraph (1) shall reallocate such allocation among the counties and large municipalities in such State in the proportion to each such county's or municipality's 2008 employment decline bears to the aggregate of the 2008 employment declines for all the counties and municipalities in such State. A county or municipality

may waive any portion of an allocation made under this subparagraph.

"(B) LARGE MUNICIPALITIES.—For purposes of subparagraph (A), the term 'large municipality' means a municipality with a population of more than 100,000.

"(C) DETERMINATION OF LOCAL EMPLOYMENT DECLINES.—For purposes of this paragraph, the employment decline of any municipality or county shall be determined in the same manner as determining the State employment decline under paragraph (2), except that in the case of a municipality any portion of which is in a county, such portion shall be treated as part of such municipality and not part of such county.

"(4) NATIONAL LIMITATIONS.—

"(A) RECOVERY ZONE ECONOMIC DEVELOPMENT BONDS.—There is a national recovery zone economic development bond limitation of $10,000,000,000.

"(B) RECOVERY ZONE FACILITY BONDS.—There is a national recovery zone facility bond limitation of $15,000,000,000.

"(b) RECOVERY ZONE.—For purposes of this part, the term 'recovery zone' means—

"(1) any area designated by the issuer as having significant poverty, unemployment, rate of home foreclosures, or general distress,

"(2) any area designated by the issuer as economically distressed by reason of the closure or realignment of a military installation pursuant to the Defense Base Closure and Realignment Act of 1990, and

"(3) any area for which a designation as an empowerment zone or renewal community is in effect.

"SEC. 1400U–2. RECOVERY ZONE ECONOMIC DEVELOPMENT BONDS.

"(a) IN GENERAL.—In the case of a recovery zone economic development bond—

"(1) such bond shall be treated as a qualified bond for purposes of section 6431, and

"(2) subsection (b) of such section shall be applied by substituting '45 percent' for '35 percent'.

"(b) RECOVERY ZONE ECONOMIC DEVELOPMENT BOND.—

"(1) IN GENERAL.—For purposes of this section, the term 'recovery zone economic development bond' means any build America bond (as defined in section 54AA(d)) issued before January 1, 2011, as part of issue if—

"(A) 100 percent of the excess of—

"(i) the available project proceeds (as defined in section 54A) of such issue, over

"(ii) the amounts in a reasonably required reserve (within the meaning of section 150(a)(3)) with respect to such issue,

are to be used for one or more qualified economic development purposes, and

"(B) the issuer designates such bond for purposes of this section.

"(2) LIMITATION ON AMOUNT OF BONDS DESIGNATED.—The maximum aggregate face amount of bonds which may be designated by any issuer under paragraph (1) shall not exceed

the amount of the recovery zone economic development bond limitation allocated to such issuer under section 1400U–1.

"(c) QUALIFIED ECONOMIC DEVELOPMENT PURPOSE.—For purposes of this section, the term 'qualified economic development purpose' means expenditures for purposes of promoting development or other economic activity in a recovery zone, including—

"(1) capital expenditures paid or incurred with respect to property located in such zone,

"(2) expenditures for public infrastructure and construction of public facilities, and

"(3) expenditures for job training and educational programs.

"SEC. 1400U–3. RECOVERY ZONE FACILITY BONDS.

"(a) IN GENERAL.—For purposes of part IV of subchapter B (relating to tax exemption requirements for State and local bonds), the term 'exempt facility bond' includes any recovery zone facility bond.

"(b) RECOVERY ZONE FACILITY BOND.—

"(1) IN GENERAL.—For purposes of this section, the term 'recovery zone facility bond' means any bond issued as part of an issue if—

"(A) 95 percent or more of the net proceeds (as defined in section 150(a)(3)) of such issue are to be used for recovery zone property,

"(B) such bond is issued before January 1, 2011, and

"(C) the issuer designates such bond for purposes of this section.

"(2) LIMITATION ON AMOUNT OF BONDS DESIGNATED.—The maximum aggregate face amount of bonds which may be designated by any issuer under paragraph (1) shall not exceed the amount of recovery zone facility bond limitation allocated to such issuer under section 1400U–1.

"(c) RECOVERY ZONE PROPERTY.—For purposes of this section—

"(1) IN GENERAL.—The term 'recovery zone property' means any property to which section 168 applies (or would apply but for section 179) if—

"(A) such property was constructed, reconstructed, renovated, or acquired by purchase (as defined in section 179(d)(2)) by the taxpayer after the date on which the designation of the recovery zone took effect,

"(B) the original use of which in the recovery zone commences with the taxpayer, and

"(C) substantially all of the use of which is in the recovery zone and is in the active conduct of a qualified business by the taxpayer in such zone.

"(2) QUALIFIED BUSINESS.—The term 'qualified business' means any trade or business except that—

"(A) the rental to others of real property located in a recovery zone shall be treated as a qualified business only if the property is not residential rental property (as defined in section 168(e)(2)), and

"(B) such term shall not include any trade or business consisting of the operation of any facility described in section 144(c)(6)(B).

"(3) SPECIAL RULES FOR SUBSTANTIAL RENOVATIONS AND SALE-LEASEBACK.—Rules similar to the rules of subsections

(a)(2) and (b) of section 1397D shall apply for purposes of this subsection.

"(d) NONAPPLICATION OF CERTAIN RULES.—Sections 146 (relating to volume cap) and 147(d) (relating to acquisition of existing property not permitted) shall not apply to any recovery zone facility bond.".

(b) CLERICAL AMENDMENT.—The table of parts for subchapter Y of chapter 1 of such Code is amended by adding at the end the following new item:

"PART III. RECOVERY ZONE BONDS.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after the date of the enactment of this Act.

SEC. 1402. TRIBAL ECONOMIC DEVELOPMENT BONDS.

(a) IN GENERAL.—Section 7871 is amended by adding at the end the following new subsection:

"(f) TRIBAL ECONOMIC DEVELOPMENT BONDS.—

"(1) ALLOCATION OF LIMITATION.—

"(A) IN GENERAL.—The Secretary shall allocate the national tribal economic development bond limitation among the Indian tribal governments in such manner as the Secretary, in consultation with the Secretary of the Interior, determines appropriate.

"(B) NATIONAL LIMITATION.—There is a national tribal economic development bond limitation of $2,000,000,000.

"(2) BONDS TREATED AS EXEMPT FROM TAX.—In the case of a tribal economic development bond—

"(A) notwithstanding subsection (c), such bond shall be treated for purposes of this title in the same manner as if such bond were issued by a State,

"(B) the Indian tribal government issuing such bond and any instrumentality of such Indian tribal government shall be treated as a State for purposes of section 141, and

"(C) section 146 shall not apply.

"(3) TRIBAL ECONOMIC DEVELOPMENT BOND.—

"(A) IN GENERAL.—For purposes of this section, the term 'tribal economic development bond' means any bond issued by an Indian tribal government—

"(i) the interest on which would be exempt from tax under section 103 if issued by a State or local government, and

"(ii) which is designated by the Indian tribal government as a tribal economic development bond for purposes of this subsection.

"(B) EXCEPTIONS.—Such term shall not include any bond issued as part of an issue if any portion of the proceeds of such issue are used to finance—

"(i) any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any other property actually used in the conduct of such gaming, or

"(ii) any facility located outside the Indian reservation (as defined in section 168(j)(6)).

"(C) LIMITATION ON AMOUNT OF BONDS DESIGNATED.—The maximum aggregate face amount of bonds which may be designated by any Indian tribal government under subparagraph (A) shall not exceed the amount of national tribal economic development bond limitation allocated to such government under paragraph (1).".

(b) STUDY.—The Secretary of the Treasury, or the Secretary's delegate, shall conduct a study of the effects of the amendment made by subsection (a). Not later than 1 year after the date of the enactment of this Act, the Secretary of the Treasury, or the Secretary's delegate, shall report to Congress on the results of the study conducted under this paragraph, including the Secretary's recommendations regarding such amendment.

(c) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to obligations issued after the date of the enactment of this Act.

SEC. 1403. INCREASE IN NEW MARKETS TAX CREDIT.

(a) IN GENERAL.—Section 45D(f)(1) is amended—

(1) by striking "and" at the end of subparagraph (C),

(2) by striking ", 2007, 2008, and 2009." in subparagraph (D), and inserting "and 2007,", and

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

"(E) $5,000,000,000 for 2008, and

"(F) $5,000,000,000 for 2009.".

(b) SPECIAL RULE FOR ALLOCATION OF INCREASED 2008 LIMITATION.—The amount of the increase in the new markets tax credit limitation for calendar year 2008 by reason of the amendments made by subsection (a) shall be allocated in accordance with section 45D(f)(2) of the Internal Revenue Code of 1986 to qualified community development entities (as defined in section 45D(c) of such Code) which—

(1) submitted an allocation application with respect to calendar year 2008, and

(2)(A) did not receive an allocation for such calendar year, or

(B) received an allocation for such calendar year in an amount less than the amount requested in the allocation application.

SEC. 1404. COORDINATION OF LOW-INCOME HOUSING CREDIT AND LOW-INCOME HOUSING GRANTS.

Subsection (i) of section 42 is amended by adding at the end the following new paragraph:

"(9) COORDINATION WITH LOW-INCOME HOUSING GRANTS.—

"(A) REDUCTION IN STATE HOUSING CREDIT CEILING FOR LOW-INCOME HOUSING GRANTS RECEIVED IN 2009.—For purposes of this section, the amounts described in clauses (i) through (iv) of subsection (h)(3)(C) with respect to any State for 2009 shall each be reduced by so much of such amount as is taken into account in determining the amount of any grant to such State under section 1602 of the American Recovery and Reinvestment Tax Act of 2009.

"(B) SPECIAL RULE FOR BASIS.—Basis of a qualified low-income building shall not be reduced by the amount of any grant described in subparagraph (A).".

Subtitle F—Infrastructure Financing Tools

PART I—IMPROVED MARKETABILITY FOR TAX-EXEMPT BONDS

SEC. 1501. DE MINIMIS SAFE HARBOR EXCEPTION FOR TAX-EXEMPT INTEREST EXPENSE OF FINANCIAL INSTITUTIONS.

(a) IN GENERAL.—Subsection (b) of section 265 is amended by adding at the end the following new paragraph:

"(7) DE MINIMIS EXCEPTION FOR BONDS ISSUED DURING 2009 OR 2010.—

"(A) IN GENERAL.—In applying paragraph (2)(A), there shall not be taken into account tax-exempt obligations issued during 2009 or 2010.

"(B) LIMITATION.—The amount of tax-exempt obligations not taken into account by reason of subparagraph (A) shall not exceed 2 percent of the amount determined under paragraph (2)(B).

"(C) REFUNDINGS.—For purposes of this paragraph, a refunding bond (whether a current or advance refunding) shall be treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).".

(b) TREATMENT AS FINANCIAL INSTITUTION PREFERENCE ITEM.—Clause (iv) of section 291(e)(1)(B) is amended by adding at the end the following: "That portion of any obligation not taken into account under paragraph (2)(A) of section 265(b) by reason of paragraph (7) of such section shall be treated for purposes of this section as having been acquired on August 7, 1986.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after December 31, 2008.

SEC. 1502. MODIFICATION OF SMALL ISSUER EXCEPTION TO TAX-EXEMPT INTEREST EXPENSE ALLOCATION RULES FOR FINANCIAL INSTITUTIONS.

(a) IN GENERAL.—Paragraph (3) of section 265(b) (relating to exception for certain tax-exempt obligations) is amended by adding at the end the following new subparagraph:

"(G) SPECIAL RULES FOR OBLIGATIONS ISSUED DURING 2009 AND 2010.—

"(i) INCREASE IN LIMITATION.—In the case of obligations issued during 2009 or 2010, subparagraphs (C)(i), (D)(i), and (D)(iii)(II) shall each be applied by substituting '$30,000,000' for '$10,000,000'.

"(ii) QUALIFIED 501(C)(3) BONDS TREATED AS ISSUED BY EXEMPT ORGANIZATION.—In the case of a qualified 501(c)(3) bond (as defined in section 145) issued during 2009 or 2010, this paragraph shall be applied by treating the 501(c)(3) organization for whose benefit such bond was issued as the issuer.

"(iii) SPECIAL RULE FOR QUALIFIED FINANCINGS.—In the case of a qualified financing issue issued during 2009 or 2010—

"(I) subparagraph (F) shall not apply, and

"(II) any obligation issued as a part of such issue shall be treated as a qualified tax-exempt

obligation if the requirements of this paragraph are met with respect to each qualified portion of the issue (determined by treating each qualified portion as a separate issue which is issued by the qualified borrower with respect to which such portion relates).

"(iv) QUALIFIED FINANCING ISSUE.—For purposes of this subparagraph, the term 'qualified financing issue' means any composite, pooled, or other conduit financing issue the proceeds of which are used directly or indirectly to make or finance loans to 1 or more ultimate borrowers each of whom is a qualified borrower.

"(v) QUALIFIED PORTION.—For purposes of this subparagraph, the term 'qualified portion' means that portion of the proceeds which are used with respect to each qualified borrower under the issue.

"(vi) QUALIFIED BORROWER.—For purposes of this subparagraph, the term 'qualified borrower' means a borrower which is a State or political subdivision thereof or an organization described in section 501(c)(3) and exempt from taxation under section 501(a).".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to obligations issued after December 31, 2008.

SEC. 1503. TEMPORARY MODIFICATION OF ALTERNATIVE MINIMUM TAX LIMITATIONS ON TAX-EXEMPT BONDS.

(a) INTEREST ON PRIVATE ACTIVITY BONDS ISSUED DURING 2009 AND 2010 NOT TREATED AS TAX PREFERENCE ITEM.—Subparagraph (C) of section 57(a)(5) is amended by adding at the end a new clause:

"(vi) EXCEPTION FOR BONDS ISSUED IN 2009 AND 2010.—

"(I) IN GENERAL.—For purposes of clause (i), the term 'private activity bond' shall not include any bond issued after December 31, 2008, and before January 1, 2011.

"(II) TREATMENT OF REFUNDING BONDS.—For purposes of subclause (I), a refunding bond (whether a current or advance refunding) shall be treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).

"(III) EXCEPTION FOR CERTAIN REFUNDING BONDS.—Subclause (II) shall not apply to any refunding bond which is issued to refund any bond which was issued after December 31, 2003, and before January 1, 2009.".

(b) NO ADJUSTMENT TO ADJUSTED CURRENT EARNINGS FOR INTEREST ON TAX-EXEMPT BONDS ISSUED DURING 2009 AND 2010.—Subparagraph (B) of section 56(g)(4) is amended by adding at the end the following new clause:

"(iv) TAX EXEMPT INTEREST ON BONDS ISSUED IN 2009 AND 2010.—

"(I) IN GENERAL.—Clause (i) shall not apply in the case of any interest on a bond issued after December 31, 2008, and before January 1, 2011.

"(II) TREATMENT OF REFUNDING BONDS.—For purposes of subclause (I), a refunding bond (whether a current or advance refunding) shall be treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).

"(III) EXCEPTION FOR CERTAIN REFUNDING BONDS.—Subclause (II) shall not apply to any refunding bond which is issued to refund any bond which was issued after December 31, 2003, and before January 1, 2009.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after December 31, 2008.

SEC. 1504. MODIFICATION TO HIGH SPEED INTERCITY RAIL FACILITY BONDS.

(a) IN GENERAL.—Paragraph (1) of section 142(i) is amended by striking "operate at speeds in excess of" and inserting "be capable of attaining a maximum speed in excess of".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to obligations issued after the date of the enactment of this Act.

PART II—DELAY IN APPLICATION OF WITHHOLDING TAX ON GOVERNMENT CONTRACTORS

SEC. 1511. DELAY IN APPLICATION OF WITHHOLDING TAX ON GOVERNMENT CONTRACTORS.

Subsection (b) of section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 is amended by striking "December 31, 2010" and inserting "December 31, 2011".

PART III—TAX CREDIT BONDS FOR SCHOOLS

SEC. 1521. QUALIFIED SCHOOL CONSTRUCTION BONDS.

(a) IN GENERAL.—Subpart I of part IV of subchapter A of chapter 1 is amended by adding at the end the following new section:

"SEC. 54F. QUALIFIED SCHOOL CONSTRUCTION BONDS.

"(a) QUALIFIED SCHOOL CONSTRUCTION BOND.—For purposes of this subchapter, the term 'qualified school construction bond' means any bond issued as part of an issue if—

"(1) 100 percent of the available project proceeds of such issue are to be used for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue,

"(2) the bond is issued by a State or local government within the jurisdiction of which such school is located, and

"(3) the issuer designates such bond for purposes of this section.

"(b) LIMITATION ON AMOUNT OF BONDS DESIGNATED.—The maximum aggregate face amount of bonds issued during any calendar year which may be designated under subsection (a) by any issuer

shall not exceed the limitation amount allocated under subsection (d) for such calendar year to such issuer.

"(c) NATIONAL LIMITATION ON AMOUNT OF BONDS DESIGNATED.—There is a national qualified school construction bond limitation for each calendar year. Such limitation is—

"(1) $11,000,000,000 for 2009,

"(2) $11,000,000,000 for 2010, and

"(3) except as provided in subsection (e), zero after 2010.

"(d) ALLOCATION OF LIMITATION.—

"(1) ALLOCATION AMONG STATES.—Except as provided in paragraph (2)(C), the limitation applicable under subsection (c) for any calendar year shall be allocated by the Secretary among the States in proportion to the respective amounts each such State is eligible to receive under section 1124 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6333) for the most recent fiscal year ending before such calendar year. The limitation amount allocated to a State under the preceding sentence shall be allocated by the State to issuers within such State.

"(2) 40 PERCENT OF LIMITATION ALLOCATED AMONG LARGEST SCHOOL DISTRICTS.—

"(A) IN GENERAL.—40 percent of the limitation applicable under subsection (c) for any calendar year shall be allocated under subparagraph (B) by the Secretary among local educational agencies which are large local educational agencies for such year.

"(B) ALLOCATION FORMULA.—The amount to be allocated under subparagraph (A) for any calendar year shall be allocated among large local educational agencies in proportion to the respective amounts each such agency received under section 1124 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6333) for the most recent fiscal year ending before such calendar year.

"(C) REDUCTION IN STATE ALLOCATION.—The allocation to any State under paragraph (1) shall be reduced by the aggregate amount of the allocations under this paragraph to large local educational agencies within such State.

"(D) ALLOCATION OF UNUSED LIMITATION TO STATE.—The amount allocated under this paragraph to a large local educational agency for any calendar year may be reallocated by such agency to the State in which such agency is located for such calendar year. Any amount reallocated to a State under the preceding sentence may be allocated as provided in paragraph (1).

"(E) LARGE LOCAL EDUCATIONAL AGENCY.—For purposes of this paragraph, the term 'large local educational agency' means, with respect to a calendar year, any local educational agency if such agency is—

"(i) among the 100 local educational agencies with the largest numbers of children aged 5 through 17 from families living below the poverty level, as determined by the Secretary using the most recent data available from the Department of Commerce that are satisfactory to the Secretary, or

"(ii) 1 of not more than 25 local educational agencies (other than those described in clause (i)) that the Secretary of Education determines (based on the

most recent data available satisfactory to the Secretary) are in particular need of assistance, based on a low level of resources for school construction, a high level of enrollment growth, or such other factors as the Secretary deems appropriate.

"(3) ALLOCATIONS TO CERTAIN POSSESSIONS.—The amount to be allocated under paragraph (1) to any possession of the United States other than Puerto Rico shall be the amount which would have been allocated if all allocations under paragraph (1) were made on the basis of respective populations of individuals below the poverty line (as defined by the Office of Management and Budget). In making other allocations, the amount to be allocated under paragraph (1) shall be reduced by the aggregate amount allocated under this paragraph to possessions of the United States.

"(4) ALLOCATIONS FOR INDIAN SCHOOLS.—In addition to the amounts otherwise allocated under this subsection, $200,000,000 for calendar year 2009, and $200,000,000 for calendar year 2010, shall be allocated by the Secretary of the Interior for purposes of the construction, rehabilitation, and repair of schools funded by the Bureau of Indian Affairs. In the case of amounts allocated under the preceding sentence, Indian tribal governments (as defined in section 7701(a)(40)) shall be treated as qualified issuers for purposes of this subchapter.

"(e) CARRYOVER OF UNUSED LIMITATION.—If for any calendar year—

"(1) the amount allocated under subsection (d) to any State, exceeds

"(2) the amount of bonds issued during such year which are designated under subsection (a) pursuant to such allocation, the limitation amount under such subsection for such State for the following calendar year shall be increased by the amount of such excess. A similar rule shall apply to the amounts allocated under subsection (d)(4).".

(b) CONFORMING AMENDMENTS.—

(1) Paragraph (1) of section 54A(d) is amended by striking "or" at the end of subparagraph (C), by inserting "or" at the end of subparagraph (D), and by inserting after subparagraph (D) the following new subparagraph:

"(E) a qualified school construction bond,".

(2) Subparagraph (C) of section 54A(d)(2) is amended by striking "and" at the end of clause (iii), by striking the period at the end of clause (iv) and inserting ", and", and by adding at the end the following new clause:

"(v) in the case of a qualified school construction bond, a purpose specified in section 54F(a)(1).".

(3) The table of sections for subpart I of part IV of subchapter A of chapter 1 is amended by adding at the end the following new item:

"Sec. 54F. Qualified school construction bonds.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after the date of the enactment of this Act.

SEC. 1522. EXTENSION AND EXPANSION OF QUALIFIED ZONE ACADEMY BONDS.

(a) IN GENERAL.—Section 54E(c)(1) is amended by striking "and 2009" and inserting "and $1,400,000,000 for 2009 and 2010".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to obligations issued after December 31, 2008.

PART IV—BUILD AMERICA BONDS

SEC. 1531. BUILD AMERICA BONDS.

(a) IN GENERAL.—Part IV of subchapter A of chapter 1 is amended by adding at the end the following new subpart:

"Subpart J—Build America Bonds

"Sec. 54AA. Build America bonds.

"SEC. 54AA. BUILD AMERICA BONDS.

"(a) IN GENERAL.—If a taxpayer holds a build America bond on one or more interest payment dates of the bond during any taxable year, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of the credits determined under subsection (b) with respect to such dates.

"(b) AMOUNT OF CREDIT.—The amount of the credit determined under this subsection with respect to any interest payment date for a build America bond is 35 percent of the amount of interest payable by the issuer with respect to such date .

"(c) LIMITATION BASED ON AMOUNT OF TAX.—

"(1) IN GENERAL.—The credit allowed under subsection (a) for any taxable year shall not exceed the excess of—

"(A) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

"(B) the sum of the credits allowable under this part (other than subpart C and this subpart).

"(2) CARRYOVER OF UNUSED CREDIT.—If the credit allowable under subsection (a) exceeds the limitation imposed by paragraph (1) for such taxable year, such excess shall be carried to the succeeding taxable year and added to the credit allowable under subsection (a) for such taxable year (determined before the application of paragraph (1) for such succeeding taxable year).

"(d) BUILD AMERICA BOND.—

"(1) IN GENERAL.—For purposes of this section, the term 'build America bond' means any obligation (other than a private activity bond) if—

"(A) the interest on such obligation would (but for this section) be excludable from gross income under section 103,

"(B) such obligation is issued before January 1, 2011, and

"(C) the issuer makes an irrevocable election to have this section apply.

"(2) APPLICABLE RULES.—For purposes of applying paragraph (1)—

"(A) for purposes of section 149(b), a build America bond shall not be treated as federally guaranteed by reason of the credit allowed under subsection (a) or section 6431,

"(B) for purposes of section 148, the yield on a build America bond shall be determined without regard to the credit allowed under subsection (a), and

"(C) a bond shall not be treated as a build America bond if the issue price has more than a de minimis amount (determined under rules similar to the rules of section 1273(a)(3)) of premium over the stated principal amount of the bond.

"(e) INTEREST PAYMENT DATE.—For purposes of this section, the term 'interest payment date' means any date on which the holder of record of the build America bond is entitled to a payment of interest under such bond.

"(f) SPECIAL RULES.—

"(1) INTEREST ON BUILD AMERICA BONDS INCLUDIBLE IN GROSS INCOME FOR FEDERAL INCOME TAX PURPOSES.—For purposes of this title, interest on any build America bond shall be includible in gross income.

"(2) APPLICATION OF CERTAIN RULES.—Rules similar to the rules of subsections (f), (g), (h), and (i) of section 54A shall apply for purposes of the credit allowed under subsection (a).

"(g) SPECIAL RULE FOR QUALIFIED BONDS ISSUED BEFORE 2011.—In the case of a qualified bond issued before January 1, 2011—

"(1) ISSUER ALLOWED REFUNDABLE CREDIT.—In lieu of any credit allowed under this section with respect to such bond, the issuer of such bond shall be allowed a credit as provided in section 6431.

"(2) QUALIFIED BOND.—For purposes of this subsection, the term 'qualified bond' means any build America bond issued as part of an issue if—

"(A) 100 percent of the excess of—

"(i) the available project proceeds (as defined in section 54A) of such issue, over

"(ii) the amounts in a reasonably required reserve (within the meaning of section 150(a)(3)) with respect to such issue,

are to be used for capital expenditures, and

"(B) the issuer makes an irrevocable election to have this subsection apply.

"(h) REGULATIONS.—The Secretary may prescribe such regulations and other guidance as may be necessary or appropriate to carry out this section and section 6431.".

(b) CREDIT FOR QUALIFIED BONDS ISSUED BEFORE 2011.—Subchapter B of chapter 65 is amended by adding at the end the following new section:

"SEC. 6431. CREDIT FOR QUALIFIED BONDS ALLOWED TO ISSUER.

"(a) IN GENERAL.—In the case of a qualified bond issued before January 1, 2011, the issuer of such bond shall be allowed a credit with respect to each interest payment under such bond which shall be payable by the Secretary as provided in subsection (b).

"(b) PAYMENT OF CREDIT.—The Secretary shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond (or to any person who makes such

interest payments on behalf of the issuer) 35 percent of the interest payable under such bond on such date.

"(c) APPLICATION OF ARBITRAGE RULES.—For purposes of section 148, the yield on a qualified bond shall be reduced by the credit allowed under this section.

"(d) INTEREST PAYMENT DATE.—For purposes of this subsection, the term 'interest payment date' means each date on which interest is payable by the issuer under the terms of the bond.

"(e) QUALIFIED BOND.—For purposes of this subsection, the term 'qualified bond' has the meaning given such term in section 54AA(g).".

(c) CONFORMING AMENDMENTS.—

(1) Section 1324(b)(2) of title 31, United States Code, is amended by striking "or 6428" and inserting "6428, or 6431,".

(2) Section 54A(c)(1)(B) is amended by striking "subpart C" and inserting "subparts C and J".

(3) Sections 54(c)(2), 1397E(c)(2), and 1400N(l)(3)(B) are each amended by striking "and I" and inserting ", I, and J".

(4) Section 6211(b)(4)(A) is amended by striking "and 6428" and inserting "6428, and 6431".

(5) Section 6401(b)(1) is amended by striking "and I" and inserting "I, and J".

(6) The table of subparts for part IV of subchapter A of chapter 1 is amended by adding at the end the following new item:

"SUBPART J. BUILD AMERICA BONDS.".

(7) The table of section for subchapter B of chapter 65 is amended by adding at the end the following new item:

"Sec. 6431. Credit for qualified bonds allowed to issuer.".

(d) TRANSITIONAL COORDINATION WITH STATE LAW.—Except as otherwise provided by a State after the date of the enactment of this Act, the interest on any build America bond (as defined in section 54AA of the Internal Revenue Code of 1986, as added by this section) and the amount of any credit determined under such section with respect to such bond shall be treated for purposes of the income tax laws of such State as being exempt from Federal income tax.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to obligations issued after the date of the enactment of this Act.

PART V—REGULATED INVESTMENT COMPANIES ALLOWED TO PASS-THRU TAX CREDIT BOND CREDITS

SEC. 1541. REGULATED INVESTMENT COMPANIES ALLOWED TO PASS-THRU TAX CREDIT BOND CREDITS.

(a) IN GENERAL.—Part I of subchapter M of chapter 1 is amended by inserting after section 853 the following new section:

"SEC. 853A. CREDITS FROM TAX CREDIT BONDS ALLOWED TO SHAREHOLDERS.

"(a) GENERAL RULE.—A regulated investment company—

"(1) which holds (directly or indirectly) one or more tax credit bonds on one or more applicable dates during the taxable year, and

"(2) which meets the requirements of section 852(a) for the taxable year,

may elect the application of this section with respect to credits allowable to the investment company during such taxable year with respect to such bonds.

"(b) EFFECT OF ELECTION.—If the election provided in subsection (a) is in effect for any taxable year—

"(1) the regulated investment company shall not be allowed any credits to which subsection (a) applies for such taxable year,

"(2) the regulated investment company shall—

"(A) include in gross income (as interest) for such taxable year an amount equal to the amount that such investment company would have included in gross income with respect to such credits if this section did not apply, and

"(B) increase the amount of the dividends paid deduction for such taxable year by the amount of such income, and

"(3) each shareholder of such investment company shall—

"(A) include in gross income an amount equal to such shareholder's proportionate share of the interest income attributable to such credits, and

"(B) be allowed the shareholder's proportionate share of such credits against the tax imposed by this chapter.

"(c) NOTICE TO SHAREHOLDERS.—For purposes of subsection (b)(3), the shareholder's proportionate share of—

"(1) credits described in subsection (a), and

"(2) gross income in respect of such credits,

shall not exceed the amounts so designated by the regulated investment company in a written notice mailed to its shareholders not later than 60 days after the close of its taxable year.

"(d) MANNER OF MAKING ELECTION AND NOTIFYING SHAREHOLDERS.—The election provided in subsection (a) and the notice to shareholders required by subsection (c) shall be made in such manner as the Secretary may prescribe.

"(e) DEFINITIONS AND SPECIAL RULES.—

"(1) DEFINITIONS.—For purposes of this subsection—

"(A) TAX CREDIT BOND.—The term 'tax credit bond' means—

"(i) a qualified tax credit bond (as defined in section 54A(d)),

"(ii) a build America bond (as defined in section 54AA(d)), and

"(iii) any bond for which a credit is allowable under subpart H of part IV of subchapter A of this chapter.

"(B) APPLICABLE DATE.—The term 'applicable date' means—

"(i) in the case of a qualified tax credit bond or a bond described in subparagraph (A)(iii), any credit allowance date (as defined in section 54A(e)(1)), and

"(ii) in the case of a build America bond (as defined in section 54AA(d)), any interest payment date (as defined in section 54AA(e)).

"(2) STRIPPED TAX CREDIT BONDS.—If the ownership of a tax credit bond is separated from the credit with respect to such bond, subsection (a) shall be applied by reference to the

instruments evidencing the entitlement to the credit rather than the tax credit bond.

"(f) REGULATIONS, ETC.—The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section, including methods for determining a shareholder's proportionate share of credits.".

(b) CONFORMING AMENDMENTS.—

(1) Section 54(l) is amended by striking paragraph (4) and by redesignating paragraphs (5) and (6) as paragraphs (4) and (5), respectively.

(2) Section 54A(h) is amended to read as follows:

"(h) BONDS HELD BY REAL ESTATE INVESTMENT TRUSTS.—If any qualified tax credit bond is held by a real estate investment trust, the credit determined under subsection (a) shall be allowed to beneficiaries of such trust (and any gross income included under subsection (f) with respect to such credit shall be distributed to such beneficiaries) under procedures prescribed by the Secretary.".

(3) The table of sections for part I of subchapter M of chapter 1 is amended by inserting after the item relating to section 853 the following new item:

"Sec. 853A. Credits from tax credit bonds allowed to shareholders.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years ending after the date of the enactment of this Act.

Subtitle G—Other Provisions

SEC. 1601. APPLICATION OF CERTAIN LABOR STANDARDS TO PROJECTS FINANCED WITH CERTAIN TAX-FAVORED BONDS.

Subchapter IV of chapter 31 of the title 40, United States Code, shall apply to projects financed with the proceeds of—

(1) any new clean renewable energy bond (as defined in section 54C of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(2) any qualified energy conservation bond (as defined in section 54D of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(3) any qualified zone academy bond (as defined in section 54E of the Internal Revenue Code of 1986) issued after the date of the enactment of this Act,

(4) any qualified school construction bond (as defined in section 54F of the Internal Revenue Code of 1986), and

(5) any recovery zone economic development bond (as defined in section 1400U–2 of the Internal Revenue Code of 1986).

SEC. 1602. GRANTS TO STATES FOR LOW-INCOME HOUSING PROJECTS IN LIEU OF LOW-INCOME HOUSING CREDIT ALLOCATIONS FOR 2009.

(a) IN GENERAL.—The Secretary of the Treasury shall make a grant to the housing credit agency of each State in an amount equal to such State's low-income housing grant election amount.

(b) LOW-INCOME HOUSING GRANT ELECTION AMOUNT.—For purposes of this section, the term "low-income housing grant election amount" means, with respect to any State, such amount as the

State may elect which does not exceed 85 percent of the product of—

(1) the sum of—

(A) 100 percent of the State housing credit ceiling for 2009 which is attributable to amounts described in clauses (i) and (iii) of section 42(h)(3)(C) of the Internal Revenue Code of 1986, and

(B) 40 percent of the State housing credit ceiling for 2009 which is attributable to amounts described in clauses (ii) and (iv) of such section, multiplied by

(2) 10.

(c) SUBAWARDS FOR LOW-INCOME BUILDINGS.—

(1) IN GENERAL.—A State housing credit agency receiving a grant under this section shall use such grant to make subawards to finance the construction or acquisition and rehabilitation of qualified low-income buildings. A subaward under this section may be made to finance a qualified low-income building with or without an allocation under section 42 of the Internal Revenue Code of 1986, except that a State housing credit agency may make subawards to finance qualified low-income buildings without an allocation only if it makes a determination that such use will increase the total funds available to the State to build and rehabilitate affordable housing. In complying with such determination requirement, a State housing credit agency shall establish a process in which applicants that are allocated credits are required to demonstrate good faith efforts to obtain investment commitments for such credits before the agency makes such subawards.

(2) SUBAWARDS SUBJECT TO SAME REQUIREMENTS AS LOW-INCOME HOUSING CREDIT ALLOCATIONS.—Any such subaward with respect to any qualified low-income building shall be made in the same manner and shall be subject to the same limitations (including rent, income, and use restrictions on such building) as an allocation of housing credit dollar amount allocated by such State housing credit agency under section 42 of the Internal Revenue Code of 1986, except that such subawards shall not be limited by, or otherwise affect (except as provided in subsection (h)(3)(J) of such section), the State housing credit ceiling applicable to such agency.

(3) COMPLIANCE AND ASSET MANAGEMENT.—The State housing credit agency shall perform asset management functions to ensure compliance with section 42 of the Internal Revenue Code of 1986 and the long-term viability of buildings funded by any subaward under this section. The State housing credit agency may collect reasonable fees from a subaward recipient to cover expenses associated with the performance of its duties under this paragraph. The State housing credit agency may retain an agent or other private contractor to satisfy the requirements of this paragraph.

(4) RECAPTURE.—The State housing credit agency shall impose conditions or restrictions, including a requirement providing for recapture, on any subaward under this section so as to assure that the building with respect to which such subaward is made remains a qualified low-income building during the compliance period. Any such recapture shall be payable to the Secretary of the Treasury for deposit in the general fund of the Treasury and may be enforced by means

of liens or such other methods as the Secretary of the Treasury determines appropriate.

(d) RETURN OF UNUSED GRANT FUNDS.—Any grant funds not used to make subawards under this section before January 1, 2011, shall be returned to the Secretary of the Treasury on such date. Any subawards returned to the State housing credit agency on or after such date shall be promptly returned to the Secretary of the Treasury. Any amounts returned to the Secretary of the Treasury under this subsection shall be deposited in the general fund of the Treasury.

(e) DEFINITIONS.—Any term used in this section which is also used in section 42 of the Internal Revenue Code of 1986 shall have the same meaning for purposes of this section as when used in such section 42. Any reference in this section to the Secretary of the Treasury shall be treated as including the Secretary's delegate.

(f) APPROPRIATIONS.—There is hereby appropriated to the Secretary of the Treasury such sums as may be necessary to carry out this section.

SEC. 1603. GRANTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS.

(a) IN GENERAL.—Upon application, the Secretary of the Treasury shall, subject to the requirements of this section, provide a grant to each person who places in service specified energy property to reimburse such person for a portion of the expense of such property as provided in subsection (b). No grant shall be made under this section with respect to any property unless such property—

(1) is placed in service during 2009 or 2010, or

(2) is placed in service after 2010 and before the credit termination date with respect to such property, but only if the construction of such property began during 2009 or 2010.

(b) GRANT AMOUNT.—

(1) IN GENERAL.—The amount of the grant under subsection (a) with respect to any specified energy property shall be the applicable percentage of the basis of such property.

(2) APPLICABLE PERCENTAGE.—For purposes of paragraph (1), the term "applicable percentage" means—

(A) 30 percent in the case of any property described in paragraphs (1) through (4) of subsection (d), and

(B) 10 percent in the case of any other property.

(3) DOLLAR LIMITATIONS.—In the case of property described in paragraph (2), (6), or (7) of subsection (d), the amount of any grant under this section with respect to such property shall not exceed the limitation described in section 48(c)(1)(B), 48(c)(2)(B), or 48(c)(3)(B) of the Internal Revenue Code of 1986, respectively, with respect to such property.

(c) TIME FOR PAYMENT OF GRANT.—The Secretary of the Treasury shall make payment of any grant under subsection (a) during the 60-day period beginning on the later of—

(1) the date of the application for such grant, or

(2) the date the specified energy property for which the grant is being made is placed in service.

(d) SPECIFIED ENERGY PROPERTY.—For purposes of this section, the term "specified energy property" means any of the following:

(1) QUALIFIED FACILITIES.—Any qualified property (as defined in section 48(a)(5)(D) of the Internal Revenue Code of 1986) which is part of a qualified facility (within the meaning of section 45 of such Code) described in paragraph (1), (2), (3), (4), (6), (7), (9), or (11) of section 45(d) of such Code.

(2) QUALIFIED FUEL CELL PROPERTY.—Any qualified fuel cell property (as defined in section 48(c)(1) of such Code).

(3) SOLAR PROPERTY.—Any property described in clause (i) or (ii) of section 48(a)(3)(A) of such Code.

(4) QUALIFIED SMALL WIND ENERGY PROPERTY.—Any qualified small wind energy property (as defined in section 48(c)(4) of such Code).

(5) GEOTHERMAL PROPERTY.—Any property described in clause (iii) of section 48(a)(3)(A) of such Code.

(6) QUALIFIED MICROTURBINE PROPERTY.—Any qualified microturbine property (as defined in section 48(c)(2) of such Code).

(7) COMBINED HEAT AND POWER SYSTEM PROPERTY.—Any combined heat and power system property (as defined in section 48(c)(3) of such Code).

(8) GEOTHERMAL HEAT PUMP PROPERTY.—Any property described in clause (vii) of section 48(a)(3)(A) of such Code.

Such term shall not include any property unless depreciation (or amortization in lieu of depreciation) is allowable with respect to such property.

(e) CREDIT TERMINATION DATE.—For purposes of this section, the term "credit termination date" means—

(1) in the case of any specified energy property which is part of a facility described in paragraph (1) of section 45(d) of the Internal Revenue Code of 1986, January 1, 2013,

(2) in the case of any specified energy property which is part of a facility described in paragraph (2), (3), (4), (6), (7), (9), or (11) of section 45(d) of such Code, January 1, 2014, and

(3) in the case of any specified energy property described in section 48 of such Code, January 1, 2017.

In the case of any property which is described in paragraph (3) and also in another paragraph of this subsection, paragraph (3) shall apply with respect to such property.

(f) APPLICATION OF CERTAIN RULES.—In making grants under this section, the Secretary of the Treasury shall apply rules similar to the rules of section 50 of the Internal Revenue Code of 1986. In applying such rules, if the property is disposed of, or otherwise ceases to be specified energy property, the Secretary of the Treasury shall provide for the recapture of the appropriate percentage of the grant amount in such manner as the Secretary of the Treasury determines appropriate.

(g) EXCEPTION FOR CERTAIN NON-TAXPAYERS.—The Secretary of the Treasury shall not make any grant under this section to—

(1) any Federal, State, or local government (or any political subdivision, agency, or instrumentality thereof),

(2) any organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code,

(3) any entity referred to in paragraph (4) of section 54(j) of such Code, or

(4) any partnership or other pass-thru entity any partner (or other holder of an equity or profits interest) of which is described in paragraph (1), (2) or (3).

(h) DEFINITIONS.—Terms used in this section which are also used in section 45 or 48 of the Internal Revenue Code of 1986 shall have the same meaning for purposes of this section as when used in such section 45 or 48. Any reference in this section to the Secretary of the Treasury shall be treated as including the Secretary's delegate.

(i) APPROPRIATIONS.—There is hereby appropriated to the Secretary of the Treasury such sums as may be necessary to carry out this section.

(j) TERMINATION.—The Secretary of the Treasury shall not make any grant to any person under this section unless the application of such person for such grant is received before October 1, 2011.

SEC. 1604. INCREASE IN PUBLIC DEBT LIMIT.

Subsection (b) of section 3101 of title 31, United States Code, is amended by striking out the dollar limitation contained in such subsection and inserting "$12,104,000,000,000".

Subtitle H—Prohibition on Collection of Certain Payments Made Under the Continued Dumping and Subsidy Offset Act of 2000

SEC. 1701. PROHIBITION ON COLLECTION OF CERTAIN PAYMENTS MADE UNDER THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000.

(a) IN GENERAL.—Notwithstanding any other provision of law, neither the Secretary of Homeland Security nor any other person may—

(1) require repayment of, or attempt in any other way to recoup, any payments described in subsection (b); or

(2) offset any past, current, or future distributions of antidumping or countervailing duties assessed with respect to imports from countries that are not parties to the North American Free Trade Agreement in an attempt to recoup any payments described in subsection (b).

(b) PAYMENTS DESCRIBED.—Payments described in this subsection are payments of antidumping or countervailing duties made pursuant to the Continued Dumping and Subsidy Offset Act of 2000 (section 754 of the Tariff Act of 1930 (19 U.S.C. 1675c; repealed by subtitle F of title VII of the Deficit Reduction Act of 2005 (Public Law 109–171; 120 Stat. 154))) that were—

(1) assessed and paid on imports of goods from countries that are parties to the North American Free Trade Agreement; and

(2) distributed on or after January 1, 2001, and before January 1, 2006.

(c) PAYMENT OF FUNDS COLLECTED OR WITHHELD.—Not later than the date that is 60 days after the date of the enactment of this Act, the Secretary of Homeland Security shall—

(1) refund any repayments, or any other recoupment, of payments described in subsection (b); and

(2) fully distribute any antidumping or countervailing duties that the U.S. Customs and Border Protection is withholding as an offset as described in subsection (a)(2).

(d) LIMITATION.—Nothing in this section shall be construed to prevent the Secretary of Homeland Security, or any other person, from requiring repayment of, or attempting to otherwise recoup, any payments described in subsection (b) as a result of—

(1) a finding of false statements or other misconduct by a recipient of such a payment; or

(2) the reliquidation of an entry with respect to which such a payment was made.

Subtitle I—Trade Adjustment Assistance

SEC. 1800. SHORT TITLE.

This subtitle may be cited as the "Trade and Globalization Adjustment Assistance Act of 2009".

PART I—TRADE ADJUSTMENT ASSISTANCE FOR WORKERS

Subpart A—Trade Adjustment Assistance for Service Sector Workers

SEC. 1801. EXTENSION OF TRADE ADJUSTMENT ASSISTANCE TO SERVICE SECTOR AND PUBLIC AGENCY WORKERS; SHIFTS IN PRODUCTION.

(a) DEFINITIONS.—Section 247 of the Trade Act of 1974 (19 U.S.C. 2319) is amended—

(1) in paragraph (1)—

(A) by striking "or appropriate subdivision of a firm"; and

(B) by striking "or subdivision";

(2) in paragraph (2), by striking "employment—" and all that follows and inserting "employment, has been totally or partially separated from such employment.";

(3) by inserting after paragraph (2) the following:

"(3) Subject to section 222(d)(5), the term 'firm' means—

"(A) a firm, including an agricultural firm, service sector firm, or public agency; or

"(B) an appropriate subdivision thereof.";

(4) by inserting after paragraph (6) the following:

"(7) The term 'public agency' means a department or agency of a State or local government or of the Federal Government, or a subdivision thereof.";

(5) in paragraph (11), by striking ", or in a subdivision of which,"; and

(6) by adding at the end the following:

"(18) The term 'service sector firm' means a firm engaged in the business of supplying services.".

(b) GROUP ELIGIBILITY REQUIREMENTS.—Section 222 of the Trade Act of 1974 (19 U.S.C. 2272) is amended—

(1) in subsection (a)(2)—

(A) by amending subparagraph (A)(ii) to read as follows:

"(ii)(I) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

"(II) imports of articles like or directly competitive with articles—

"(aa) into which one or more component parts produced by such firm are directly incorporated, or

"(bb) which are produced directly using services supplied by such firm,

have increased; or

"(III) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased; and"; and

(B) by amending subparagraph (B) to read as follows:

"(B)(i)(I) there has been a shift by such workers' firm to a foreign country in the production of articles or the supply of services like or directly competitive with articles which are produced or services which are supplied by such firm; or

"(II) such workers' firm has acquired from a foreign country articles or services that are like or directly competitive with articles which are produced or services which are supplied by such firm; and

"(ii) the shift described in clause (i)(I) or the acquisition of articles or services described in clause (i)(II) contributed importantly to such workers' separation or threat of separation.";

(2) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(3) by inserting after subsection (a) the following:

"(b) ADVERSELY AFFECTED WORKERS IN PUBLIC AGENCIES.—A group of workers in a public agency shall be certified by the Secretary as eligible to apply for adjustment assistance under this chapter pursuant to a petition filed under section 221 if the Secretary determines that—

"(1) a significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

"(2) the public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

"(3) the acquisition of services described in paragraph (2) contributed importantly to such workers' separation or threat of separation.".

(c) BASIS FOR SECRETARY'S DETERMINATIONS.—Section 222 of the Trade Act of 1974 (19 U.S.C. 2272), as amended, is further amended by adding at the end the following:

"(e) BASIS FOR SECRETARY'S DETERMINATIONS.—

"(1) IN GENERAL.—The Secretary shall, in determining whether to certify a group of workers under section 223, obtain from the workers' firm, or a customer of the workers' firm, information the Secretary determines to be necessary to make the certification, through questionnaires and in such other manner as the Secretary determines appropriate.

"(2) ADDITIONAL INFORMATION.—The Secretary may seek additional information to determine whether to certify a group of workers under subsection (a), (b), or (c)—

"(A) by contacting—

"(i) officials or employees of the workers' firm;

"(ii) officials of customers of the workers' firm;

"(iii) officials of certified or recognized unions or other duly authorized representatives of the group of workers; or

"(iv) one-stop operators or one-stop partners (as defined in section 101 of the Workforce Investment Act of 1998 (29 U.S.C. 2801)); or

"(B) by using other available sources of information.

"(3) VERIFICATION OF INFORMATION.—

"(A) CERTIFICATION.—The Secretary shall require a firm or customer to certify—

"(i) all information obtained under paragraph (1) from the firm or customer (as the case may be) through questionnaires; and

"(ii) all other information obtained under paragraph (1) from the firm or customer (as the case may be) on which the Secretary relies in making a determination under section 223, unless the Secretary has a reasonable basis for determining that such information is accurate and complete without being certified.

"(B) USE OF SUBPOENAS.—The Secretary shall require the workers' firm or a customer of the workers' firm to provide information requested by the Secretary under paragraph (1) by subpoena pursuant to section 249 if the firm or customer (as the case may be) fails to provide the information within 20 days after the date of the Secretary's request, unless the firm or customer (as the case may be) demonstrates to the satisfaction of the Secretary that the firm or customer (as the case may be) will provide the information within a reasonable period of time.

"(C) PROTECTION OF CONFIDENTIAL INFORMATION.—The Secretary may not release information obtained under paragraph (1) that the Secretary considers to be confidential business information unless the firm or customer (as the case may be) submitting the confidential business information had notice, at the time of submission, that the information would be released by the Secretary, or the firm or customer (as the case may be) subsequently consents to the release of the information. Nothing in this subparagraph shall be construed to prohibit the Secretary from providing such confidential business information to a court in camera or to another party under a protective order issued by a court.".

(d) PENALTIES.—Section 244 of the Trade Act of 1974 (19 U.S.C. 2316) is amended to read as follows:

"SEC. 244. PENALTIES.

"Any person who—

"(1) makes a false statement of a material fact knowing it to be false, or knowingly fails to disclose a material fact, for the purpose of obtaining or increasing for that person or for any other person any payment authorized to be furnished

under this chapter or pursuant to an agreement under section 239, or

"(2) makes a false statement of a material fact knowing it to be false, or knowingly fails to disclose a material fact, when providing information to the Secretary during an investigation of a petition under section 221,

shall be imprisoned for not more than one year, or fined under title 18, United States Code, or both.".

(e) CONFORMING AMENDMENTS.—

(1) Section 221(a) of the Trade Act of 1974 (19 U.S.C. 2271(a)) is amended—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A)—

(I) by striking "Secretary" and inserting "Secretary of Labor"; and

(II) by striking "or subdivision" and inserting "(as defined in section 247)"; and

(ii) in subparagraph (A), by striking "(including workers in an agricultural firm or subdivision of any agricultural firm)";

(B) in paragraph (2)(A), by striking "rapid response assistance" and inserting "rapid response activities"; and

(C) in paragraph (3), by inserting "and on the website of the Department of Labor" after "Federal Register".

(2) Section 222 of the Trade Act of 1974 (19 U.S.C. 2272), as amended, is further amended—

(A) by striking "(including workers in any agricultural firm or subdivision of an agricultural firm)" each place it appears;

(B) in subsection (a)—

(i) in paragraph (1), by striking ", or an appropriate subdivision of the firm,"; and

(ii) in paragraph (2), by striking "or subdivision" each place it appears;

(C) in subsection (c) (as redesignated)—

(i) in paragraph (2)—

(I) by striking "(or subdivision)" each place it appears;

(II) by inserting "or service" after "the article"; and

(III) by striking "(c) (3)" and inserting "(d) (3)"; and

(ii) in paragraph (3), by striking "(or subdivision)" each place it appears; and

(D) in subsection (d) (as redesignated)—

(i) by striking "For purposes" and inserting "DEFINITIONS.—For purposes";

(ii) in paragraph (2), by striking ", or appropriate subdivision of a firm," each place it appears;

(iii) by amending paragraph (3) to read as follows:

"(3) DOWNSTREAM PRODUCER.—

"(A) IN GENERAL.—The term 'downstream producer' means a firm that performs additional, value-added production processes or services directly for another firm for articles or services with respect to which a group of workers in such other firm has been certified under subsection (a).

"(B) VALUE-ADDED PRODUCTION PROCESSES OR SERVICES.—For purposes of subparagraph (A), value-added production processes or services include final assembly, finishing, testing, packaging, or maintenance or transportation services.";

(iv) in paragraph (4)—

(I) by striking "(or subdivision)"; and

(II) by inserting ", or services, used in the production of articles or in the supply of services, as the case may be," after "for articles"; and

(v) by adding at the end the following:

"(5) REFERENCE TO FIRM.—For purposes of subsection (a), the term 'firm' does not include a public agency.".

(3) Section 231(a)(2) of the Trade Act of 1974 (19 U.S.C. 2291(a)(2)) is amended—

(A) in the matter preceding subparagraph (A), by striking "or subdivision of a firm"; and

(B) in subparagraph (C), by striking "or subdivision".

SEC. 1802. SEPARATE BASIS FOR CERTIFICATION.

Section 222 of the Trade Act of 1974 (19 U.S.C. 2272), as amended, is further amended by adding at the end the following:

"(f) FIRMS IDENTIFIED BY THE INTERNATIONAL TRADE COMMISSION.—Notwithstanding any other provision of this chapter, a group of workers covered by a petition filed under section 221 shall be certified under subsection (a) as eligible to apply for adjustment assistance under this chapter if—

"(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

"(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1);

"(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1); or

"(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

"(2) the petition is filed during the one-year period beginning on the date on which—

"(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the Federal Register under section 202(f)(3); or

"(B) notice of an affirmative determination described in subparagraph (B) or (C) of paragraph (1) is published in the Federal Register; and

"(3) the workers have become totally or partially separated from the workers' firm within—

"(A) the one-year period described in paragraph (2); or

"(B) notwithstanding section 223(b), the one-year period preceding the one-year period described in paragraph (2).".

SEC. 1803. DETERMINATIONS BY SECRETARY OF LABOR.

Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) is amended—

(1) in subsection (b), by striking "or appropriate subdivision of the firm before his application" and all that follows and inserting "before the worker's application under section 231 occurred more than one year before the date of the petition on which such certification was granted.";

(2) in subsection (c), by striking "together with his reasons" and inserting "and on the website of the Department of Labor, together with the Secretary's reasons";

(3) in subsection (d)—

(A) by striking "or subdivision of the firm" and all that follows through "he shall" and inserting ", that total or partial separations from such firm are no longer attributable to the conditions specified in section 222, the Secretary shall"; and

(B) by striking "together with his reasons" and inserting "and on the website of the Department of Labor, together with the Secretary's reasons"; and

(4) by adding at the end the following:

"(e) STANDARDS FOR INVESTIGATIONS AND DETERMINATIONS.—

"(1) IN GENERAL.—The Secretary shall establish standards, including data requirements, for investigations of petitions filed under section 221 and criteria for making determinations under subsection (a).

"(2) CONSULTATIONS.—Not less than 90 days before issuing a final rule with respect to the standards required under paragraph (1), the Secretary shall consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives with respect to such rule.".

SEC. 1804. MONITORING AND REPORTING RELATING TO SERVICE SECTOR.

(a) IN GENERAL.—Section 282 of the Trade Act of 1974 (19 U.S.C. 2393) is amended—

(1) in the heading, by striking "**SYSTEM**" and inserting "**AND DATA COLLECTION**";

(2) in the first sentence—

(A) by striking "The Secretary" and inserting "(a) MONITORING PROGRAMS.—The Secretary";

(B) by inserting "and services" after "imports of articles";

(C) by inserting "and domestic supply of services" after "domestic production";

(D) by inserting "or supplying services" after "producing articles"; and

(E) by inserting ", or supply of services," after "changes in production"; and

(3) by adding at the end the following:

"(b) COLLECTION OF DATA AND REPORTS ON SERVICE SECTOR.—

"(1) SECRETARY OF LABOR.—Not later than 90 days after the date of the enactment of this subsection, the Secretary of Labor shall implement a system to collect data on adversely affected workers employed in the service sector that includes the number of workers by State and industry, and by the

cause of the dislocation of each worker, as identified in the certification.

"(2) SECRETARY OF COMMERCE.—Not later than 1 year after such date of enactment, the Secretary of Commerce shall, in consultation with the Secretary of Labor, conduct a study and submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report on ways to improve the timeliness and coverage of data on trade in services, including methods to identify increased imports due to the relocation of United States firms to foreign countries, and increased imports due to United States firms acquiring services from firms in foreign countries.".

(b) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by striking the item relating to section 282 and inserting the following:

"Sec. 282. Trade monitoring and data collection.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

Subpart B—Industry Notifications Following Certain Affirmative Determinations

SEC. 1811. NOTIFICATIONS FOLLOWING CERTAIN AFFIRMATIVE DETERMINATIONS.

(a) IN GENERAL.—Section 224 of the Trade Act of 1974 (19 U.S.C. 2274) is amended—

(1) by amending the heading to read as follows:

"SEC. 224. STUDY AND NOTIFICATIONS REGARDING CERTAIN AFFIRMATIVE DETERMINATIONS; INDUSTRY NOTIFICATION OF ASSISTANCE.";

(2) in subsection (a), by striking "Whenever" and inserting "STUDY OF DOMESTIC INDUSTRY.—Whenever";

(3) in subsection (b)—

(A) by striking "The report" and inserting "REPORT BY THE SECRETARY.—The report"; and

(B) by inserting "and on the website of the Department of Labor" after "Federal Register"; and

(4) by adding at the end the following:

"(c) NOTIFICATIONS FOLLOWING AFFIRMATIVE GLOBAL SAFEGUARD DETERMINATIONS.—Upon making an affirmative determination under section 202(b)(1), the Commission shall promptly notify the Secretary of Labor and the Secretary of Commerce and, in the case of a determination with respect to an agricultural commodity, the Secretary of Agriculture, of the determination.

"(d) NOTIFICATIONS FOLLOWING AFFIRMATIVE BILATERAL OR PLURILATERAL SAFEGUARD DETERMINATIONS.—

"(1) NOTIFICATIONS OF DETERMINATIONS OF MARKET DISRUPTION.—Upon making an affirmative determination under section 421(b)(1), the Commission shall promptly notify the Secretary of Labor and the Secretary of Commerce and, in the case of a determination with respect to an agricultural commodity, the Secretary of Agriculture, of the determination.

"(2) NOTIFICATIONS REGARDING TRADE AGREEMENT SAFEGUARDS.—Upon making an affirmative determination in a proceeding initiated under an applicable safeguard provision (other than a provision described in paragraph (3)) that is enacted

to implement a trade agreement to which the United States is a party, the Commission shall promptly notify the Secretary of Labor and the Secretary of Commerce and, in the case of a determination with respect to an agricultural commodity, the Secretary of Agriculture, of the determination.

"(3) NOTIFICATIONS REGARDING TEXTILE AND APPAREL SAFEGUARDS.—Upon making an affirmative determination in a proceeding initiated under any safeguard provision relating to textile and apparel articles that is enacted to implement a trade agreement to which the United States is a party, the President shall promptly notify the Secretary of Labor and the Secretary of Commerce of the determination.

"(e) NOTIFICATIONS FOLLOWING CERTAIN AFFIRMATIVE DETERMINATIONS UNDER TITLE VII OF THE TARIFF ACT OF 1930.—Upon making an affirmative determination under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A)), the Commission shall promptly notify the Secretary of Labor and the Secretary of Commerce and, in the case of a determination with respect to an agricultural commodity, the Secretary of Agriculture, of the determination.

"(f) INDUSTRY NOTIFICATION OF ASSISTANCE.—Upon receiving a notification of a determination under subsection (c), (d), or (e) with respect to a domestic industry—

"(1) the Secretary of Labor shall—

"(A) notify the representatives of the domestic industry affected by the determination, firms publicly identified by name during the course of the proceeding relating to the determination, and any certified or recognized union or, to the extent practicable, other duly authorized representative of workers employed by such representatives of the domestic industry, of—

"(i) the allowances, training, employment services, and other benefits available under this chapter;

"(ii) the manner in which to file a petition and apply for such benefits; and

"(iii) the availability of assistance in filing such petitions;

"(B) notify the Governor of each State in which one or more firms in the industry described in subparagraph (A) are located of the Commission's determination and the identity of the firms; and

"(C) upon request, provide any assistance that is necessary to file a petition under section 221;

"(2) the Secretary of Commerce shall—

"(A) notify the representatives of the domestic industry affected by the determination and any firms publicly identified by name during the course of the proceeding relating to the determination of—

"(i) the benefits available under chapter 3;

"(ii) the manner in which to file a petition and apply for such benefits; and

"(iii) the availability of assistance in filing such petitions; and

"(B) upon request, provide any assistance that is necessary to file a petition under section 251; and

"(3) in the case of an affirmative determination based upon imports of an agricultural commodity, the Secretary of Agriculture shall—

"(A) notify representatives of the domestic industry affected by the determination and any agricultural commodity producers publicly identified by name during the course of the proceeding relating to the determination of—

"(i) the benefits available under chapter 6;

"(ii) the manner in which to file a petition and apply for such benefits; and

"(iii) the availability of assistance in filing such petitions; and

"(B) upon request, provide any assistance that is necessary to file a petition under section 292.

"(g) REPRESENTATIVES OF THE DOMESTIC INDUSTRY.—For purposes of subsection (f), the term 'representatives of the domestic industry' means the persons that petitioned for relief in connection with—

"(1) a proceeding under section 202 or 421 of this Act;

"(2) a proceeding under section 702(b) or 732(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)); or

"(3) any safeguard investigation described in subsection (d)(2) or (d)(3).".

(b) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by striking the item relating to section 224 and inserting the following:

"Sec. 224. Study and notifications regarding certain affirmative determinations; industry notification of assistance.".

SEC. 1812. NOTIFICATION TO SECRETARY OF COMMERCE.

Section 225 of the Trade Act of 1974 (19 U.S.C. 2275) is amended by adding at the end the following:

"(c) Upon issuing a certification under section 223, the Secretary shall notify the Secretary of Commerce of the identity of each firm covered by the certification.".

Subpart C—Program Benefits

SEC. 1821. QUALIFYING REQUIREMENTS FOR WORKERS.

(a) IN GENERAL.—Section 231(a)(5)(A)(ii) of the Trade Act of 1974 (19 U.S.C. 2291 (a)(5)(A)(ii)) is amended—

(1) by striking subclauses (I) and (II) and inserting the following:

"(I) in the case of a worker whose most recent total separation from adversely affected employment that meets the requirements of paragraphs (1) and (2) occurs after the date on which the Secretary issues a certification covering the worker, the last day of the 26th week after such total separation,

"(II) in the case of a worker whose most recent total separation from adversely affected employment that meets the requirements of paragraphs (1) and (2) occurs before the date on which the Secretary issues a certification covering the worker, the last day of the 26th week after the date of such certification,";

(2) in subclause (III)—

(A) by striking "later of the dates specified in subclause (I) or (II)" and inserting "date specified in subclause (I) or (II), as the case may be"; and

(B) by striking "or" at the end;

(3) by redesignating subclause (IV) as subclause (V); and

(4) by inserting after subclause (III) the following:

"(IV) in the case of a worker who fails to enroll by the date required by subclause (I), (II), or (III), as the case may be, due to the failure to provide the worker with timely information regarding the date specified in such subclause, the last day of a period determined by the Secretary, or".

(b) WAIVERS OF TRAINING REQUIREMENTS.—Section 231(c) of the Trade Act of 1974 (19 U.S.C. 2291(c)) is amended—

(1) in paragraph (1)(B)—

(A) by striking "The worker possesses" and inserting the following:

"(i) IN GENERAL.—The worker possesses"; and

(B) by adding at the end the following:

"(ii) MARKETABLE SKILLS DEFINED.—For purposes of clause (i), the term 'marketable skills' may include the possession of a postgraduate degree from an institution of higher education (as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002)) or an equivalent institution, or the possession of an equivalent postgraduate certification in a specialized field.";

(2) in paragraph (2)(A), by striking "A waiver" and inserting "Except as provided in paragraph (3)(B), a waiver"; and

(3) in paragraph (3)—

(A) in subparagraph (A), by striking "Pursuant to an agreement under section 239, the Secretary may authorize a" and inserting "An agreement under section 239 shall authorize a";

(B) by redesignating subparagraph (B) as subparagraph (C); and

(C) by inserting after subparagraph (A) the following:

"(B) REVIEW OF WAIVERS.—An agreement under section 239 shall require a cooperating State to review each waiver issued by the State under subparagraph (A), (B), (D), (E), or (F) of paragraph (1)—

"(i) 3 months after the date on which the State issues the waiver; and

"(ii) on a monthly basis thereafter.".

(c) CONFORMING AMENDMENTS.—

(1) Section 231 of the Trade Act of 1974 (19 U.S.C. 2291), as amended, is further amended—

(A) in subsection (a), in the matter preceding paragraph (1), by striking "more than 60 days" and all that follows through "section 221" and inserting "on or after the date of such certification"; and

(B) in subsection (b)—

(i) by striking paragraph (2); and

(ii) in paragraph (1)—

(I) by striking "(1)";

(II) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(III) by redesignating clauses (i) and (ii) as subparagraphs (A) and (B), respectively; and

(IV) by redesignating subclauses (I) and (II) as clauses (i) and (ii), respectively.

(2) Section 233 of the Trade Act of 1974 (19 U.S.C. 2293) is amended—

(A) by striking subsection (b); and

(B) by redesignating subsections (c) through (g) as subsections (b) through (f), respectively.

SEC. 1822. WEEKLY AMOUNTS.

Section 232 of the Trade Act of 1974 (19 U.S.C. 2292) is amended—

(1) in subsection (a)—

(A) by striking "subsections (b) and (c)" and inserting "subsections (b), (c), and (d)";

(B) by striking "total unemployment" the first place it appears and inserting "unemployment"; and

(C) in paragraph (2), by inserting before the period the following: ", except that in the case of an adversely affected worker who is participating in training under this chapter, such income shall not include earnings from work for such week that are equal to or less than the most recent weekly benefit amount of the unemployment insurance payable to the worker for a week of total unemployment preceding the worker's first exhaustion of unemployment insurance (as determined for purposes of section 231(a)(3)(B))"; and

(2) by adding at the end the following:

"(d) ELECTION OF TRADE READJUSTMENT ALLOWANCE OR UNEMPLOYMENT INSURANCE.—Notwithstanding section 231(a)(3)(B), an adversely affected worker may elect to receive a trade readjustment allowance instead of unemployment insurance during any week with respect to which the worker—

"(1) is entitled to receive unemployment insurance as a result of the establishment by the worker of a new benefit year under State law, based in whole or in part upon part-time or short-term employment in which the worker engaged after the worker's most recent total separation from adversely affected employment; and

"(2) is otherwise entitled to a trade readjustment allowance.".

SEC. 1823. LIMITATIONS ON TRADE READJUSTMENT ALLOWANCES; ALLOWANCES FOR EXTENDED TRAINING AND BREAKS IN TRAINING.

Section 233(a) of the Trade Act of 1974 (19 U.S.C. 2293(a)) is amended—

(1) in paragraph (2), by inserting "under paragraph (1)" after "trade readjustment allowance"; and

(2) in paragraph (3)—

(A) in the matter preceding subparagraph (A)—

(i) by striking "training approved for him" and inserting "a training program approved for the worker";

(ii) by striking "52 additional weeks" and inserting "78 additional weeks"; and

(iii) by striking "52-week" and inserting "91-week"; and

(B) in the matter following subparagraph (B), by striking "52-week" and inserting "91-week".

SEC. 1824. SPECIAL RULES FOR CALCULATION OF ELIGIBILITY PERIOD.

Section 233 of the Trade Act of 1974 (19 U.S.C. 2293), as amended, is further amended by adding at the end the following:

"(g) SPECIAL RULE FOR CALCULATING SEPARATION.—Notwithstanding any other provision of this chapter, any period during which a judicial or administrative appeal is pending with respect to the denial by the Secretary of a petition under section 223 shall not be counted for purposes of calculating the period of separation under subsection (a)(2).

"(h) SPECIAL RULE FOR JUSTIFIABLE CAUSE.—If the Secretary determines that there is justifiable cause, the Secretary may extend the period during which trade readjustment allowances are payable to an adversely affected worker under paragraphs (2) and (3) of subsection (a) (but not the maximum amounts of such allowances that are payable under this section).

"(i) SPECIAL RULE WITH RESPECT TO MILITARY SERVICE.—

"(1) IN GENERAL.—Notwithstanding any other provision of this chapter, the Secretary may waive any requirement of this chapter that the Secretary determines is necessary to ensure that an adversely affected worker who is a member of a reserve component of the Armed Forces and serves a period of duty described in paragraph (2) is eligible to receive a trade readjustment allowance, training, and other benefits under this chapter in the same manner and to the same extent as if the worker had not served the period of duty.

"(2) PERIOD OF DUTY DESCRIBED.—An adversely affected worker serves a period of duty described in this paragraph if, before completing training under section 236, the worker—

"(A) serves on active duty for a period of more than 30 days under a call or order to active duty of more than 30 days; or

"(B) in the case of a member of the Army National Guard of the United States or Air National Guard of the United States, performs full-time National Guard duty under section 502(f) of title 32, United States Code, for 30 consecutive days or more when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds.".

SEC. 1825. APPLICATION OF STATE LAWS AND REGULATIONS ON GOOD CAUSE FOR WAIVER OF TIME LIMITS OR LATE FILING OF CLAIMS.

Section 234 of the Trade Act of 1974 (19 U.S.C. 2294) is amended—

(1) by striking "Except where inconsistent" and inserting "(a) IN GENERAL.—Except where inconsistent"; and

(2) by adding at the end the following:

"(b) SPECIAL RULE WITH RESPECT TO STATE LAWS AND REGULATIONS ON GOOD CAUSE FOR WAIVER OF TIME LIMITS OR LATE FILING OF CLAIMS.—Any law, regulation, policy, or practice of a cooperating State that allows for a waiver for good cause of any time limitation relating to the administration of the State unemployment insurance law shall, in the administration of the program under this chapter

by the State, apply to any time limitation with respect to an application for a trade readjustment allowance or enrollment in training under this chapter.".

SEC. 1826. EMPLOYMENT AND CASE MANAGEMENT SERVICES.

(a) IN GENERAL.—Section 235 of the Trade Act of 1974 (19 U.S.C. 2295) is amended to read as follows:

"SEC. 235. EMPLOYMENT AND CASE MANAGEMENT SERVICES.

"The Secretary shall make available, directly or through agreements with States under section 239, to adversely affected workers and adversely affected incumbent workers covered by a certification under subchapter A of this chapter the following employment and case management services:

"(1) Comprehensive and specialized assessment of skill levels and service needs, including through—

"(A) diagnostic testing and use of other assessment tools; and

"(B) in-depth interviewing and evaluation to identify employment barriers and appropriate employment goals.

"(2) Development of an individual employment plan to identify employment goals and objectives, and appropriate training to achieve those goals and objectives.

"(3) Information on training available in local and regional areas, information on individual counseling to determine which training is suitable training, and information on how to apply for such training.

"(4) Information on how to apply for financial aid, including referring workers to educational opportunity centers described in section 402F of the Higher Education Act of 1965 (20 U.S.C. 1070a–16), where applicable, and notifying workers that the workers may request financial aid administrators at institutions of higher education (as defined in section 102 of such Act (20 U.S.C. 1002)) to use the administrators' discretion under section 479A of such Act (20 U.S.C. 1087tt) to use current year income data, rather than preceding year income data, for determining the amount of need of the workers for Federal financial assistance under title IV of such Act (20 U.S.C. 1070 et seq.).

"(5) Short-term prevocational services, including development of learning skills, communications skills, interviewing skills, punctuality, personal maintenance skills, and professional conduct to prepare individuals for employment or training.

"(6) Individual career counseling, including job search and placement counseling, during the period in which the individual is receiving a trade adjustment allowance or training under this chapter, and after receiving such training for purposes of job placement.

"(7) Provision of employment statistics information, including the provision of accurate information relating to local, regional, and national labor market areas, including—

"(A) job vacancy listings in such labor market areas;

"(B) information on jobs skills necessary to obtain jobs identified in job vacancy listings described in subparagraph (A);

"(C) information relating to local occupations that are in demand and earnings potential of such occupations; and

"(D) skills requirements for local occupations described in subparagraph (C).

"(8) Information relating to the availability of supportive services, including services relating to child care, transportation, dependent care, housing assistance, and need-related payments that are necessary to enable an individual to participate in training.".

(b) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by striking the item relating to section 235 and inserting the following:

"235. Employment and case management services.".

SEC. 1827. ADMINISTRATIVE EXPENSES AND EMPLOYMENT AND CASE MANAGEMENT SERVICES.

(a) IN GENERAL.—Part II of subchapter B of chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2295 et seq.) is amended by inserting after section 235 the following:

"SEC. 235A. FUNDING FOR ADMINISTRATIVE EXPENSES AND EMPLOYMENT AND CASE MANAGEMENT SERVICES.

"(a) FUNDING FOR ADMINISTRATIVE EXPENSES AND EMPLOYMENT AND CASE MANAGEMENT SERVICES.—

"(1) IN GENERAL.—In addition to any funds made available to a State to carry out section 236 for a fiscal year, the State shall receive for the fiscal year a payment in an amount that is equal to 15 percent of the amount of such funds.

"(2) USE OF FUNDS.—A State that receives a payment under paragraph (1) shall—

"(A) use not more than ⅔ of such payment for the administration of the trade adjustment assistance for workers program under this chapter, including for—

"(i) processing waivers of training requirements under section 231;

"(ii) collecting, validating, and reporting data required under this chapter; and

"(iii) providing reemployment trade adjustment assistance under section 246; and

"(B) use not less than ⅓ of such payment for employment and case management services under section 235.

"(b) ADDITIONAL FUNDING FOR EMPLOYMENT AND CASE MANAGEMENT SERVICES.—

"(1) IN GENERAL.—In addition to any funds made available to a State to carry out section 236 and the payment under subsection (a)(1) for a fiscal year, the Secretary shall provide to the State for the fiscal year a payment in the amount of $350,000.

"(2) USE OF FUNDS.—A State that receives a payment under paragraph (1) shall use such payment for the purpose of providing employment and case management services under section 235.

"(3) VOLUNTARY RETURN OF FUNDS.—A State that receives a payment under paragraph (1) may decline or otherwise return such payment to the Secretary.".

(b) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by inserting after the item relating to section 235 the following:

"Sec. 235A. Funding for administrative expenses and employment and case management services.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

SEC. 1828. TRAINING FUNDING.

(a) IN GENERAL.—Section 236(a)(2) of the Trade Act of 1974 (19 U.S.C. 2296(a)(2)) is amended to read as follows:

"(2)(A) The total amount of payments that may be made under paragraph (1) shall not exceed—

"(i) for each of the fiscal years 2009 and 2010, $575,000,000; and

"(ii) for the period beginning October 1, 2010, and ending December 31, 2010, $143,750,000.

"(B)(i) The Secretary shall, as soon as practicable after the beginning of each fiscal year, make an initial distribution of the funds made available to carry out this section, in accordance with the requirements of subparagraph (C).

"(ii) The Secretary shall ensure that not less than 90 percent of the funds made available to carry out this section for a fiscal year are distributed to the States by not later than July 15 of that fiscal year.

"(C)(i) In making the initial distribution of funds pursuant to subparagraph (B)(i) for a fiscal year, the Secretary shall hold in reserve 35 percent of the funds made available to carry out this section for that fiscal year for additional distributions during the remainder of the fiscal year.

"(ii) Subject to clause (iii), in determining how to apportion the initial distribution of funds pursuant to subparagraph (B)(i) in a fiscal year, the Secretary shall take into account, with respect to each State—

"(I) the trend in the number of workers covered by certifications of eligibility under this chapter during the most recent 4 consecutive calendar quarters for which data are available;

"(II) the trend in the number of workers participating in training under this section during the most recent 4 consecutive calendar quarters for which data are available;

"(III) the number of workers estimated to be participating in training under this section during the fiscal year;

"(IV) the amount of funding estimated to be necessary to provide training approved under this section to such workers during the fiscal year; and

"(V) such other factors as the Secretary considers appropriate relating to the provision of training under this section.

"(iii) In no case may the amount of the initial distribution to a State pursuant to subparagraph (B)(i) in a fiscal year be less than 25 percent of the initial distribution to the State in the preceding fiscal year.

"(D) The Secretary shall establish procedures for the distribution of the funds that remain available for the fiscal year after the initial distribution required under subparagraph (B)(i). Such procedures may include the distribution of funds pursuant to requests submitted by States in need of such funds.

"(E) If, during a fiscal year, the Secretary estimates that the amount of funds necessary to pay the costs of training approved under this section will exceed the dollar amount limitation specified in subparagraph (A), the Secretary shall decide how the amount of funds made available to carry out this section that have not been distributed at the time of the estimate will be apportioned among the States for the remainder of the fiscal year.".

(b) DETERMINATIONS REGARDING TRAINING.—Section 236(a)(9) of the Trade Act of 1974 (19 U.S.C. 2296(a)(9)) is amended—

(1) by striking "The Secretary" and inserting "(A) Subject to subparagraph (B), the Secretary"; and

(2) by adding at the end the following:

"(B)(i) In determining under paragraph (1)(E) whether a worker is qualified to undertake and complete training, the Secretary may approve training for a period longer than the worker's period of eligibility for trade readjustment allowances under part I if the worker demonstrates a financial ability to complete the training after the expiration of the worker's period of eligibility for such trade readjustment allowances.

"(ii) In determining the reasonable cost of training under paragraph (1)(F) with respect to a worker, the Secretary may consider whether other public or private funds are reasonably available to the worker, except that the Secretary may not require a worker to obtain such funds as a condition of approval of training under paragraph (1).".

(c) REGULATIONS.—Section 236 of the Trade Act of 1974 (19 U.S.C. 2296) is amended by adding at the end the following:

"(g) REGULATIONS WITH RESPECT TO APPORTIONMENT OF TRAINING FUNDS TO STATES.—

"(1) IN GENERAL.—Not later than 1 year after the date of the enactment of this subsection, the Secretary shall issue such regulations as may be necessary to carry out the provisions of subsection (a)(2).

"(2) CONSULTATIONS.—The Secretary shall consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives not less than 90 days before issuing any regulation pursuant to paragraph (1).".

(d) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect upon the expiration of the 90-day period beginning on the date of the enactment of this Act, except that—

(1) subparagraph (A) of section 236(a)(2) of the Trade Act of 1974, as amended by subsection (a) of this section, shall take effect on the date of the enactment of this Act; and

(2) subparagraphs (B), (C), and (D) of such section 236(a)(2) shall take effect on October 1, 2009.

SEC. 1829. PREREQUISITE EDUCATION; APPROVED TRAINING PROGRAMS.

(a) IN GENERAL.—Section 236(a)(5) of the Trade Act of 1974 (19 U.S.C. 2296(a)(5)) is amended—

(1) in subparagraph (A)—

(A) by striking "and" at the end of clause (i);

(B) by adding "and" at the end of clause (ii); and

(C) by inserting after clause (ii) the following:

"(iii) apprenticeship programs registered under the Act of August 16, 1937 (commonly known as the 'National Apprenticeship Act'; 50 Stat. 664, chapter 663; 29 U.S.C. 50 et seq.),";

(2) by redesignating subparagraphs (E) and (F) as subparagraphs (F) and (G), respectively;

(3) by inserting after subparagraph (D) the following:

"(E) any program of prerequisite education or coursework required to enroll in training that may be approved under this section,";

(4) in subparagraph (F)(ii), as redesignated by paragraph (2), by striking "and" at the end;

(5) in subparagraph (G), as redesignated by paragraph (2), by striking the period at the end and inserting ", and"; and

(6) by adding at the end the following:

"(H) any training program or coursework at an accredited institution of higher education (described in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002)), including a training program or coursework for the purpose of—

"(i) obtaining a degree or certification; or

"(ii) completing a degree or certification that the worker had previously begun at an accredited institution of higher education.

The Secretary may not limit approval of a training program under paragraph (1) to a program provided pursuant to title I of the Workforce Investment Act of 1998 (29 U.S.C. 2801 et seq.).".

(b) CONFORMING AMENDMENTS.—Section 233 of the Trade Act of 1974 (19 U.S.C. 2293) is amended—

(1) in subsection (a)(2), by inserting "prerequisite education or" after "requires a program of"; and

(2) in subsection (f) (as redesignated by section 1821(c) of this subtitle), by inserting "prerequisite education or" after "includes a program of".

(c) TECHNICAL CORRECTIONS.—Section 236 of the Trade Act of 1974 (19 U.S.C. 2296) is amended—

(1) in subsection (a)—

(A) in paragraph (1), in the flush text, by striking "his behalf" and inserting "the worker's behalf"; and

(B) in paragraph (3), by striking "this paragraph (1)" and inserting "paragraph (1)"; and

(2) in subsection (b)(2), by striking ", and" and inserting a period.

SEC. 1830. PRE-LAYOFF AND PART-TIME TRAINING.

(a) PRE-LAYOFF TRAINING.—

(1) IN GENERAL.—Section 236(a) of the Trade Act of 1974 (19 U.S.C. 2296(a)) is amended—

(A) in paragraph (1), by inserting after "determines" the following: ", with respect to an adversely affected worker or an adversely affected incumbent worker,";

(B) in paragraph (4)—

(i) in subparagraphs (A) and (B), by inserting "or an adversely affected incumbent worker" after "an adversely affected worker" each place it appears; and

(ii) in subparagraph (C), by inserting "or adversely affected incumbent worker" after "adversely affected worker" each place it appears;

(C) in paragraph (5), in the matter preceding subparagraph (A), by striking "The training programs" and inserting "Except as provided in paragraph (10), the training programs";

(D) in paragraph (6)(B), by inserting "or adversely affected incumbent worker" after "adversely affected worker";

(E) in paragraph (7)(B), by inserting "or adversely affected incumbent worker" after "adversely affected worker"; and

(F) by inserting after paragraph (9) the following:

"(10) In the case of an adversely affected incumbent worker, the Secretary may not approve—

"(A) on-the-job training under paragraph (5)(A)(i); or

"(B) customized training under paragraph (5)(A)(ii), unless such training is for a position other than the worker's adversely affected employment.

"(11) If the Secretary determines that an adversely affected incumbent worker for whom the Secretary approved training under this section is no longer threatened with a total or partial separation, the Secretary shall terminate the approval of such training.".

(2) DEFINITIONS.—Section 247 of the Trade Act of 1974 (19 U.S.C. 2319), as amended, is further amended by adding at the end the following:

"(19) The term 'adversely affected incumbent worker' means a worker who—

"(A) is a member of a group of workers who have been certified as eligible to apply for adjustment assistance under subchapter A;

"(B) has not been totally or partially separated from adversely affected employment; and

"(C) the Secretary determines, on an individual basis, is threatened with total or partial separation.".

(b) PART-TIME TRAINING.—Section 236 of the Trade Act of 1974 (19 U.S.C. 2296), as amended, is further amended by adding at the end the following:

"(h) PART-TIME TRAINING.—

"(1) IN GENERAL.—The Secretary may approve full-time or part-time training for a worker under subsection (a).

"(2) LIMITATION.—Notwithstanding paragraph (1), a worker participating in part-time training approved under subsection (a) may not receive a trade readjustment allowance under section 231.".

SEC. 1831. ON-THE-JOB TRAINING.

(a) IN GENERAL.—Section 236(c) of the Trade Act of 1974 (19 U.S.C. 2296(c)) is amended—

(1) by redesignating paragraphs (1) through (10) as subparagraphs (A) through (J) and moving such subparagraphs 2 ems to the right;

(2) by striking "(c) The Secretary shall" and all that follows through "such costs," and inserting the following:

"(c) ON-THE-JOB TRAINING REQUIREMENTS.—

"(1) IN GENERAL.—The Secretary may approve on-the-job training for any adversely affected worker if—

"(A) the worker meets the requirements for training to be approved under subsection (a)(1);

"(B) the Secretary determines that on-the-job training—

"(i) can reasonably be expected to lead to suitable employment with the employer offering the on-the-job training;

"(ii) is compatible with the skills of the worker;

"(iii) includes a curriculum through which the worker will gain the knowledge or skills to become proficient in the job for which the worker is being trained; and

"(iv) can be measured by benchmarks that indicate that the worker is gaining such knowledge or skills; and

"(C) the State determines that the on-the-job training program meets the requirements of clauses (iii) and (iv) of subparagraph (B).

"(2) MONTHLY PAYMENTS.—The Secretary shall pay the costs of on-the-job training approved under paragraph (1) in monthly installments.

"(3) CONTRACTS FOR ON-THE-JOB TRAINING.—

"(A) IN GENERAL.—The Secretary shall ensure, in entering into a contract with an employer to provide on-the-job training to a worker under this subsection, that the skill requirements of the job for which the worker is being trained, the academic and occupational skill level of the worker, and the work experience of the worker are taken into consideration.

"(B) TERM OF CONTRACT.—Training under any such contract shall be limited to the period of time required for the worker receiving on-the-job training to become proficient in the job for which the worker is being trained, but may not exceed 104 weeks in any case.

"(4) EXCLUSION OF CERTAIN EMPLOYERS.—The Secretary shall not enter into a contract for on-the-job training with an employer that exhibits a pattern of failing to provide workers receiving on-the-job training from the employer with—

"(A) continued, long-term employment as regular employees; and

"(B) wages, benefits, and working conditions that are equivalent to the wages, benefits, and working conditions provided to regular employees who have worked a similar period of time and are doing the same type of work as workers receiving on-the-job training from the employer.

"(5) LABOR STANDARDS.—The Secretary may pay the costs of on-the-job training,"; and

(3) in paragraph (5), as redesignated—

(A) in subparagraph (I), as redesignated by paragraph (1) of this section, by striking "paragraphs (1), (2), (3), (4), (5), and (6)" and inserting "subparagraphs (A), (B), (C), (D), (E), and (F)"; and

(B) in subparagraph (J), as redesignated by paragraph (1) of this section, by striking "paragraph (8)" and inserting "subparagraph (H)".

(b) REPEAL OF PREFERENCE FOR TRAINING ON THE JOB.—Section 236(a)(1) of the Trade Act of 1974 (19 U.S.C. 2296(a)(1)) is amended by striking the last sentence.

SEC. 1832. ELIGIBILITY FOR UNEMPLOYMENT INSURANCE AND PROGRAM BENEFITS WHILE IN TRAINING.

Section 236(d) of the Trade Act of 1974 (19 U.S.C. 2296(d)) is amended to read as follows:

"(d) ELIGIBILITY.—An adversely affected worker may not be determined to be ineligible or disqualified for unemployment insurance or program benefits under this subchapter—

"(1) because the worker—

"(A) is enrolled in training approved under subsection (a);

"(B) left work—

"(i) that was not suitable employment in order to enroll in such training; or

"(ii) that the worker engaged in on a temporary basis during a break in such training or a delay in the commencement of such training; or

"(C) left on-the-job training not later than 30 days after commencing such training because the training did not meet the requirements of subsection (c)(1)(B); or

"(2) because of the application to any such week in training of the provisions of State law or Federal unemployment insurance law relating to availability for work, active search for work, or refusal to accept work.".

SEC. 1833. JOB SEARCH AND RELOCATION ALLOWANCES.

(a) JOB SEARCH ALLOWANCES.—Section 237 of the Trade Act of 1974 (19 U.S.C. 2297) is amended—

(1) in subsection (a)(2)(C)(ii), by striking ", unless the worker received a waiver under section 231(c)"; and

(2) in subsection (b)—

(A) in paragraph (1), by striking "90 percent of the cost of" and inserting "all"; and

(B) in paragraph (2), by striking "$1,250" and inserting "$1,500".

(b) RELOCATION ALLOWANCES.—Section 238 of the Trade Act of 1974 (19 U.S.C. 2298) is amended—

(1) in subsection (a)(2)(E)(ii), by striking ", unless the worker received a waiver under section 231(c)"; and

(2) in subsection (b)—

(A) in paragraph (1), by striking "90 percent of the" and inserting "all"; and

(B) in paragraph (2), by striking "$1,250" and inserting "$1,500".

Subpart D—Reemployment Trade Adjustment Assistance Program

SEC. 1841. REEMPLOYMENT TRADE ADJUSTMENT ASSISTANCE PROGRAM.

(a) IN GENERAL.—Section 246 of the Trade Act of 1974 (19 U.S.C. 2318) is amended—

(1) by amending the heading to read as follows:

"SEC. 246. REEMPLOYMENT TRADE ADJUSTMENT ASSISTANCE PROGRAM.";

(2) in subsection (a)—

(A) in paragraph (1)—

(i) by striking "Not later than" and all that follows through "2002, the Secretary" and inserting "The Secretary"; and

(ii) by striking "an alternative trade adjustment assistance program for older workers" and inserting "a reemployment trade adjustment assistance program";

(B) in paragraph (2)—

(i) in subparagraph (A)—

(I) in the matter preceding clause (i), by striking "for a period not to exceed 2 years" and inserting "for the eligibility period under subparagraph (A) or (B) of paragraph (4) (as the case may be)"; and

(II) by striking clauses (i) and (ii) and inserting the following:

"(i) the wages received by the worker at the time of separation; and

"(ii) the wages received by the worker from reemployment.";

(ii) in subparagraph (B)—

(I) by striking "for a period not to exceed 2 years" and inserting "for the eligibility period under subparagraph (A) or (B) of paragraph (4) (as the case may be)"; and

(II) by striking ", as added by section 201 of the Trade Act of 2002"; and

(iii) by adding at the end the following:

"(C) TRAINING AND OTHER SERVICES.—A worker described in paragraph (3)(B) participating in the program established under paragraph (1) is eligible to receive training approved under section 236 and employment and case management services under section 235."; and

(C) by striking paragraphs (3) through (5) and inserting the following:

"(3) ELIGIBILITY.—

"(A) IN GENERAL.—A group of workers certified under subchapter A as eligible for adjustment assistance under subchapter A is eligible for benefits described in paragraph (2) under the program established under paragraph (1).

"(B) INDIVIDUAL ELIGIBILITY.—A worker in a group of workers described in subparagraph (A) may elect to receive benefits described in paragraph (2) under the program established under paragraph (1) if the worker—

"(i) is at least 50 years of age;

"(ii) earns not more than $55,000 each year in wages from reemployment;

"(iii)(I) is employed on a full-time basis as defined by the law of the State in which the worker is employed and is not enrolled in a training program approved under section 236; or

"(II) is employed at least 20 hours per week and is enrolled in a training program approved under section 236; and

"(iv) is not employed at the firm from which the worker was separated.

"(4) ELIGIBILITY PERIOD FOR PAYMENTS.—

"(A) WORKER WHO HAS NOT RECEIVED TRADE READJUSTMENT ALLOWANCE.—In the case of a worker described in paragraph (3)(B) who has not received a trade readjustment allowance under part I of subchapter B pursuant to the certification described in paragraph (3)(A), the worker may receive benefits described in paragraph (2) for a period not to exceed 2 years beginning on the earlier of—

"(i) the date on which the worker exhausts all rights to unemployment insurance based on the separation of the worker from the adversely affected employment that is the basis of the certification; or

"(ii) the date on which the worker obtains reemployment described in paragraph (3)(B).

"(B) WORKER WHO HAS RECEIVED TRADE READJUSTMENT ALLOWANCE.—In the case of a worker described in paragraph (3)(B) who has received a trade readjustment allowance under part I of subchapter B pursuant to the certification described in paragraph (3)(A), the worker may receive benefits described in paragraph (2) for a period of 104 weeks beginning on the date on which the worker obtains reemployment described in paragraph (3)(B), reduced by the total number of weeks for which the worker received such trade readjustment allowance.

"(5) TOTAL AMOUNT OF PAYMENTS.—

"(A) IN GENERAL.—The payments described in paragraph (2)(A) made to a worker may not exceed—

"(i) $12,000 per worker during the eligibility period under paragraph (4)(A); or

"(ii) the amount described in subparagraph (B) per worker during the eligibility period under paragraph (4)(B).

"(B) AMOUNT DESCRIBED.—The amount described in this subparagraph is the amount equal to the product of—

"(i) $12,000, and

"(ii) the ratio of—

"(I) the total number of weeks in the eligibility period under paragraph (4)(B) with respect to the worker, to

"(II) 104 weeks.

"(6) CALCULATION OF AMOUNT OF PAYMENTS FOR CERTAIN WORKERS.—

"(A) IN GENERAL.—In the case of a worker described in paragraph (3)(B)(iii)(II), paragraph (2)(A) shall be applied by substituting the percentage described in subparagraph (B) for '50 percent'.

"(B) PERCENTAGE DESCRIBED.—The percentage described in this subparagraph is the percentage—

"(i) equal to ½ of the ratio of—

"(I) the number of weekly hours of employment of the worker referred to in paragraph (3)(B)(iii)(II), to

"(II) the number of weekly hours of employment of the worker at the time of separation, but

"(ii) in no case more than 50 percent.

"(7) LIMITATION ON OTHER BENEFITS.—A worker described in paragraph (3)(B) may not receive a trade readjustment allowance under part I of subchapter B pursuant to the certification described in paragraph (3)(A) during any week for which the worker receives a payment described in paragraph (2)(A).";

and

(3) in subsection (b)(2), by striking "subsection (a)(3)(B)" and inserting "subsection (a)(3)".

(b) EXTENSION OF PROGRAM.—Section 246(b)(1) of the Trade Act of 1974 (19 U.S.C. 2318(b)(1)) is amended by striking "the date that is 5 years" and all that follows through the end period and inserting "December 31, 2010.".

(c) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by striking the item relating to section 246 and inserting the following:

"Sec. 246. Reemployment trade adjustment assistance program.".

Subpart E—Other Matters

SEC. 1851. OFFICE OF TRADE ADJUSTMENT ASSISTANCE.

(a) IN GENERAL.—Subchapter C of chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2311 et seq.) is amended by adding at the end the following:

"SEC. 249A. OFFICE OF TRADE ADJUSTMENT ASSISTANCE.

"(a) ESTABLISHMENT.—There is established in the Department of Labor an office to be known as the Office of Trade Adjustment Assistance (in this section referred to as the 'Office').

"(b) HEAD OF OFFICE.—The head of the Office shall be an administrator, who shall report directly to the Deputy Assistant Secretary for Employment and Training.

"(c) PRINCIPAL FUNCTIONS.—The principal functions of the administrator of the Office shall be—

"(1) to oversee and implement the administration of trade adjustment assistance program under this chapter; and

"(2) to carry out functions delegated to the Secretary of Labor under this chapter, including—

"(A) making determinations under section 223;

"(B) providing information under section 225 about trade adjustment assistance to workers and assisting such workers to prepare petitions or applications for program benefits;

"(C) providing assistance to employers of groups of workers that have filed petitions under section 221 in submitting information required by the Secretary relating to the petitions;

"(D) ensuring workers covered by a certification of eligibility under subchapter A receive the employment and case management services described in section 235;

"(E) ensuring that States fully comply with agreements entered into under section 239;

"(F) advocating for workers applying for benefits available under this chapter;

"(G) establishing and overseeing a hotline that workers, employers, and other entities may call to obtain information regarding eligibility criteria, procedural requirements, and benefits available under this chapter; and

"(H) carrying out such other duties with respect to this chapter as the Secretary specifies for purposes of this section.

"(d) ADMINISTRATION.—

"(1) DESIGNATION.—The administrator shall designate an employee of the Department of Labor with appropriate experience and expertise to carry out the duties described in paragraph (2).

"(2) DUTIES.—The employee designated under paragraph (1) shall—

"(A) receive complaints and requests for assistance related to the trade adjustment assistance program under this chapter;

"(B) resolve such complaints and requests for assistance, in coordination with other employees of the Office;

"(C) compile basic information concerning such complaints and requests for assistance; and

"(D) carry out such other duties with respect to this chapter as the Secretary specifies for purposes of this section.".

(b) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by inserting after the item relating to section 249 the following:

"Sec. 249A. Office of Trade Adjustment Assistance.".

SEC. 1852. ACCOUNTABILITY OF STATE AGENCIES; COLLECTION AND PUBLICATION OF PROGRAM DATA; AGREEMENTS WITH STATES.

(a) IN GENERAL.—Section 239(a) of the Trade Act of 1974 (19 U.S.C. 2311(a)) is amended—

(1) by amending clause (2) to read as follows: "(2) in accordance with subsection (f), shall make available to adversely affected workers and adversely affected incumbent workers covered by a certification under subchapter A the employment and case management services described in section 235,"; and

(2) by striking "will" each place it appears and inserting "shall".

(b) FORM AND MANNER OF DATA.—Section 239 of the Trade Act of 1974 (19 U.S.C. 2311) is amended—

(1) by redesignating subsections (c) through (g) as subsections (d) through (h), respectively; and

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

"(c) FORM AND MANNER OF DATA.—Each agreement under this subchapter shall—

"(1) provide the Secretary with the authority to collect any data the Secretary determines necessary to meet the requirements of this chapter; and

"(2) specify the form and manner in which any such data requested by the Secretary shall be reported.".

(c) STATE ACTIVITIES.—Section 239(g) of the Trade Act of 1974 (as redesignated) is amended—

(1) in paragraph (3), by striking "and" at the end;

(2) by amending paragraph (4) to read as follows:

"(4) perform outreach to, intake of, and orientation for adversely affected workers and adversely affected incumbent workers covered by a certification under subchapter A with respect to assistance and benefits available under this chapter, and"; and

(3) by adding at the end the following:

"(5) make employment and case management services described in section 235 available to adversely affected workers and adversely affected incumbent workers covered by a certification under subchapter A and, if funds provided to carry out this chapter are insufficient to make such services available, make arrangements to make such services available through other Federal programs.".

(d) REPORTING REQUIREMENT.—Section 239(h) of the Trade Act of 1974 (as redesignated) is amended by striking "1998." and inserting "1998 (29 U.S.C. 2822(b)) and a description of the State's rapid response activities under section 221(a)(2)(A).".

(e) CONTROL MEASURES.—Section 239 of the Trade Act of 1974 (19 U.S.C. 2311), as amended, is further amended by adding at the end the following:

"(i) CONTROL MEASURES.—

"(1) IN GENERAL.—The Secretary shall require each cooperating State and cooperating State agency to implement effective control measures and to effectively oversee the operation and administration of the trade adjustment assistance program under this chapter, including by means of monitoring the operation of control measures to improve the accuracy and timeliness of the data being collected and reported.

"(2) DEFINITION.—For purposes of paragraph (1), the term 'control measures' means measures that—

"(A) are internal to a system used by a State to collect data; and

"(B) are designed to ensure the accuracy and verifiability of such data.

"(j) DATA REPORTING.—

"(1) IN GENERAL.—Any agreement entered into under this section shall require the cooperating State or cooperating State agency to report to the Secretary on a quarterly basis comprehensive performance accountability data, to consist of—

"(A) the core indicators of performance described in paragraph (2)(A);

"(B) the additional indicators of performance described in paragraph (2)(B), if any; and

"(C) a description of efforts made to improve outcomes for workers under the trade adjustment assistance program.

"(2) CORE INDICATORS DESCRIBED.—

"(A) IN GENERAL.—The core indicators of performance described in this paragraph are—

"(i) the percentage of workers receiving benefits under this chapter who are employed during the second calendar quarter following the calendar quarter in which the workers cease receiving such benefits;

"(ii) the percentage of such workers who are employed in each of the third and fourth calendar quarters following the calendar quarter in which the workers cease receiving such benefits; and

"(iii) the earnings of such workers in each of the third and fourth calendar quarters following the calendar quarter in which the workers cease receiving such benefits.

"(B) ADDITIONAL INDICATORS.—The Secretary and a cooperating State or cooperating State agency may agree upon additional indicators of performance for the trade adjustment assistance program under this chapter, as appropriate.

"(3) STANDARDS WITH RESPECT TO RELIABILITY OF DATA.—In preparing the quarterly report required by paragraph (1), each cooperating State or cooperating State agency shall establish procedures that are consistent with guidelines to be issued by the Secretary to ensure that the data reported are valid and reliable.".

SEC. 1853. VERIFICATION OF ELIGIBILITY FOR PROGRAM BENEFITS.

Section 239 of the Trade Act of 1974 (19 U.S.C. 2311), as amended, is further amended by adding at the end the following:

"(k) VERIFICATION OF ELIGIBILITY FOR PROGRAM BENEFITS.—

"(1) IN GENERAL.—An agreement under this subchapter shall provide that the State shall periodically redetermine that a worker receiving benefits under this subchapter who is not a citizen or national of the United States remains in a satisfactory immigration status. Once satisfactory immigration status has been initially verified through the immigration status verification system described in section 1137(d) of the Social Security Act (42 U.S.C. 1320b-7(d)) for purposes of establishing a worker's eligibility for unemployment compensation, the State shall reverify the worker's immigration status if the documentation provided during initial verification will expire during the period in which that worker is potentially eligible to receive benefits under this subchapter. The State shall conduct such redetermination in a timely manner, utilizing the immigration status verification system described in section 1137(d) of the Social Security Act (42 U.S.C. 1320b-7(d)).

"(2) PROCEDURES.—The Secretary shall establish procedures to ensure the uniform application by the States of the requirements of this subsection.".

SEC. 1854. COLLECTION OF DATA AND REPORTS; INFORMATION TO WORKERS.

(a) IN GENERAL.—Subchapter C of chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2311 et seq.), as amended, is further amended by adding at the end the following:

"SEC. 249B. COLLECTION AND PUBLICATION OF DATA AND REPORTS; INFORMATION TO WORKERS.

"(a) IN GENERAL.—Not later than 180 days after the date of the enactment of this section, the Secretary shall implement a system to collect and report the data described in subsection (b), as well as any other information that the Secretary considers appropriate to effectively carry out this chapter.

"(b) DATA TO BE INCLUDED.—The system required under subsection (a) shall include collection of and reporting on the following data for each fiscal year:

"(1) DATA ON PETITIONS FILED, CERTIFIED, AND DENIED.—

"(A) The number of petitions filed, certified, and denied under this chapter.

"(B) The number of workers covered by petitions filed, certified, and denied.

"(C) The number of petitions, classified by—

"(i) the basis for certification, including increased imports, shifts in production, and other bases of eligibility; and

"(ii) congressional district of the United States.

"(D) The average time for processing such petitions.

"(2) DATA ON BENEFITS RECEIVED.—

"(A) The number of workers receiving benefits under this chapter.

"(B) The number of workers receiving each type of benefit, including training, trade readjustment allowances, employment and case management services, and relocation and job search allowances, and, to the extent feasible, credits for health insurance costs under section 35 of the Internal Revenue Code of 1986.

"(C) The average time during which such workers receive each such type of benefit.

"(3) DATA ON TRAINING.—

"(A) The number of workers enrolled in training approved under section 236, classified by major types of training, including classroom training, training through distance learning, on-the-job training, and customized training.

"(B) The number of workers enrolled in full-time training and part-time training.

"(C) The average duration of training.

"(D) The number of training waivers granted under section 231(c), classified by type of waiver.

"(E) The number of workers who complete training and the duration of such training.

"(F) The number of workers who do not complete training.

"(4) DATA ON OUTCOMES.—

"(A) A summary of the quarterly reports required under section 239(j).

"(B) The sectors in which workers are employed after receiving benefits under this chapter.

"(5) DATA ON RAPID RESPONSE ACTIVITIES.—Whether rapid response activities were provided with respect to each petition filed under section 221.

"(c) CLASSIFICATION OF DATA.—To the extent possible, in collecting and reporting the data described in subsection (b), the Secretary shall classify the data by industry, State, and national totals.

"(d) REPORT.—Not later than December 15 of each year, the Secretary shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report that includes—

"(1) a summary of the information collected under this section for the preceding fiscal year;

"(2) information on the distribution of funds to each State pursuant to section 236(a)(2); and

"(3) any recommendations of the Secretary with respect to changes in eligibility requirements, benefits, or training funding under this chapter based on the data collected under this section.

"(e) AVAILABILITY OF DATA.—

"(1) IN GENERAL.—The Secretary shall make available to the public, by publishing on the website of the Department of Labor and by other means, as appropriate—

"(A) the report required under subsection (d);

"(B) the data collected under this section, in a searchable format; and

"(C) a list of cooperating States and cooperating State agencies that failed to submit the data required by this section to the Secretary in a timely manner.

"(2) UPDATES.—The Secretary shall update the data under paragraph (1) on a quarterly basis.".

(b) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by inserting after the item relating to section 249A the following:

"Sec. 249B. Collection and publication of data and reports; information to workers.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

SEC. 1855. FRAUD AND RECOVERY OF OVERPAYMENTS.

Section 243(a)(1) of the Trade Act of 1974 (19 U.S.C. 2315(a)(1)) is amended—

(1) in the matter preceding subparagraph (A)—

(A) by striking "may waive" and inserting "shall waive"; and

(B) by striking ", in accordance with guidelines prescribed by the Secretary,"; and

(2) in subparagraph (B), by striking "would be contrary to equity and good conscience" and inserting "would cause a financial hardship for the individual (or the individual's household, if applicable) when taking into consideration the income and resources reasonably available to the individual (or household) and other ordinary living expenses of the individual (or household)".

SEC. 1856. SENSE OF CONGRESS ON APPLICATION OF TRADE ADJUSTMENT ASSISTANCE.

(a) IN GENERAL.—Chapter 5 of title II of the Trade Act of 1974 (19 U.S.C. 2391 et seq.) is amended by adding at the end the following:

"SEC. 288. SENSE OF CONGRESS.

"It is the sense of Congress that the Secretaries of Labor, Commerce, and Agriculture should apply the provisions of chapter 2 (relating to adjustment assistance for workers), chapter 3 (relating to adjustment assistance for firms), chapter 4 (relating to adjustment assistance for communities), and chapter 6 (relating to adjustment assistance for farmers), respectively, with the utmost regard

for the interests of workers, firms, communities, and farmers petitioning for benefits under such chapters.".

(b) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by inserting after the item relating to section 287 the following:

"Sec. 288. Sense of Congress.".

SEC. 1857. CONSULTATIONS IN PROMULGATION OF REGULATIONS.

Section 248 of the Trade Act of 1974 (19 U.S.C. 2320) is amended—

(1) by striking "The Secretary shall" and inserting the following:

"(a) IN GENERAL.—The Secretary shall"; and

(2) by adding at the end the following:

"(b) CONSULTATIONS.—Not later than 90 days before issuing a regulation under subsection (a), the Secretary shall consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives with respect to the regulation.".

SEC. 1858. TECHNICAL CORRECTIONS.

(a) DETERMINATIONS BY SECRETARY OF LABOR.—Section 223(c) of the Trade Act of 1974 (19 U.S.C. 2273(c)) is amended by striking "his determination" and inserting "a determination".

(b) QUALIFYING REQUIREMENTS FOR WORKERS.—Section 231(a) of the Trade Act of 1974 (19 U.S.C. 2291(a)) is amended—

(1) in paragraph (1)—

(A) in the matter preceding subparagraph (A), by striking "his application" and inserting "the worker's application"; and

(B) in subparagraph (A), by striking "he is covered" and inserting "the worker is covered";

(2) in paragraph (2)—

(A) in subparagraph (A), by striking the period and inserting a comma; and

(B) in subparagraph (D), by striking "5 U.S.C. 8521(a)(1)" and inserting "section 8521(a)(1) of title 5, United States Code"; and

(3) in paragraph (3)—

(A) by striking "he" each place it appears and inserting "the worker"; and

(B) in subparagraph (C), by striking "him" and inserting "the worker".

(c) SUBPOENA POWER.—Section 249 of the Trade Act of 1974 (19 U.S.C. 2321) is amended—

(1) in the section heading, by striking "**SUBPENA**" and inserting "**SUBPOENA**";

(2) by striking "subpena" and inserting "subpoena" each place it appears; and

(3) in subsection (a), by striking "him" and inserting "the Secretary".

(d) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by striking the item relating to section 249 and inserting the following:

"Sec. 249. Subpoena power.".

PART II—TRADE ADJUSTMENT ASSISTANCE FOR FIRMS

SEC. 1861. EXPANSION TO SERVICE SECTOR FIRMS.

(a) IN GENERAL.—Section 251 of the Trade Act of 1974 (19 U.S.C. 2341) is amended by inserting "or service sector firm" after "agricultural firm" each place it appears.

(b) DEFINITION OF SERVICE SECTOR FIRM.—Section 261 of the Trade Act of 1974 (19 U.S.C. 2351) is amended—

(1) by striking "chapter," and inserting "chapter:";

(2) by striking "the term 'firm'" and inserting the following:

"(1) FIRM.—The term 'firm'"; and

(3) by adding at the end the following:

"(2) SERVICE SECTOR FIRM.—The term 'service sector firm' means a firm engaged in the business of supplying services.".

(c) CONFORMING AMENDMENTS.—

(1) Section 251(c)(1)(C) of the Trade Act of 1974 (19 U.S.C. 2341(c)(1)(C)) is amended—

(A) by inserting "or services" after "articles" the first place it appears; and

(B) by inserting "or services which are supplied" after "produced".

(2) Section 251(c)(2)(B)(ii) of such Act is amended to read as follows:

"(ii) Any firm that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas.".

SEC. 1862. MODIFICATION OF REQUIREMENTS FOR CERTIFICATION.

Section 251(c)(1)(B) of the Trade Act of 1974 (19 U.S.C. 2341(c)(1)(B)) is amended to read as follows:

"(B) that—

"(i) sales or production, or both, of the firm have decreased absolutely,

"(ii) sales or production, or both, of an article or service that accounted for not less than 25 percent of the total sales or production of the firm during the 12-month period preceding the most recent 12-month period for which date are available have decreased absolutely,

"(iii) sales or production, or both, of the firm during the most recent 12-month period for which data are available have decreased compared to—

"(I) the average annual sales or production for the firm during the 24-month period preceding that 12-month period, or

"(II) the average annual sales or production for the firm during the 36-month period preceding that 12-month period, and

"(iv) sales or production, or both, of an article or service that accounted for not less than 25 percent of the total sales or production of the firm during the most recent 12-month period for which data are available have decreased compared to—

"(I) the average annual sales or production for the article or service during the 24-month period preceding that 12-month period, or

"(II) the average annual sales or production for the article or service during the 36-month period preceding that 12-month period, and".

SEC. 1863. BASIS FOR DETERMINATIONS.

Section 251 of the Trade Act of 1974 (19 U.S.C. 2341), as amended, is further amended by adding at the end the following:

"(e) BASIS FOR SECRETARY'S DETERMINATIONS.—For purposes of subsection (c)(1)(C), the Secretary may determine that there are increased imports of like or directly competitive articles or services, if customers accounting for a significant percentage of the decrease in the sales or production of the firm certify to the Secretary that such customers have increased their imports of such articles or services from a foreign country, either absolutely or relative to their acquisition of such articles or services from suppliers located in the United States.

"(f) NOTIFICATION TO FIRMS OF AVAILABILITY OF BENEFITS.—Upon receiving notice from the Secretary of Labor under section 225 of the identity of a firm that is covered by a certification issued under section 223, the Secretary of Commerce shall notify the firm of the availability of adjustment assistance under this chapter.".

SEC. 1864. OVERSIGHT AND ADMINISTRATION; AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—Chapter 3 of title II of the Trade Act of 1974 (19 U.S.C. 2341 et seq.) is amended—

(1) by striking sections 254, 255, 256, and 257;

(2) by redesignating sections 258, 259, 260, 261, 262, 264, and 265, as sections 256, 257, 258, 259, 260, 261, and 262, respectively; and

(3) by inserting after section 253 the following:

"SEC. 254. OVERSIGHT AND ADMINISTRATION.

"(a) IN GENERAL.—The Secretary shall, to such extent and in such amounts as are provided in appropriations Acts, provide grants to intermediary organizations (referred to in section 253(b)(1)) throughout the United States pursuant to agreements with such intermediary organizations. Each such agreement shall require the intermediary organization to provide benefits to firms certified under section 251. The Secretary shall, to the maximum extent practicable, provide by October 1, 2010, that contracts entered into with intermediary organizations be for a 12-month period and that all such contracts have the same beginning date and the same ending date.

"(b) DISTRIBUTION OF FUNDS.—

"(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this subsection, the Secretary shall develop a methodology for the distribution of funds among the intermediary organizations described in subsection (a).

"(2) PROMPT INITIAL DISTRIBUTION.—The methodology described in paragraph (1) shall ensure the prompt initial distribution of funds and establish additional criteria governing the apportionment and distribution of the remainder of such funds among the intermediary organizations.

"(3) CRITERIA.—The methodology described in paragraph (1) shall include criteria based on the data in the annual report on the trade adjustment assistance for firms program

described in section 1866 of the Trade and Globalization Adjustment Assistance Act of 2009.

"(c) REQUIREMENTS FOR CONTRACTS.—An agreement with an intermediary organization described in subsection (a) shall require the intermediary organization to contract for the supply of services to carry out grants under this chapter in accordance with terms and conditions that are consistent with guidelines established by the Secretary.

"(d) CONSULTATIONS.—

"(1) CONSULTATIONS REGARDING METHODOLOGY.—The Secretary shall consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives—

"(A) not less than 30 days before finalizing the methodology described in subsection (b); and

"(B) not less than 60 days before adopting any changes to such methodology.

"(2) CONSULTATIONS REGARDING GUIDELINES.—The Secretary shall consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives not less than 60 days before finalizing the guidelines described in subsection (c) or adopting any subsequent changes to such guidelines.

"SEC. 255. AUTHORIZATION OF APPROPRIATIONS.

"(a) IN GENERAL.—There are authorized to be appropriated to the Secretary $50,000,000 for each of the fiscal years 2009 through 2010, and $12,501,000 for the period beginning October 1, 2010, and ending December 31, 2010, to carry out the provisions of this chapter. Amounts appropriated pursuant to this subsection shall—

"(1) be available to provide adjustment assistance to firms that file a petition for such assistance pursuant to this chapter on or before December 31, 2010; and

"(2) otherwise remain available until expended.

"(b) PERSONNEL.—Of the amounts appropriated pursuant to this section for each fiscal year, $350,000 shall be available for full-time positions in the Department of Commerce to administer the provisions of this chapter. Of such funds the Secretary shall make available to the Economic Development Administration such sums as may be necessary to establish the position of Director of Adjustment Assistance for Firms and such other full-time positions as may be appropriate to administer the provisions of this chapter.".

(b) RESIDUAL AUTHORITY.—The Secretary of Commerce shall have the authority to modify, terminate, resolve, liquidate, or take any other action with respect to a loan, guarantee, contract, or any other financial assistance that was extended under section 254, 255, 256, or 257 of the Trade Act of 1974 (19 U.S.C. 2344, 2345, 2346, and 2347), as in effect on the day before the effective date set forth in section 1891.

(c) CONFORMING AMENDMENTS.—

(1) Section 256 of the Trade Act of 1974, as redesignated by subsection (a) of this section, is amended by striking subsection (d).

(2) Section 258 of the Trade Act of 1974, as redesignated by subsection (a) of this section, is amended—

(A) in the first sentence, by striking "and financial"; and

(B) in the last sentence—

(i) by striking "sections 253 and 254" and inserting "section 253"; and

(ii) by striking "title 28 of the United States Code" and inserting "title 28, United States Code".

(d) CLERICAL AMENDMENTS.—The table of contents of the Trade Act of 1974 is amended by striking the items relating to sections 254, 255, 256, 257, 258, 259, 260, 261, 262, 264, and 265, and inserting the following:

"Sec. 254. Oversight and administration.
"Sec. 255. Authorization of appropriations.
"Sec. 256. Protective provisions.
"Sec. 257. Penalties.
"Sec. 258. Civil actions.
"Sec. 259. Definitions.
"Sec. 260. Regulations.
"Sec. 261. Study by Secretary of Commerce when International Trade Commission begins investigation; action where there is affirmative finding.
"Sec. 262. Assistance to industries.".

(e) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect upon the expiration of the 90-day period beginning on the date of the enactment of this Act, except that subsections (b) and (d) of section 254 of the Trade Act of 1974 (as added by subsection (a) of this section) shall take effect on such date of enactment.

SEC. 1865. INCREASED PENALTIES FOR FALSE STATEMENTS.

Section 257 of the Trade Act of 1974, as redesignated by section 1864(a), is amended to read as follows:

"SEC. 257. PENALTIES.

"Any person who—

"(1) makes a false statement of a material fact knowing it to be false, or knowingly fails to disclose a material fact, or willfully overvalues any security, for the purpose of influencing in any way a determination under this chapter, or for the purpose of obtaining money, property, or anything of value under this chapter, or

"(2) makes a false statement of a material fact knowing it to be false, or knowingly fails to disclose a material fact, when providing information to the Secretary during an investigation of a petition under this chapter,

shall be imprisoned for not more than 2 years, or fined under title 18, United States Code, or both.".

SEC. 1866. ANNUAL REPORT ON TRADE ADJUSTMENT ASSISTANCE FOR FIRMS.

(a) IN GENERAL.—Not later than December 15, 2009, and each year thereafter, the Secretary of Commerce shall prepare a report containing data regarding the trade adjustment assistance for firms program provided for in chapter 3 of title II of the Trade Act of 1974 (19 U.S.C. 2341 et seq.) for the preceding fiscal year. The data shall include the following:

(1) The number of firms that inquired about the program.
(2) The number of petitions filed under section 251.
(3) The number of petitions certified and denied.
(4) The average time for processing petitions.

(5) The number of petitions filed and firms certified for each congressional district of the United States.

(6) The number of firms that received assistance in preparing their petitions.

(7) The number of firms that received assistance developing business recovery plans.

(8) The number of business recovery plans approved and denied by the Secretary of Commerce.

(9) Sales, employment, and productivity at each firm participating in the program at the time of certification.

(10) Sales, employment, and productivity at each firm upon completion of the program and each year for the 2-year period following completion.

(11) The financial assistance received by each firm participating in the program.

(12) The financial contribution made by each firm participating in the program.

(13) The types of technical assistance included in the business recovery plans of firms participating in the program.

(14) The number of firms leaving the program before completing the project or projects in their business recovery plans and the reason the project was not completed.

(b) CLASSIFICATION OF DATA.—To the extent possible, in collecting and reporting the data described in subsection (a), the Secretary shall classify the data by intermediary organization, State, and national totals.

(c) REPORT TO CONGRESS; PUBLICATION.—The Secretary of Commerce shall—

(1) submit the report described in subsection (a) to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives; and

(2) publish the report in the Federal Register and on the website of the Department of Commerce.

(d) PROTECTION OF CONFIDENTIAL INFORMATION.—The Secretary of Commerce may not release information described in subsection (a) that the Secretary considers to be confidential business information unless the person submitting the confidential business information had notice, at the time of submission, that such information would be released by the Secretary, or such person subsequently consents to the release of the information. Nothing in this subsection shall be construed to prohibit the Secretary from providing such confidential business information to a court in camera or to another party under a protective order issued by a court.

SEC. 1867. TECHNICAL CORRECTIONS.

(a) IN GENERAL.—Section 251 of the Trade Act of 1974 (19 U.S.C. 2341), as amended, is further amended—

(1) in subsection (a), by striking "he has" and inserting "the Secretary has"; and

(2) in subsection (d), by striking "60 days" and inserting "40 days".

(b) TECHNICAL ASSISTANCE.—Section 253(a)(3) of the Trade Act of 1974 (19 U.S.C. 2343(a)(3)) is amended by striking "of a certified firm" and inserting "to a certified firm".

PART III—TRADE ADJUSTMENT ASSISTANCE FOR COMMUNITIES

SEC. 1871. PURPOSE.

The purpose of the amendments made by this part is to assist communities impacted by trade with economic adjustment through the coordination of Federal, State, and local resources, the creation of community-based development strategies, and the development and provision of programs that meet the training needs of workers covered by certifications under section 223.

SEC. 1872. TRADE ADJUSTMENT ASSISTANCE FOR COMMUNITIES.

(a) IN GENERAL.—Chapter 4 of title II of the Trade Act of 1974 (19 U.S.C. 2371 et seq.) is amended to read as follows:

"CHAPTER 4—TRADE ADJUSTMENT ASSISTANCE FOR COMMUNITIES

"Subchapter A—Trade Adjustment Assistance for Communities

"SEC. 271. DEFINITIONS.

"In this subchapter:

"(1) AGRICULTURAL COMMODITY PRODUCER.—The term 'agricultural commodity producer' has the meaning given that term in section 291.

"(2) COMMUNITY.—The term 'community' means a city, county, or other political subdivision of a State or a consortium of political subdivisions of a State.

"(3) COMMUNITY IMPACTED BY TRADE.—The term 'community impacted by trade' means a community described in section 273(b)(2).

"(4) ELIGIBLE COMMUNITY.—The term 'eligible community' means a community that the Secretary has determined under section 273(b)(1) is eligible to apply for assistance under this subchapter.

"(5) SECRETARY.—The term 'Secretary' means the Secretary of Commerce.

"SEC. 272. ESTABLISHMENT OF TRADE ADJUSTMENT ASSISTANCE FOR COMMUNITIES PROGRAM.

"Not later than August 1, 2009, the Secretary shall establish a trade adjustment assistance for communities program at the Department of Commerce under which the Secretary shall—

"(1) provide technical assistance under section 274 to communities impacted by trade to facilitate the economic adjustment of those communities; and

"(2) award grants to communities impacted by trade to carry out strategic plans developed under section 276.

"SEC. 273. ELIGIBILITY; NOTIFICATION.

"(a) PETITION.—

"(1) IN GENERAL.—A community may submit a petition to the Secretary for an affirmative determination under subsection (b)(1) that the community is eligible to apply for assistance under this subchapter if—

"(A) on or after August 1, 2009, one or more certifications described in subsection (b)(3) are made with respect to the community; and

"(B) the community submits the petition not later than 180 days after the date of the most recent certification.

"(2) SPECIAL RULE WITH RESPECT TO CERTAIN COMMUNITIES.—In the case of a community with respect to which one or more certifications described in subsection (b)(3) were made on or after January 1, 2007, and before August 1, 2009, the community may submit not later than February 1, 2010, a petition to the Secretary for an affirmative determination under subsection (b)(1).

"(b) AFFIRMATIVE DETERMINATION.—

"(1) IN GENERAL.—The Secretary shall make an affirmative determination that a community is eligible to apply for assistance under this subchapter if the Secretary determines that the community is a community impacted by trade.

"(2) COMMUNITY IMPACTED BY TRADE.—A community is a community impacted by trade if—

"(A) one or more certifications described in paragraph (3) are made with respect to the community; and

"(B) the Secretary determines that the community is significantly affected by the threat to, or the loss of, jobs associated with any such certification.

"(3) CERTIFICATION DESCRIBED.—A certification described in this paragraph is a certification—

"(A) by the Secretary of Labor that a group of workers in the community is eligible to apply for assistance under section 223;

"(B) by the Secretary of Commerce that a firm located in the community is eligible to apply for adjustment assistance under section 251; or

"(C) by the Secretary of Agriculture that a group of agricultural commodity producers in the community is eligible to apply for adjustment assistance under section 293.

"(c) NOTIFICATIONS.—

"(1) NOTIFICATION TO THE GOVERNOR.—The Governor of a State shall be notified promptly—

"(A) by the Secretary of Labor, upon making a determination that a group of workers in the State is eligible for assistance under section 223;

"(B) by the Secretary of Commerce, upon making a determination that a firm in the State is eligible for assistance under section 251; and

"(C) by the Secretary of Agriculture, upon making a determination that a group of agricultural commodity producers in the State is eligible for assistance under section 293.

"(2) NOTIFICATION TO COMMUNITY.—Upon making an affirmative determination under subsection (b)(1) that a community is eligible to apply for assistance under this subchapter, the Secretary shall promptly notify the community and the Governor of the State in which the community is located—

"(A) of the affirmative determination;

"(B) of the applicable provisions of this subchapter; and

"(C) of the means for obtaining assistance under this subchapter and other appropriate economic assistance that may be available to the community.

"SEC. 274. TECHNICAL ASSISTANCE.

"(a) IN GENERAL.—The Secretary shall provide comprehensive technical assistance to an eligible community to assist the community to—

"(1) diversify and strengthen the economy in the community;

"(2) identify significant impediments to economic development that result from the impact of trade on the community; and

"(3) develop a strategic plan under section 276 to address economic adjustment and workforce dislocation in the community, including unemployment among agricultural commodity producers.

"(b) COORDINATION OF FEDERAL RESPONSE.—The Secretary shall coordinate the Federal response to an eligible community by—

"(1) identifying Federal, State, and local resources that are available to assist the community in responding to economic distress; and

"(2) assisting the community in accessing available Federal assistance and ensuring that such assistance is provided in a targeted, integrated manner.

"(c) INTERAGENCY COMMUNITY ASSISTANCE WORKING GROUP.—

"(1) IN GENERAL.—The Secretary shall establish an interagency Community Assistance Working Group, to be chaired by the Secretary or the Secretary's designee, which shall assist the Secretary with the coordination of the Federal response pursuant to subsection (b).

"(2) MEMBERSHIP.—The Working Group shall consist of representatives of any Federal department or agency with responsibility for providing economic adjustment assistance, including the Department of Agriculture, the Department of Defense, the Department of Education, the Department of Labor, the Department of Housing and Urban Development, the Department of Health and Human Services, the Small Business Administration, the Department of the Treasury, and any other Federal, State, or regional public department or agency the Secretary determines to be appropriate.

"SEC. 275. GRANTS FOR ELIGIBLE COMMUNITIES.

"(a) IN GENERAL.—The Secretary may award a grant under this section to an eligible community to assist the community in carrying out any project or program that is included in a strategic plan developed by the community under section 276.

"(b) APPLICATION.—

"(1) IN GENERAL.—An eligible community seeking to receive a grant under this section shall submit a grant application to the Secretary that contains—

"(A) the strategic plan developed by the community under section 276(a)(1)(A) and approved by the Secretary under section 276(a)(1)(B); and

"(B) a description of the project or program included in the strategic plan with respect to which the community seeks the grant.

"(2) COORDINATION AMONG GRANT PROGRAMS.—If an entity in an eligible community is seeking or plans to seek a Community College and Career Training Grant under section 278 or a Sector Partnership Grant under section 279A while the eligible community is seeking a grant under this section, the eligible community shall include in the grant application a description of how the eligible community will integrate any projects or programs carried out using a grant under this section with any projects or programs that may be carried out using such other grants.

"(c) LIMITATION.—An eligible community may not be awarded more than $5,000,000 under this section.

"(d) COST-SHARING.—

"(1) FEDERAL SHARE.—The Federal share of a project or program for which a grant is awarded under this section may not exceed 95 percent of the cost of such project or program.

"(2) COMMUNITY SHARE.—The Secretary shall require, as a condition of awarding a grant to an eligible community under this section, that the eligible community contribute not less than an amount equal to 5 percent of the amount of the grant toward the cost of the project or program for which the grant is awarded.

"(e) GRANTS TO SMALL- AND MEDIUM-SIZED COMMUNITIES.—The Secretary shall give priority to grant applications submitted under this section by eligible communities that are small- and medium-sized communities.

"(f) ANNUAL REPORT.—Not later than December 15 in each of the calendar years 2009 through 2011, the Secretary shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report—

"(1) describing each grant awarded under this section during the preceding fiscal year; and

"(2) assessing the impact on the eligible community of each such grant awarded in a fiscal year before the fiscal year referred to in paragraph (1).

"SEC. 276. STRATEGIC PLANS.

"(a) IN GENERAL.—

"(1) DEVELOPMENT.—An eligible community that intends to apply for a grant under section 275 shall—

"(A) develop a strategic plan for the community's economic adjustment to the impact of trade; and

"(B) submit the plan to the Secretary for evaluation and approval.

"(2) INVOLVEMENT OF PRIVATE AND PUBLIC ENTITIES.—

"(A) IN GENERAL.—To the extent practicable, an eligible community shall consult with entities described in subparagraph (B) in developing a strategic plan under paragraph (1).

"(B) ENTITIES DESCRIBED.—Entities described in this subparagraph are public and private entities within the eligible community, including—

"(i) local, county, or State government agencies serving the community;

"(ii) firms, including small- and medium-sized firms, within the community;

"(iii) local workforce investment boards established under section 117 of the Workforce Investment Act of 1998 (29 U.S.C. 2832);

"(iv) labor organizations, including State labor federations and labor-management initiatives, representing workers in the community; and

"(v) educational institutions, local educational agencies, or other training providers serving the community.

"(b) CONTENTS.—The strategic plan shall, at a minimum, contain the following:

"(1) A description and analysis of the capacity of the eligible community to achieve economic adjustment to the impact of trade.

"(2) An analysis of the economic development challenges and opportunities facing the community as well as the strengths and weaknesses of the economy of the community.

"(3) An assessment of the commitment of the eligible community to the strategic plan over the long term and the participation and input of members of the community affected by economic dislocation.

"(4) A description of the role and the participation of the entities described in subsection (a)(2)(B) in developing the strategic plan.

"(5) A description of the projects to be undertaken by the eligible community under the strategic plan.

"(6) A description of how the strategic plan and the projects to be undertaken by the eligible community will facilitate the community's economic adjustment.

"(7) A description of the educational and training programs available to workers in the eligible community and the future employment needs of the community.

"(8) An assessment of the cost of implementing the strategic plan, the timing of funding required by the eligible community to implement the strategic plan, and the method of financing to be used to implement the strategic plan.

"(9) A strategy for continuing the economic adjustment of the eligible community after the completion of the projects described in paragraph (5).

"(c) GRANTS TO DEVELOP STRATEGIC PLANS.—

"(1) IN GENERAL.—The Secretary, upon receipt of an application from an eligible community, may award a grant to the community to assist the community in developing a strategic plan under subsection (a)(1). A grant awarded under this paragraph shall not exceed 75 percent of the cost of developing the strategic plan.

"(2) FUNDS TO BE USED.—Of the funds appropriated pursuant to section 277(c), the Secretary may make available not more than $25,000,000 for each of the fiscal years 2009 and 2010, and $6,250,000 for the period beginning October 1, 2010, and ending December 31, 2010, to provide grants to eligible communities under paragraph (1).

"SEC. 277. GENERAL PROVISIONS.

"(a) REGULATIONS.—

"(1) IN GENERAL.—The Secretary shall prescribe such regulations as are necessary to carry out the provisions of this subchapter, including—

"(A) establishing specific guidelines for the submission and evaluation of strategic plans under section 276;

"(B) establishing specific guidelines for the submission and evaluation of grant applications under section 275; and

"(C) administering the grant programs established under sections 275 and 276.

"(2) CONSULTATIONS.—The Secretary shall consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives not less than 90 days prior to promulgating any final rule or regulation pursuant to paragraph (1).

"(b) PERSONNEL.—The Secretary shall designate such staff as may be necessary to carry out the responsibilities described in this subchapter.

"(c) AUTHORIZATION OF APPROPRIATIONS.—

"(1) IN GENERAL.—There are authorized to be appropriated to the Secretary $150,000,000 for each of the fiscal years 2009 and 2010, and $37,500,000 for the period beginning October 1, 2010, and ending December 31, 2010, to carry out this subchapter.

"(2) AVAILABILITY.—Amounts appropriated pursuant to this subchapter—

"(A) shall be available to provide adjustment assistance to communities that have been approved for assistance pursuant to this chapter on or before December 31, 2010; and

"(B) shall otherwise remain available until expended.

"(3) SUPPLEMENT NOT SUPPLANT.—Funds appropriated pursuant to this subchapter shall be used to supplement and not supplant other Federal, State, and local public funds expended to provide economic development assistance for communities.

"Subchapter B—Community College and Career Training Grant Program

"SEC. 278. COMMUNITY COLLEGE AND CAREER TRAINING GRANT PROGRAM.

"(a) GRANTS AUTHORIZED.—

"(1) IN GENERAL.—Beginning August 1, 2009, the Secretary may award Community College and Career Training Grants to eligible institutions for the purpose of developing, offering, or improving educational or career training programs for workers eligible for training under section 236.

"(2) LIMITATIONS.—An eligible institution may not be awarded—

"(A) more than one grant under this section; or

"(B) a grant under this section in excess of $1,000,000.

"(b) DEFINITIONS.—In this section:

"(1) ELIGIBLE INSTITUTION.—The term 'eligible institution' means an institution of higher education (as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002)),

but only with respect to a program offered by the institution that can be completed in not more than 2 years.

"(2) SECRETARY.—The term 'Secretary' means the Secretary of Labor.

"(c) GRANT PROPOSALS.—

"(1) IN GENERAL.—An eligible institution seeking to receive a grant under this section shall submit a grant proposal to the Secretary at such time, in such manner, and containing such information as the Secretary may require.

"(2) GUIDELINES.—Not later than June 1, 2009, the Secretary shall—

"(A) promulgate guidelines for the submission of grant proposals under this section; and

"(B) publish and maintain such guidelines on the website of the Department of Labor.

"(3) ASSISTANCE.—The Secretary shall offer assistance in preparing a grant proposal to any eligible institution that requests such assistance.

"(4) GENERAL REQUIREMENTS FOR GRANT PROPOSALS.—

"(A) IN GENERAL.—A grant proposal submitted to the Secretary under this section shall include a detailed description of—

"(i) the specific project for which the grant proposal is submitted, including the manner in which the grant will be used to develop, offer, or improve an educational or career training program that is suited to workers eligible for training under section 236;

"(ii) the extent to which the project for which the grant proposal is submitted will meet the educational or career training needs of workers in the community served by the eligible institution who are eligible for training under section 236;

"(iii) the extent to which the project for which the grant proposal is submitted fits within any overall strategic plan developed by an eligible community under section 276;

"(iv) the extent to which the project for which the grant proposal is submitted relates to any project funded by a Sector Partnership Grant awarded under section 279A; and

"(v) any previous experience of the eligible institution in providing educational or career training programs to workers eligible for training under section 236.

"(B) ABSENCE OF EXPERIENCE.—The absence of any previous experience in providing educational or career training programs described in subparagraph (A)(v) shall not automatically disqualify an eligible institution from receiving a grant under this section.

"(5) COMMUNITY OUTREACH REQUIRED.—In order to be considered by the Secretary, a grant proposal submitted by an eligible institution under this section shall—

"(A) demonstrate that the eligible institution—

"(i) reached out to employers, and other entities described in section 276(a)(2)(B) to identify—

"(I) any shortcomings in existing educational and career training opportunities available to workers in the community; and

"(II) any future employment opportunities within the community and the educational and career training skills required for workers to meet the future employment demand;

"(ii) reached out to other similarly situated institutions in an effort to benefit from any best practices that may be shared with respect to providing educational or career training programs to workers eligible for training under section 236; and

"(iii) reached out to any eligible partnership in the community that has sought or received a Sector Partnership Grant under section 279A to enhance the effectiveness of each grant and avoid duplication of efforts; and

"(B) include a detailed description of—

"(i) the extent and outcome of the outreach conducted under subparagraph (A);

"(ii) the extent to which the project for which the grant proposal is submitted will contribute to meeting any shortcomings identified under subparagraph (A)(i)(I) or any educational or career training needs identified under subparagraph (A)(i)(II); and

"(iii) the extent to which employers, including small- and medium-sized firms within the community, have demonstrated a commitment to employing workers who would benefit from the project for which the grant proposal is submitted.

"(d) CRITERIA FOR AWARD OF GRANTS.—

"(1) IN GENERAL.—Subject to the appropriation of funds, the Secretary shall award a grant under this section based on—

"(A) a determination of the merits of the grant proposal submitted by the eligible institution to develop, offer, or improve educational or career training programs to be made available to workers eligible for training under section 236;

"(B) an evaluation of the likely employment opportunities available to workers who complete an educational or career training program that the eligible institution proposes to develop, offer, or improve; and

"(C) an evaluation of prior demand for training programs by workers eligible for training under section 236 in the community served by the eligible institution, as well as the availability and capacity of existing training programs to meet future demand for training programs.

"(2) PRIORITY FOR CERTAIN COMMUNITIES.—In awarding grants under this section, the Secretary shall give priority to an eligible institution that serves a community that the Secretary of Commerce has determined under section 273 is eligible to apply for assistance under subchapter A within the 5-year period preceding the date on which the grant proposal is submitted to the Secretary under this section.

"(3) MATCHING REQUIREMENTS.—A grant awarded under this section may not be used to satisfy any private matching requirement under any other provision of law.

"(e) ANNUAL REPORT.—Not later than December 15 in each of the calendar years 2009 through 2011, the Secretary shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report—

"(1) describing each grant awarded under this section during the preceding fiscal year; and

"(2) assessing the impact of each award of a grant under this section in a fiscal year preceding the fiscal year referred to in paragraph (1) on workers receiving training under section 236.

"SEC. 279. AUTHORIZATION OF APPROPRIATIONS.

"(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary of Labor $40,000,000 for each of the fiscal years 2009 and 2010, and $10,000,000 for the period beginning October 1, 2010, and ending December 31, 2010, to fund the Community College and Career Training Grant Program. Funds appropriated pursuant to this section shall remain available until expended.

"(b) SUPPLEMENT NOT SUPPLANT.—Funds appropriated pursuant to this section shall be used to supplement and not supplant other Federal, State, and local public funds expended to support community college and career training programs.

"Subchapter C—Industry or Sector Partnership Grant Program for Communities Impacted by Trade

"SEC. 279A. INDUSTRY OR SECTOR PARTNERSHIP GRANT PROGRAM FOR COMMUNITIES IMPACTED BY TRADE.

"(a) PURPOSE.—The purpose of this subchapter is to facilitate efforts by industry or sector partnerships to strengthen and revitalize industries and create employment opportunities for workers in communities impacted by trade.

"(b) DEFINITIONS.—In this subchapter:

"(1) COMMUNITY IMPACTED BY TRADE.—The term 'community impacted by trade' has the meaning given that term in section 271.

"(2) DISLOCATED WORKER.—The term 'dislocated worker' means a worker who has been totally or partially separated, or is threatened with total or partial separation, from employment in an industry or sector in a community impacted by trade.

"(3) ELIGIBLE PARTNERSHIP.—The term 'eligible partnership' means a voluntary partnership composed of public and private persons, firms, or other entities within a community impacted by trade, that shall include representatives of—

"(A) an industry or sector within the community, including an industry association;

"(B) local, county, or State government;

"(C) multiple firms in the industry or sector, including small- and medium-sized firms, within the community;

"(D) local workforce investment boards established under section 117 of the Workforce Investment Act of 1998 (29 U.S.C. 2832);

"(E) labor organizations, including State labor federations and labor-management initiatives, representing workers in the community; and

"(F) educational institutions, local educational agencies, or other training providers serving the community.

"(4) LEAD ENTITY.—The term 'lead entity' means—

"(A) an entity designated by the eligible partnership to be responsible for submitting a grant proposal under subsection (e) and serving as the eligible partnership's fiscal agent in expending any Sector Partnership Grant awarded under this section; or

"(B) a State agency designated by the Governor of the State to carry out the responsibilities described in subparagraph (A).

"(5) SECRETARY.—The term 'Secretary' means the Secretary of Labor.

"(6) TARGETED INDUSTRY OR SECTOR.—The term 'targeted industry or sector' means the industry or sector represented by an eligible partnership.

"(c) SECTOR PARTNERSHIP GRANTS AUTHORIZED.—Beginning on August 1, 2009, and subject to the appropriation of funds, the Secretary shall award Sector Partnership Grants to eligible partnerships to assist the eligible partnerships in carrying out projects, over periods of not more than 3 years, to strengthen and revitalize industries and sectors and create employment opportunities for dislocated workers.

"(d) USE OF SECTOR PARTNERSHIP GRANTS.—An eligible partnership may use a Sector Partnership Grant to carry out any project that the Secretary determines will further the purpose of this subchapter, which may include—

"(1) identifying the skill needs of the targeted industry or sector and any gaps in the available supply of skilled workers in the community impacted by trade, and developing strategies for filling the gaps, including by—

"(A) developing systems to better link firms in the targeted industry or sector to available skilled workers;

"(B) helping firms in the targeted industry or sector to obtain access to new sources of qualified job applicants;

"(C) retraining dislocated and incumbent workers; or

"(D) facilitating the training of new skilled workers by aligning the instruction provided by local suppliers of education and training services with the needs of the targeted industry or sector;

"(2) analyzing the skills and education levels of dislocated and incumbent workers and developing training to address skill gaps that prevent such workers from obtaining jobs in the targeted industry or sector;

"(3) helping firms, especially small- and medium-sized firms, in the targeted industry or sector increase their productivity and the productivity of their workers;

"(4) helping such firms retain incumbent workers;

"(5) developing learning consortia of small- and medium-sized firms in the targeted industry or sector with similar training needs to enable the firms to combine their purchases of training services, and thereby lower their training costs;

"(6) providing information and outreach activities to firms in the targeted industry or sector regarding the activities of

the eligible partnership and other local service suppliers that could assist the firms in meeting needs for skilled workers;

"(7) seeking, applying, and disseminating best practices learned from similarly situated communities impacted by trade in the development and implementation of economic growth and revitalization strategies; and

"(8) identifying additional public and private resources to support the activities described in this subsection, which may include the option to apply for a community grant under section 275 or a Community College and Career Training Grant under section 278 (subject to meeting any additional requirements of those sections).

"(e) GRANT PROPOSALS.—

"(1) IN GENERAL.—The lead entity of an eligible partnership seeking to receive a Sector Partnership Grant under this section shall submit a grant proposal to the Secretary at such time, in such manner, and containing such information as the Secretary may require.

"(2) GENERAL REQUIREMENTS OF GRANT PROPOSALS.—A grant proposal submitted under paragraph (1) shall, at a minimum—

"(A) identify the members of the eligible partnership;

"(B) identify the targeted industry or sector for which the eligible partnership intends to carry out projects using the Sector Partnership Grant;

"(C) describe the goals that the eligible partnership intends to achieve to promote the targeted industry or sector;

"(D) describe the projects that the eligible partnership will undertake to achieve such goals;

"(E) demonstrate that the eligible partnership has the organizational capacity to carry out the projects described in subparagraph (D);

"(F) explain—

"(i) whether—

"(I) the community impacted by trade has sought or received a community grant under section 275;

"(II) an eligible institution in the community has sought or received a Community College and Career Training Grant under section 278; or

"(III) any other entity in the community has received funds pursuant to any other federally funded training project; and

"(ii) how the eligible partnership will coordinate its use of a Sector Partnership Grant with the use of such other grants or funds in order to enhance the effectiveness of each grant and any such funds and avoid duplication of efforts; and

"(G) include performance measures, developed based on the performance measures issued by the Secretary under subsection (g)(2), and a timeline for measuring progress toward achieving the goals described in subparagraph (C).

"(f) AWARD OF GRANTS.—

"(1) IN GENERAL.—Upon application by the lead entity of an eligible partnership, the Secretary may award a Sector Partnership Grant to the eligible partnership to assist the

partnership in carrying out any of the projects in the grant proposal that the Secretary determines will further the purposes of this subchapter.

"(2) LIMITATIONS.—An eligible partnership may not be awarded—

"(A) more than one Sector Partnership Grant; or

"(B) a total grant award under this subchapter in excess of—

"(i) except as provided in clause (ii), $2,500,000; or

"(ii) in the case of an eligible partnership located within a community impacted by trade that is not served by an institution receiving a Community College and Career Training Grant under section 278, $3,000,000.

"(g) ADMINISTRATION BY THE SECRETARY.—

"(1) TECHNICAL ASSISTANCE AND OVERSIGHT.—

"(A) IN GENERAL.—The Secretary shall provide technical assistance to, and oversight of, the lead entity of an eligible partnership in applying for and administering Sector Partnership Grants awarded under this section.

"(B) TECHNICAL ASSISTANCE.—Technical assistance provided under subparagraph (A) shall include providing conferences and such other methods of collecting and disseminating information on best practices developed by eligible partnerships as the Secretary determines appropriate.

"(C) GRANTS OR CONTRACTS FOR TECHNICAL ASSISTANCE.—The Secretary may award a grant or contract to one or more national or State organizations to provide technical assistance to foster the planning, formation, and implementation of eligible partnerships.

"(2) PERFORMANCE MEASURES.—The Secretary shall issue a range of performance measures, with quantifiable benchmarks, and methodologies that eligible partnerships may use to measure progress toward the goals described in subsection (e). In developing such measures, the Secretary shall consider the benefits of the eligible partnership and its activities for workers, firms, industries, and communities.

"(h) REPORTS.—

"(1) PROGRESS REPORT.—Not later than 1 year after receiving a Sector Partnership Grant, and 3 years thereafter, the lead entity shall submit to the Secretary, on behalf of the eligible partnership, a report containing—

"(A) a detailed description of the progress made toward achieving the goals described in subsection (e)(2)(C), using the performance measures required under subsection (e)(2)(G);

"(B) a detailed evaluation of the impact of the grant award on workers and employers in the community impacted by trade; and

"(C) a detailed description of all expenditures of funds awarded to the eligible partnership under the Sector Partnership Grant approved by the Secretary under this subchapter.

"(2) ANNUAL REPORT.—Not later than December 15 in each of the calendar years 2009 through 2011, the Secretary shall submit to the Committee on Finance of the Senate and the

Committee on Ways and Means of the House of Representatives a report—

"(A) describing each Sector Partnership Grant awarded to an eligible partnership during the preceding fiscal year; and

"(B) assessing the impact of each Sector Partnership Grant awarded in a fiscal year preceding the fiscal year referred to in subparagraph (A) on workers and employers in communities impacted by trade.

"SEC. 279B. AUTHORIZATION OF APPROPRIATIONS.

"(a) IN GENERAL.—There are authorized to be appropriated to the Secretary of Labor $40,000,000 for each of the fiscal years 2009 and 2010, and $10,000,000 for the period beginning October 1, 2010, and ending December 31, 2010, to carry out the Sector Partnership Grant program under section 279A. Funds appropriated pursuant to this section shall remain available until expended.

"(b) SUPPLEMENT NOT SUPPLANT.—Funds appropriated pursuant to this section shall be used to supplement and not supplant other Federal, State, and local public funds expended to support the economic development of local communities.

"(c) ADMINISTRATIVE COSTS.—The Secretary may retain not more than 5 percent of the funds appropriated pursuant to this section for each fiscal year to administer the Sector Partnership Grant program under section 279A.

"Subchapter D—General Provisions

"SEC. 279C. RULE OF CONSTRUCTION.

"Nothing in this chapter prevents a worker from receiving trade adjustment assistance under chapter 2 of this title at the same time the worker is receiving assistance in any manner from—

"(1) a community receiving a community grant under subchapter A;

"(2) an eligible institution receiving a Community College and Career Training Grant under subchapter B; or

"(3) an eligible partnership receiving a Sector Partnership Grant under subchapter C.".

SEC. 1873. CONFORMING AMENDMENTS.

(a) TABLE OF CONTENTS.—The table of contents of the Trade Act of 1974 is amended by striking the items relating to chapter 4 of title II and inserting the following:

"CHAPTER 4—TRADE ADJUSTMENT ASSISTANCE FOR COMMUNITIES

"Subchapter A—Trade Adjustment Assistance for Communities

"Sec. 271. Definitions.
"Sec. 272. Establishment of trade adjustment assistance for communities program.
"Sec. 273. Eligibility; notification.
"Sec. 274. Technical assistance.
"Sec. 275. Grants for eligible communities.
"Sec. 276. Strategic plans.
"Sec. 277. General provisions.

"Subchapter B—Community College and Career Training Grant Program

"Sec. 278. Community college and career training grant program.
"Sec. 279. Authorization of appropriations.

"Subchapter C—Industry or Sector Partnership Grant Program for Communities Impacted by Trade

"Sec. 279A. Industry or sector partnership grant program for communities impacted by trade.
"Sec. 279B. Authorization of appropriations.

"Subchapter D—General Provisions

"Sec. 279C. Rule of construction."

(b) JUDICIAL REVIEW.—

(1) Section 284(a) of the Trade Act of 1974 (19 U.S.C. 2395(a)) is amended—

(A) by inserting "or 296" after "section 293";

(B) by striking "or any other interested domestic party" and inserting "or authorized representative of a community"; and

(C) by striking "section 271" and inserting "section 273".

(2) Section 1581(d) of title 28, United States Code, is amended—

(A) in paragraph (2), by striking "; and" and inserting a semicolon;

(B) in paragraph (3)—

(i) by striking "271" and inserting "273"; and

(ii) by striking the period and inserting "; and"; and

(C) by adding at the end the following:

"(4) any final determination of the Secretary of Agriculture under section 293 or 296 of the Trade Act of 1974 (19 U.S.C. 2401b) with respect to the eligibility of a group of agricultural commodity producers for adjustment assistance under such Act.".

PART IV—TRADE ADJUSTMENT ASSISTANCE FOR FARMERS

SEC. 1881. DEFINITIONS.

Section 291 of the Trade Act of 1974 (19 U.S.C. 2401) is amended—

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

"(1) AGRICULTURAL COMMODITY.—The term 'agricultural commodity' includes—

"(A) any agricultural commodity (including livestock) in its raw or natural state;

"(B) any class of goods within an agricultural commodity; and

"(C) in the case of an agricultural commodity producer described in paragraph (2)(B), wild-caught aquatic species.";

(2) by amending paragraph (2) to read as follows:

"(2) AGRICULTURAL COMMODITY PRODUCER.—The term 'agricultural commodity producer' means—

"(A) a person that shares in the risk of producing an agricultural commodity and that is entitled to a share of the commodity for marketing, including an operator, a sharecropper, or a person that owns or rents the land on which the commodity is produced; or

"(B) a person that reports gain or loss from the trade or business of fishing on the person's annual Federal income tax return for the taxable year that most closely

corresponds to the marketing year with respect to which a petition is filed under section 292."; and

(3) by adding at the end the following:

"(7) MARKETING YEAR.—The term 'marketing year' means—

"(A) a marketing year designated by the Secretary with respect to an agricultural commodity; or

"(B) in the case of an agricultural commodity with respect to which the Secretary does not designate a marketing year, a calendar year.".

SEC. 1882. ELIGIBILITY.

(a) IN GENERAL.—Section 292 of the Trade Act of 1974 (19 U.S.C. 2401a) is amended by striking subsections (c) through (e) and inserting the following:

"(c) GROUP ELIGIBILITY REQUIREMENTS.—The Secretary shall certify a group of agricultural commodity producers as eligible to apply for adjustment assistance under this chapter if the Secretary determines that—

"(1)(A) the national average price of the agricultural commodity produced by the group during the most recent marketing year for which data are available is less than 85 percent of the average of the national average price for the commodity in the 3 marketing years preceding such marketing year;

"(B) the quantity of production of the agricultural commodity produced by the group during such marketing year is less than 85 percent of the average of the quantity of production of the commodity produced by the group in the 3 marketing years preceding such marketing year;

"(C) the value of production of the agricultural commodity produced by the group during such marketing year is less than 85 percent of the average value of production of the commodity produced by the group in the 3 marketing years preceding such marketing year; or

"(D) the cash receipts for the agricultural commodity produced by the group during such marketing year are less than 85 percent of the average of the cash receipts for the commodity produced by the group in the 3 marketing years preceding such marketing year;

"(2) the volume of imports of articles like or directly competitive with the agricultural commodity produced by the group in the marketing year with respect to which the group files the petition increased compared to the average volume of such imports during the 3 marketing years preceding such marketing year; and

"(3) the increase in such imports contributed importantly to the decrease in the national average price, quantity of production, or value of production of, or cash receipts for, the agricultural commodity, as described in paragraph (1).

"(d) ELIGIBILITY OF CERTAIN OTHER PRODUCERS.—An agricultural commodity producer or group of producers that resides outside of the State or region identified in the petition filed under subsection (a) may file a request to become a party to that petition not later than 15 days after the date the notice is published in the Federal Register under subsection (a) with respect to that petition.

"(e) TREATMENT OF CLASSES OF GOODS WITHIN A COMMODITY.—In any case in which there are separate classes of goods within

an agricultural commodity, the Secretary shall treat each class as a separate commodity in determining under subsection (c)—

"(1) group eligibility;

"(2) the national average price, quantity of production, or value of production, or cash receipts; and

"(3) the volume of imports.".

(b) CONFORMING AMENDMENTS.—Section 293 of the Trade Act of 1974 (19 U.S.C. 2401b) is amended—

(1) in subsection (a), by striking "section 292 (c) or (d), as the case may be," and inserting "section 292(c)"; and

(2) in subsection (c), by striking "decline in price for" and inserting "decrease in the national average price, quantity of production, or value of production of, or cash receipts for,".

SEC. 1883. BENEFITS.

(a) IN GENERAL.—Section 296 of the Trade Act of 1974 (19 U.S.C. 2401e) is amended to read as follows:

"SEC. 296. QUALIFYING REQUIREMENTS AND BENEFITS FOR AGRICULTURAL COMMODITY PRODUCERS.

"(a) IN GENERAL.—

"(1) REQUIREMENTS.—

"(A) IN GENERAL.—Benefits under this chapter shall be available to an agricultural commodity producer covered by a certification under this chapter who files an application for such benefits not later than 90 days after the date on which the Secretary makes a determination and issues a certification of eligibility under section 293, if the producer submits to the Secretary sufficient information to establish that—

"(i) the producer produced the agricultural commodity covered by the application filed under this subsection in the marketing year with respect to which the petition is filed and in at least 1 of the 3 marketing years preceding that marketing year;

"(ii)(I) the quantity of the agricultural commodity that was produced by the producer in the marketing year with respect to which the petition is filed has decreased compared to the most recent marketing year preceding that marketing year for which data are available; or

"(II)(aa) the price received for the agricultural commodity by the producer during the marketing year with respect to which the petition is filed has decreased compared to the average price for the commodity received by the producer in the 3 marketing years preceding that marketing year; or

"(bb) the county level price maintained by the Secretary for the agricultural commodity on the date on which the petition is filed has decreased compared to the average county level price for the commodity in the 3 marketing years preceding the date on which the petition is filed; and

"(iii) the producer is not receiving—

"(I) cash benefits under chapter 2 or 3; or

"(II) benefits based on the production of an agricultural commodity covered by another petition filed under this chapter.

"(B) SPECIAL RULE WITH RESPECT TO CROPS NOT GROWN EVERY YEAR.—For purposes of subparagraph (A)(ii)(II)(aa), if a petition is filed with respect to an agricultural commodity that is not produced by the producer every year, an agricultural commodity producer producing that commodity may establish the average price received for the commodity by the producer in the 3 marketing years preceding the year with respect to which the petition is filed by using average price data for the 3 most recent marketing years in which the producer produced the commodity and for which data are available.

"(2) LIMITATIONS BASED ON ADJUSTED GROSS INCOME.—

"(A) IN GENERAL.—Notwithstanding any other provision of this chapter, an agricultural commodity producer shall not be eligible for assistance under this chapter in any year in which the average adjusted gross income (as defined in section 1001D(a) of the Food Security Act of 1985 (7 U.S.C. 1308–3a(a))) of the producer exceeds the level set forth in subparagraph (A) or (B) of section 1001D(b)(1) of the Food Security Act of 1985 (7 U.S.C. 1308–3a(b)(1)), whichever is applicable.

"(B) DEMONSTRATION OF COMPLIANCE.—An agricultural commodity producer shall provide to the Secretary such information as the Secretary determines necessary to demonstrate that the producer is in compliance with the limitation under subparagraph (A).

"(C) COUNTER-CYCLICAL AND ACRE PAYMENTS.—The total amount of payments made to an agricultural commodity producer under this chapter during any crop year may not exceed the limitations on payments set forth in subsections (b)(2), (b)(3), (c)(2), and (c)(3) of section 1001 of the Food Security Act of 1985 (7 U.S.C. 1308).

"(b) TECHNICAL ASSISTANCE.—

"(1) INITIAL TECHNICAL ASSISTANCE.—

"(A) IN GENERAL.—An agricultural commodity producer that files an application and meets the requirements under subsection (a)(1) shall be entitled to receive initial technical assistance designed to improve the competitiveness of the production and marketing of the agricultural commodity with respect to which the producer was certified under this chapter. Such assistance shall include information regarding—

"(i) improving the yield and marketing of that agricultural commodity; and

"(ii) the feasibility and desirability of substituting one or more alternative agricultural commodities for that agricultural commodity.

"(B) TRANSPORTATION AND SUBSISTENCE EXPENSES.—

"(i) IN GENERAL.—The Secretary may authorize supplemental assistance necessary to defray reasonable transportation and subsistence expenses incurred by an agricultural commodity producer in connection with initial technical assistance under subparagraph (A) if such assistance is provided at facilities that are not within normal commuting distance of the regular place of residence of the producer.

"(ii) EXCEPTIONS.—The Secretary may not authorize payments to an agricultural commodity producer under clause (i)—

"(I) for subsistence expenses that exceed the lesser of—

"(aa) the actual per diem expenses for subsistence incurred by the producer; or

"(bb) the prevailing per diem allowance rate authorized under Federal travel regulations; or

"(II) for travel expenses that exceed the prevailing mileage rate authorized under the Federal travel regulations.

"(2) INTENSIVE TECHNICAL ASSISTANCE.—A producer that has completed initial technical assistance under paragraph (1) shall be eligible to participate in intensive technical assistance. Such assistance shall consist of—

"(A) a series of courses to further assist the producer in improving the competitiveness of the producer in producing—

"(i) the agricultural commodity with respect to which the producer was certified under this chapter; or

"(ii) another agricultural commodity; and

"(B) assistance in developing an initial business plan based on the courses completed under subparagraph (A).

"(3) INITIAL BUSINESS PLAN.—

"(A) APPROVAL BY SECRETARY.—The Secretary shall approve an initial business plan developed under paragraph (2)(B) if the plan—

"(i) reflects the skills gained by the producer through the courses described in paragraph (2)(A); and

"(ii) demonstrates how the producer will apply those skills to the circumstances of the producer.

"(B) FINANCIAL ASSISTANCE FOR IMPLEMENTING INITIAL BUSINESS PLAN.—Upon approval of the producer's initial business plan by the Secretary under subparagraph (A), a producer shall be entitled to an amount not to exceed $4,000 to—

"(i) implement the initial business plan; or

"(ii) develop a long-term business adjustment plan under paragraph (4).

"(4) LONG-TERM BUSINESS ADJUSTMENT PLAN.—

"(A) IN GENERAL.—A producer that has completed intensive technical assistance under paragraph (2) and whose initial business plan has been approved under paragraph (3)(A) shall be eligible for, in addition to the amount under subparagraph (C), assistance in developing a long-term business adjustment plan.

"(B) APPROVAL OF LONG-TERM BUSINESS ADJUSTMENT PLANS.—The Secretary shall approve a long-term business adjustment plan developed under subparagraph (A) if the Secretary determines that the plan—

"(i) includes steps reasonably calculated to materially contribute to the economic adjustment of the producer to changing market conditions;

"(ii) takes into consideration the interests of the workers employed by the producer; and

"(iii) demonstrates that the producer will have sufficient resources to implement the business plan.

"(C) PLAN IMPLEMENTATION.—Upon approval of the producer's long-term business adjustment plan under subparagraph (B), a producer shall be entitled to an amount not to exceed $8,000 to implement the long-term business adjustment plan.

"(c) MAXIMUM AMOUNT OF ASSISTANCE.—An agricultural commodity producer may receive not more than $12,000 under paragraphs (3) and (4) of subsection (b) in the 36-month period following certification under section 293.

"(d) LIMITATIONS ON OTHER ASSISTANCE.—An agricultural commodity producer that receives benefits under this chapter (other than initial technical assistance under subsection (b)(1)) shall not be eligible for cash benefits under chapter 2 or 3.".

(b) CLERICAL AMENDMENT.—The table of contents of the Trade Act of 1974 is amended by striking the item relating to section 296 and inserting the following:

"Sec. 296. Qualifying requirements and benefits for agricultural commodity producers.".

SEC. 1884. REPORT.

Section 293 of the Trade Act of 1974 (19 U.S.C. 2401b) is amended by adding at the end the following:

"(d) REPORT BY THE SECRETARY.—Not later than January 30, 2010, and annually thereafter, the Secretary of Agriculture shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report containing the following information with respect to adjustment assistance provided under this chapter during the preceding fiscal year:

"(1) A list of the agricultural commodities covered by a certification under this chapter.

"(2) The States or regions in which such commodities are produced and the aggregate amount of such commodities produced in each such State or region.

"(3) The total number of agricultural commodity producers, by congressional district, receiving benefits under this chapter.

"(4) The total number of agricultural commodity producers, by congressional district, receiving technical assistance under this chapter.".

SEC. 1885. FRAUD AND RECOVERY OF OVERPAYMENTS.

Section 297(a)(1) of the Trade Act of 1974 (19 U.S.C. 2401f(a)(1)) is amended by inserting "or has expended funds received under this chapter for a purpose that was not approved by the Secretary," after "entitled,".

SEC. 1886. DETERMINATION OF INCREASES OF IMPORTS FOR CERTAIN FISHERMEN.

For purposes of chapters 2 and 6 of title II of the Trade Act of 1974 (19 U.S.C. 2251 et seq.), in the case of an agricultural commodity producer that—

(1) is a fisherman or aquaculture producer, and

(2) is otherwise eligible for adjustment assistance under chapter 2 or 6, as the case may be,

the increase in imports of articles like or directly competitive with the agricultural commodity produced by such producer may be based on imports of wild-caught seafood, farm-raised seafood, or both.

SEC. 1887. EXTENSION OF TRADE ADJUSTMENT ASSISTANCE FOR FARMERS.

Section 298(a) of the Trade Act of 1974 (19 U.S.C. 2401g(a)) is amended by striking "fiscal years 2003 through 2007" and all that follows through the end period and inserting "fiscal years 2009 and 2010, and $22,500,000 for the period beginning October 1, 2010, and ending December 31, 2010, to carry out the purposes of this chapter, including administrative costs, and salaries and expenses of employees of the Department of Agriculture.".

PART V—GENERAL PROVISIONS

SEC. 1891. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise provided in this subtitle, and subsection (b) of this section, this subtitle and the amendments made by this subtitle—

(1) shall take effect upon the expiration of the 90-day period beginning on the date of the enactment of this Act; and

(2) shall apply to—

(A) petitions for certification filed under chapter 2, 3, or 6 of title II of the Trade Act of 1974 on or after the effective date described in paragraph (1); and

(B) petitions for assistance and proposals for grants filed under chapter 4 of title II of the Trade Act of 1974 on or after such effective date.

(b) CERTIFICATIONS MADE BEFORE EFFECTIVE DATE.—Notwithstanding subsection (a)—

(1) a worker shall continue to receive (or be eligible to receive) trade adjustment assistance and other benefits under subchapter B of chapter 2 of title II of the Trade Act of 1974, as in effect on the day before the effective date described in subsection (a)(1), for any week for which the worker meets the eligibility requirements of such chapter 2 as in effect on the day before such effective date, if the worker—

(A) is certified as eligible for trade adjustment assistance benefits under such chapter 2 pursuant to a petition filed under section 221 of the Trade Act of 1974 on or before such effective date; and

(B) would otherwise be eligible to receive trade adjustment assistance benefits under such chapter as in effect on the day before such effective date;

(2) a worker shall continue to receive (or be eligible to receive) benefits under section 246(a)(2) of the Trade Act of 1974, as in effect on the day before the effective date described in subsection (a)(1), for such period for which the worker meets the eligibility requirements of section 246 of that Act as in effect on the day before such effective date, if the worker—

(A) is certified as eligible for benefits under such section 246 pursuant to a petition filed under section 221 of the Trade Act of 1974 on or before such effective date; and

(B) would otherwise be eligible to receive benefits under such section 246(a)(2) as in effect on the day before such effective date; and

(3) a firm shall continue to receive (or be eligible to receive) adjustment assistance under chapter 3 of title II of the Trade Act of 1974, as in effect on the day before the effective date described in subsection (a)(1), for such period for which the firm meets the eligibility requirements of such chapter 3 as in effect on the day before such effective date, if the firm—

(A) is certified as eligible for benefits under such chapter 3 pursuant to a petition filed under section 251 of the Trade Act of 1974 on or before such effective date; and

(B) would otherwise be eligible to receive benefits under such chapter 3 as in effect on the day before such effective date.

SEC. 1892. EXTENSION OF TRADE ADJUSTMENT ASSISTANCE PROGRAMS.

(a) FOR WORKERS.—Section 245(a) of the Trade Act of 1974 (19 U.S.C. 2317(a)) is amended by striking "December 31, 2007" and inserting "December 31, 2010".

(b) TERMINATION.—Section 285 of the Trade Act of 1974 (19 U.S.C. 2271 note prec.) is amended—

(1) in subsection (a), by striking "December 31, 2007" each place it appears and inserting "December 31, 2010"; and

(2) by amending subsection (b) to read as follows:

"(b) OTHER ASSISTANCE.—

"(1) ASSISTANCE FOR FIRMS.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), technical assistance and grants may not be provided under chapter 3 after December 31, 2010.

"(B) EXCEPTION.—Notwithstanding subparagraph (A), any technical assistance or grant approved under chapter 3 on or before December 31, 2010, may be provided—

"(i) to the extent funds are available pursuant to such chapter for such purpose; and

"(ii) to the extent the recipient of the technical assistance or grant is otherwise eligible to receive such technical assistance or grant, as the case may be.

"(2) FARMERS.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), technical assistance and financial assistance may not be provided under chapter 6 after December 31, 2010.

"(B) EXCEPTION.—Notwithstanding subparagraph (A), any technical or financial assistance approved under chapter 6 on or before December 31, 2010, may be provided—

"(i) to the extent funds are available pursuant to such chapter for such purpose; and

"(ii) to the extent the recipient of the technical or financial assistance is otherwise eligible to receive such technical or financial assistance, as the case may be.

"(3) ASSISTANCE FOR COMMUNITIES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), technical assistance and grants may not be provided under chapter 4 after December 31, 2010.

"(B) EXCEPTION.—Notwithstanding subparagraph (A), any technical assistance or grant approved under chapter 4 on or before December 31, 2010, may be provided—

"(i) to the extent funds are available pursuant to such chapter for such purpose; and

"(ii) to the extent the recipient of the technical assistance or grant is otherwise eligible to receive such technical assistance or grant, as the case may be.".

SEC. 1893. TERMINATION; RELATED PROVISIONS.

(a) SUNSET.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by this subtitle to chapters 2, 3, 4, 5, and 6 of title II of the Trade Act of 1974 (19 U.S.C. 2271 et seq.) shall not apply on or after January 1, 2011.

(2) EXCEPTION.—The amendments made by this subtitle to section 285 of the Trade Act of 1974 shall continue to apply on and after January 1, 2011, with respect to—

(A) workers certified as eligible for trade adjustment assistance benefits under chapter 2 of title II of that Act pursuant to petitions filed under section 221 of that Act before January 1, 2011;

(B) firms certified as eligible for technical assistance or grants under chapter 3 of title II of that Act pursuant to petitions filed under section 251 of that Act before January 1, 2011;

(C) recipients approved for technical assistance or grants under chapter 4 of title II of that Act pursuant to petitions for assistance or proposals for grants (as the case may be) filed pursuant to such chapter before January 1, 2011; and

(D) agricultural commodity producers certified as eligible for technical or financial assistance under chapter 6 of title II of that Act pursuant to petitions filed under section 292 of that Act before January 1, 2011.

(b) APPLICATION OF PRIOR LAW.—Chapters 2, 3, 4, 5, and 6 of title II of the Trade Act of 1974 (19 U.S.C. 2271 et seq.) shall be applied and administered beginning January 1, 2011, as if the amendments made by this subtitle (other than part VI) had never been enacted, except that in applying and administering such chapters—

(1) section 245 of that Act shall be applied and administered by substituting "2011" for "2007";

(2) section 246(b) of that Act shall be applied and administered by substituting "December 31, 2011" for "the date that is 5 years" and all that follows through "State";

(3) section 256(b) of that Act shall be applied and administered by substituting "the 1-year period beginning January 1, 2011" for "each of fiscal years 2003 through 2007, and $4,000,000 for the 3-month period beginning October 1, 2007";

(4) section 298(a) of that Act shall be applied and administered by substituting "the 1-year period beginning January 1, 2011" for "each of the fiscal years" and all that follows through "October 1, 2007"; and

(5) subject to subsection (a)(2), section 285 of that Act shall be applied and administered—

(A) in subsection (a), by substituting "2011" for "2007" each place it appears; and

(B) by applying and administering subsection (b) as if it read as follows:

"(b) OTHER ASSISTANCE.—

"(1) ASSISTANCE FOR FIRMS.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), assistance may not be provided under chapter 3 after December 31, 2011.

"(B) EXCEPTION.—Notwithstanding subparagraph (A), any assistance approved under chapter 3 on or before December 31, 2011, may be provided—

"(i) to the extent funds are available pursuant to such chapter for such purpose; and

"(ii) to the extent the recipient of the assistance is otherwise eligible to receive such assistance.

"(2) FARMERS.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), assistance may not be provided under chapter 6 after December 31, 2011.

"(B) EXCEPTION.—Notwithstanding subparagraph (A), any assistance approved under chapter 6 on or before December 31, 2011, may be provided—

"(i) to the extent funds are available pursuant to such chapter for such purpose; and

"(ii) to the extent the recipient of the assistance is otherwise eligible to receive such assistance.".

SEC. 1894. GOVERNMENT ACCOUNTABILITY OFFICE REPORT.

Not later than September 30, 2012, the Comptroller General of the United States shall prepare and submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a comprehensive report on the operation and effectiveness of the amendments made by this subtitle to chapters 2, 3, 4, and 6 of the Trade Act of 1974.

SEC. 1895. EMERGENCY DESIGNATION.

Amounts appropriated pursuant to this subtitle are designated as an emergency requirement and necessary to meet emergency needs pursuant to section 204(a) of S. Con. Res. 21 (110th Congress) and section 301(b)(2) of S. Con. Res. 70 (110th Congress), the concurrent resolutions on the budget for fiscal years 2008 and 2009.

PART VI—HEALTH COVERAGE IMPROVEMENT

SEC. 1899. SHORT TITLE.

This part may be cited as the "TAA Health Coverage Improvement Act of 2009".

SEC. 1899A. IMPROVEMENT OF THE AFFORDABILITY OF THE CREDIT.

(a) IMPROVEMENT OF AFFORDABILITY.—

(1) IN GENERAL.—Section 35(a) of the Internal Revenue Code of 1986 (relating to credit for health insurance costs of eligible individuals) is amended by inserting "(80 percent

in the case of eligible coverage months beginning before January 1, 2011)" after "65 percent".

(2) CONFORMING AMENDMENT.—Section 7527(b) of such Code (relating to advance payment of credit for health insurance costs of eligible individuals) is amended by inserting "(80 percent in the case of eligible coverage months beginning before January 1, 2011)" after "65 percent".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to coverage months beginning on or after the first day of the first month beginning 60 days after the date of the enactment of this Act.

SEC. 1899B. PAYMENT FOR MONTHLY PREMIUMS PAID PRIOR TO COMMENCEMENT OF ADVANCE PAYMENTS OF CREDIT.

(a) PAYMENT FOR PREMIUMS DUE PRIOR TO COMMENCEMENT OF ADVANCE PAYMENTS OF CREDIT.—Section 7527 of the Internal Revenue Code of 1986 (relating to advance payment of credit for health insurance costs of eligible individuals) is amended by adding at the end the following new subsection:

"(e) PAYMENT FOR PREMIUMS DUE PRIOR TO COMMENCEMENT OF ADVANCE PAYMENTS.—In the case of eligible coverage months beginning before January 1, 2011—

"(1) IN GENERAL.—The program established under subsection (a) shall provide that the Secretary shall make 1 or more retroactive payments on behalf of a certified individual in an aggregate amount equal to 80 percent of the premiums for coverage of the taxpayer and qualifying family members under qualified health insurance for eligible coverage months (as defined in section 35(b)) occurring prior to the first month for which an advance payment is made on behalf of such individual under subsection (a).

"(2) REDUCTION OF PAYMENT FOR AMOUNTS RECEIVED UNDER NATIONAL EMERGENCY GRANTS.—The amount of any payment determined under paragraph (1) shall be reduced by the amount of any payment made to the taxpayer for the purchase of qualified health insurance under a national emergency grant pursuant to section 173(f) of the Workforce Investment Act of 1998 for a taxable year including the eligible coverage months described in paragraph (1).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to coverage months beginning after December 31, 2008.

(c) TRANSITIONAL RULE.—The Secretary of the Treasury shall not be required to make any payments under section 7527(e) of the Internal Revenue Code of 1986, as added by this section, until after the date that is 6 months after the date of the enactment of this Act.

SEC. 1899C. TAA RECIPIENTS NOT ENROLLED IN TRAINING PROGRAMS ELIGIBLE FOR CREDIT.

(a) IN GENERAL.—Paragraph (2) of section 35(c) of the Internal Revenue Code of 1986 (defining eligible TAA recipient) is amended to read as follows:

"(2) ELIGIBLE TAA RECIPIENT.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the term 'eligible TAA recipient' means, with respect to any month, any individual who is receiving for any day of such month a trade readjustment allowance under chapter 2 of title II of the Trade Act of 1974 or who

would be eligible to receive such allowance if section 231 of such Act were applied without regard to subsection (a)(3)(B) of such section. An individual shall continue to be treated as an eligible TAA recipient during the first month that such individual would otherwise cease to be an eligible TAA recipient by reason of the preceding sentence.

"(B) SPECIAL RULE.—In the case of any eligible coverage month beginning after the date of the enactment of this paragraph and before January 1, 2011, the term 'eligible TAA recipient' means, with respect to any month, any individual who—

"(i) is receiving for any day of such month a trade readjustment allowance under chapter 2 of title II of the Trade Act of 1974,

"(ii) would be eligible to receive such allowance except that such individual is in a break in training provided under a training program approved under section 236 of such Act that exceeds the period specified in section 233(e) of such Act, but is within the period for receiving such allowances provided under section 233(a) of such Act, or

"(iii) is receiving unemployment compensation (as defined in section 85(b)) for any day of such month and who would be eligible to receive such allowance for such month if section 231 of such Act were applied without regard to subsections (a)(3)(B) and (a)(5) thereof.

An individual shall continue to be treated as an eligible TAA recipient during the first month that such individual would otherwise cease to be an eligible TAA recipient by reason of the preceding sentence.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to coverage months beginning after the date of the enactment of this Act.

SEC. 1899D. TAA PRE-CERTIFICATION PERIOD RULE FOR PURPOSES OF DETERMINING WHETHER THERE IS A 63-DAY LAPSE IN CREDITABLE COVERAGE.

(a) IRC AMENDMENT.—Section 9801(c)(2) of the Internal Revenue Code of 1986 (relating to not counting periods before significant breaks in creditable coverage) is amended by adding at the end the following new subparagraph:

"(D) TAA-ELIGIBLE INDIVIDUALS.—In the case of plan years beginning before January 1, 2011—

"(i) TAA PRE-CERTIFICATION PERIOD RULE.—In the case of a TAA-eligible individual, the period beginning on the date the individual has a TAA-related loss of coverage and ending on the date which is 7 days after the date of the issuance by the Secretary (or by any person or entity designated by the Secretary) of a qualified health insurance costs credit eligibility certificate for such individual for purposes of section 7527 shall not be taken into account in determining the continuous period under subparagraph (A).

"(ii) DEFINITIONS.—The terms 'TAA-eligible individual' and 'TAA-related loss of coverage' have the

meanings given such terms in section 4980B(f)(5)(C)(iv).".

(b) ERISA AMENDMENT.—Section 701(c)(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1181(c)(2)) is amended by adding at the end the following new subparagraph:

"(C) TAA-ELIGIBLE INDIVIDUALS.—In the case of plan years beginning before January 1, 2011—

"(i) TAA PRE-CERTIFICATION PERIOD RULE.—In the case of a TAA-eligible individual, the period beginning on the date the individual has a TAA-related loss of coverage and ending on the date that is 7 days after the date of the issuance by the Secretary (or by any person or entity designated by the Secretary) of a qualified health insurance costs credit eligibility certificate for such individual for purposes of section 7527 of the Internal Revenue Code of 1986 shall not be taken into account in determining the continuous period under subparagraph (A).

"(ii) DEFINITIONS.—The terms 'TAA-eligible individual' and 'TAA-related loss of coverage' have the meanings given such terms in section 605(b)(4).".

(c) PHSA AMENDMENT.—Section 2701(c)(2) of the Public Health Service Act (42 U.S.C. 300gg(c)(2)) is amended by adding at the end the following new subparagraph:

"(C) TAA-ELIGIBLE INDIVIDUALS.—In the case of plan years beginning before January 1, 2011—

"(i) TAA PRE-CERTIFICATION PERIOD RULE.—In the case of a TAA-eligible individual, the period beginning on the date the individual has a TAA-related loss of coverage and ending on the date that is 7 days after the date of the issuance by the Secretary (or by any person or entity designated by the Secretary) of a qualified health insurance costs credit eligibility certificate for such individual for purposes of section 7527 of the Internal Revenue Code of 1986 shall not be taken into account in determining the continuous period under subparagraph (A).

"(ii) DEFINITIONS.—The terms 'TAA-eligible individual' and 'TAA-related loss of coverage' have the meanings given such terms in section 2205(b)(4).".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to plan years beginning after the date of the enactment of this Act.

SEC. 1899E. CONTINUED QUALIFICATION OF FAMILY MEMBERS AFTER CERTAIN EVENTS.

(a) IN GENERAL.—Subsection (g) of section 35 of such Code is amended by redesignating paragraph (9) as paragraph (10) and inserting after paragraph (8) the following new paragraph:

"(9) CONTINUED QUALIFICATION OF FAMILY MEMBERS AFTER CERTAIN EVENTS.—In the case of eligible coverage months beginning before January 1, 2011—

"(A) MEDICARE ELIGIBILITY.—In the case of any month which would be an eligible coverage month with respect to an eligible individual but for subsection (f)(2)(A), such month shall be treated as an eligible coverage month with respect to such eligible individual solely for purposes of

determining the amount of the credit under this section with respect to any qualifying family members of such individual (and any advance payment of such credit under section 7527). This subparagraph shall only apply with respect to the first 24 months after such eligible individual is first entitled to the benefits described in subsection (f)(2)(A).

"(B) DIVORCE.—In the case of the finalization of a divorce between an eligible individual and such individual's spouse, such spouse shall be treated as an eligible individual for purposes of this section and section 7527 for a period of 24 months beginning with the date of such finalization, except that the only qualifying family members who may be taken into account with respect to such spouse are those individuals who were qualifying family members immediately before such finalization.

"(C) DEATH.—In the case of the death of an eligible individual—

"(i) any spouse of such individual (determined at the time of such death) shall be treated as an eligible individual for purposes of this section and section 7527 for a period of 24 months beginning with the date of such death, except that the only qualifying family members who may be taken into account with respect to such spouse are those individuals who were qualifying family members immediately before such death, and

"(ii) any individual who was a qualifying family member of the decedent immediately before such death (or, in the case of an individual to whom paragraph (4) applies, the taxpayer to whom the deduction under section 151 is allowable) shall be treated as an eligible individual for purposes of this section and section 7527 for a period of 24 months beginning with the date of such death, except that in determining the amount of such credit only such qualifying family member may be taken into account.".

(b) CONFORMING AMENDMENT.—Section 173(f) of the Workforce Investment Act of 1998 (29 U.S.C. 2918(f)) is amended by adding at the end the following:

"(8) CONTINUED QUALIFICATION OF FAMILY MEMBERS AFTER CERTAIN EVENTS.—In the case of eligible coverage months beginning before January 1, 2011—

"(A) MEDICARE ELIGIBILITY.—In the case of any month which would be an eligible coverage month with respect to an eligible individual but for paragraph (7)(B)(i), such month shall be treated as an eligible coverage month with respect to such eligible individual solely for purposes of determining the eligibility of qualifying family members of such individual under this subsection. This subparagraph shall only apply with respect to the first 24 months after such eligible individual is first entitled to the benefits described in paragraph (7)(B)(i).

"(B) DIVORCE.—In the case of the finalization of a divorce between an eligible individual and such individual's spouse, such spouse shall be treated as an eligible individual for purposes of this subsection for a period of 24 months beginning with the date of such finalization, except that the only qualifying family members who may be taken into account with respect to such spouse are those individuals who were qualifying family members immediately before such finalization.

"(C) DEATH.—In the case of the death of an eligible individual—

"(i) any spouse of such individual (determined at the time of such death) shall be treated as an eligible individual for purposes of this subsection for a period of 24 months beginning with the date of such death, except that the only qualifying family members who may be taken into account with respect to such spouse are those individuals who were qualifying family members immediately before such death, and

"(ii) any individual who was a qualifying family member of the decedent immediately before such death shall be treated as an eligible individual for purposes this subsection for a period of 24 months beginning with the date of such death, except that no qualifying family members may be taken into account with respect to such individual.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to months beginning after December 31, 2009.

SEC. 1899F. EXTENSION OF COBRA BENEFITS FOR CERTAIN TAA-ELIGIBLE INDIVIDUALS AND PBGC RECIPIENTS.

(a) ERISA AMENDMENTS.—Section 602(2)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1162(2)(A)) is amended—

(1) by moving clause (v) to after clause (iv) and before the flush left sentence beginning with "In the case of a qualified beneficiary";

(2) by striking "In the case of a qualified beneficiary" and inserting the following:

"(vi) SPECIAL RULE FOR DISABILITY.—In the case of a qualified beneficiary"; and

(3) by redesignating clauses (v) and (vi), as amended by paragraphs (1) and (2), as clauses (vii) and (viii), respectively, and by inserting after clause (iv) the following new clauses:

"(v) SPECIAL RULE FOR PBGC RECIPIENTS.—In the case of a qualifying event described in section 603(2) with respect to a covered employee who (as of such qualifying event) has a nonforfeitable right to a benefit any portion of which is to be paid by the Pension Benefit Guaranty Corporation under title IV, notwithstanding clause (i) or (ii), the date of the death of the covered employee, or in the case of the surviving spouse or dependent children of the covered employee, 24 months after the date of the death of the covered employee. The preceding sentence shall not require any period of coverage to extend beyond December 31, 2010.

"(vi) SPECIAL RULE FOR TAA-ELIGIBLE INDIVIDUALS.—In the case of a qualifying event described in section 603(2) with respect to a covered employee who is (as of the date that the period of coverage would,

but for this clause or clause (vii), otherwise terminate under clause (i) or (ii)) a TAA-eligible individual (as defined in section 605(b)(4)(B)), the period of coverage shall not terminate by reason of clause (i) or (ii), as the case may be, before the later of the date specified in such clause or the date on which such individual ceases to be such a TAA-eligible individual. The preceding sentence shall not require any period of coverage to extend beyond December 31, 2010.".

(b) IRC AMENDMENTS.—Clause (i) of section 4980B(f)(2)(B) of the Internal Revenue Code of 1986 is amended—

(1) by striking "In the case of a qualified beneficiary" and inserting the following:

"(VI) SPECIAL RULE FOR DISABILITY.—In the case of a qualified beneficiary", and

(2) by redesignating subclauses (V) and (VI), as amended by paragraph (1), as subclauses (VII) and (VIII), respectively, and by inserting after clause (IV) the following new subclauses:

"(V) SPECIAL RULE FOR PBGC RECIPIENTS.—In the case of a qualifying event described in paragraph (3)(B) with respect to a covered employee who (as of such qualifying event) has a nonforfeitable right to a benefit any portion of which is to be paid by the Pension Benefit Guaranty Corporation under title IV of the Employee Retirement Income Security Act of 1974, notwithstanding subclause (I) or (II), the date of the death of the covered employee, or in the case of the surviving spouse or dependent children of the covered employee, 24 months after the date of the death of the covered employee. The preceding sentence shall not require any period of coverage to extend beyond December 31, 2010.

"(VI) SPECIAL RULE FOR TAA-ELIGIBLE INDIVIDUALS.—In the case of a qualifying event described in paragraph (3)(B) with respect to a covered employee who is (as of the date that the period of coverage would, but for this subclause or subclause (VII), otherwise terminate under subclause (I) or (II)) a TAA-eligible individual (as defined in paragraph (5)(C)(iv)(II)), the period of coverage shall not terminate by reason of subclause (I) or (II), as the case may be, before the later of the date specified in such subclause or the date on which such individual ceases to be such a TAA-eligible individual. The preceding sentence shall not require any period of coverage to extend beyond December 31, 2010.".

(c) PHSA AMENDMENTS.—Section 2202(2)(A) of the Public Health Service Act (42 U.S.C. 300bb-2(2)(A)) is amended—

(1) by striking "In the case of a qualified beneficiary" and inserting the following:

"(v) SPECIAL RULE FOR DISABILITY.—In the case of a qualified beneficiary"; and

(2) by redesignating clauses (iv) and (v), as amended by paragraph (1), as clauses (v) and (vi), respectively, and by inserting after clause (iii) the following new clause:

"(iv) SPECIAL RULE FOR TAA-ELIGIBLE INDIVIDUALS.—In the case of a qualifying event described in section 2203(2) with respect to a covered employee who is (as of the date that the period of coverage would, but for this clause or clause (v), otherwise terminate under clause (i) or (ii)) a TAA-eligible individual (as defined in section 2205(b)(4)(B)), the period of coverage shall not terminate by reason of clause (i) or (ii), as the case may be, before the later of the date specified in such clause or the date on which such individual ceases to be such a TAA-eligible individual. The preceding sentence shall not require any period of coverage to extend beyond December 31, 2010.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to periods of coverage which would (without regard to the amendments made by this section) end on or after the date of the enactment of this Act.

SEC. 1899G. ADDITION OF COVERAGE THROUGH VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATIONS.

(a) IN GENERAL.—Paragraph (1) of section 35(e) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

"(K) In the case of eligible coverage months beginning before January 1, 2011, coverage under an employee benefit plan funded by a voluntary employees' beneficiary association (as defined in section 501(c)(9)) established pursuant to an order of a bankruptcy court, or by agreement with an authorized representative, as provided in section 1114 of title 11, United States Code.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to coverage months beginning after the date of the enactment of this Act.

SEC. 1899H. NOTICE REQUIREMENTS.

(a) IN GENERAL.—Subsection (d) of section 7527 of the Internal Revenue Code of 1986 (relating to qualified health insurance costs credit eligibility certificate) is amended to read as follows:

"(d) QUALIFIED HEALTH INSURANCE COSTS ELIGIBILITY CERTIFICATE.—

"(1) IN GENERAL.—For purposes of this section, the term 'qualified health insurance costs eligibility certificate' means any written statement that an individual is an eligible individual (as defined in section 35(c)) if such statement provides such information as the Secretary may require for purposes of this section and—

"(A) in the case of an eligible TAA recipient (as defined in section 35(c)(2)) or an eligible alternative TAA recipient (as defined in section 35(c)(3)), is certified by the Secretary of Labor (or by any other person or entity designated by the Secretary), or

"(B) in the case of an eligible PBGC pension recipient (as defined in section 35(c)(4)), is certified by the Pension Benefit Guaranty Corporation (or by any other person or entity designated by the Secretary).

"(2) INCLUSION OF CERTAIN INFORMATION.—In the case of any statement described in paragraph (1) which is issued before January 1, 2011, such statement shall not be treated as a

qualified health insurance costs credit eligibility certificate unless such statement includes—

"(A) the name, address, and telephone number of the State office or offices responsible for providing the individual with assistance with enrollment in qualified health insurance (as defined in section 35(e)),

"(B) a list of the coverage options that are treated as qualified health insurance (as so defined) by the State in which the individual resides, and

"(C) in the case of a TAA-eligible individual (as defined in section 4980B(f)(5)(C)(iv)(II)), a statement informing the individual that the individual has 63 days from the date that is 7 days after the date of the issuance of such certificate to enroll in such insurance without a lapse in creditable coverage (as defined in section 9801(c)).".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to certificates issued after the date that is 6 months after the date of the enactment of this Act.

SEC. 1899I. SURVEY AND REPORT ON ENHANCED HEALTH COVERAGE TAX CREDIT PROGRAM.

(a) SURVEY.—

(1) IN GENERAL.—The Secretary of the Treasury shall conduct a biennial survey of eligible individuals (as defined in section 35(c) of the Internal Revenue Code of 1986) relating to the health coverage tax credit under section 35 of the Internal Revenue Code of 1986 (hereinafter in this section referred to as the "health coverage tax credit").

(2) INFORMATION OBTAINED.—The survey conducted under subsection (a) shall obtain the following information:

(A) HCTC PARTICIPANTS.—In the case of eligible individuals receiving the health coverage tax credit (including individuals participating in the health coverage tax credit program under section 7527 of such Code, hereinafter in this section referred to as the "HCTC program")—

(i) demographic information of such individuals, including income and education levels,

(ii) satisfaction of such individuals with the enrollment process in the HCTC program,

(iii) satisfaction of such individuals with available health coverage options under the credit, including level of premiums, benefits, deductibles, cost-sharing requirements, and the adequacy of provider networks, and

(iv) any other information that the Secretary determines is appropriate.

(B) NON-HCTC PARTICIPANTS.—In the case of eligible individuals not receiving the health coverage tax credit—

(i) demographic information of each individual, including income and education levels,

(ii) whether the individual was aware of the health coverage tax credit or the HCTC program,

(iii) the reasons the individual has not enrolled in the HCTC program, including whether such reasons include the burden of the process of enrollment and the affordability of coverage,

(iv) whether the individual has health insurance coverage, and, if so, the source of such coverage, and

(v) any other information that the Secretary determines is appropriate.

(3) REPORT.—Not later than December 31 of each year in which a survey is conducted under paragraph (1) (beginning in 2010), the Secretary of the Treasury shall report to the Committee on Finance and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means, the Committee on Education and Labor, and the Committee on Energy and Commerce of the House of Representatives the findings of the most recent survey conducted under paragraph (1).

(b) REPORT.—Not later than October 1 of each year (beginning in 2010), the Secretary of the Treasury (after consultation with the Secretary of Health and Human Services, and, in the case of the information required under paragraph (7), the Secretary of Labor) shall report to the Committee on Finance and the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Ways and Means, the Committee on Education and Labor, and the Committee on Energy and Commerce of the House of Representatives the following information with respect to the most recent taxable year ending before such date:

(1) In each State and nationally—

(A) the total number of eligible individuals (as defined in section 35(c) of the Internal Revenue Code of 1986) and the number of eligible individuals receiving the health coverage tax credit,

(B) the total number of such eligible individuals who receive an advance payment of the health coverage tax credit through the HCTC program,

(C) the average length of the time period of the participation of eligible individuals in the HCTC program, and

(D) the total number of participating eligible individuals in the HCTC program who are enrolled in each category of coverage as described in section 35(e)(1) of such Code,

with respect to each category of eligible individuals described in section 35(c)(1) of such Code.

(2) In each State and nationally, an analysis of—

(A) the range of monthly health insurance premiums, for self-only coverage and for family coverage, for individuals receiving the health coverage tax credit, and

(B) the average and median monthly health insurance premiums, for self-only coverage and for family coverage, for individuals receiving the health coverage tax credit, with respect to each category of coverage as described in section 35(e)(1) of such Code.

(3) In each State and nationally, an analysis of the following information with respect to the health insurance coverage of individuals receiving the health coverage tax credit who are enrolled in coverage described in subparagraphs (B) through (H) of section 35(e)(1) of such Code:

(A) Deductible amounts.

(B) Other out-of-pocket cost-sharing amounts.

(C) A description of any annual or lifetime limits on coverage or any other significant limits on coverage services, or benefits.

The information required under this paragraph shall be reported with respect to each category of coverage described in such subparagraphs.

(4) In each State and nationally, the gender and average age of eligible individuals (as defined in section 35(c) of such Code) who receive the health coverage tax credit, in each category of coverage described in section 35(e)(1) of such Code, with respect to each category of eligible individuals described in such section.

(5) The steps taken by the Secretary of the Treasury to increase the participation rates in the HCTC program among eligible individuals, including outreach and enrollment activities.

(6) The cost of administering the HCTC program by function, including the cost of subcontractors, and recommendations on ways to reduce administrative costs, including recommended statutory changes.

(7) The number of States applying for and receiving national emergency grants under section 173(f) of the Workforce Investment Act of 1998 (29 U.S.C. 2918(f)), the activities funded by such grants on a State-by-State basis, and the time necessary for application approval of such grants.

SEC. 1899J. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated $80,000,000 for the period of fiscal years 2009 through 2010 to implement the amendments made by, and the provisions of, sections 1899 through 1899I of this part.

SEC. 1899K. EXTENSION OF NATIONAL EMERGENCY GRANTS.

(a) IN GENERAL.—Section 173(f) of the Workforce Investment Act of 1998 (29 U.S.C. 2918(f)), as amended by this Act, is amended—

(1) by striking paragraph (1) and inserting the following new paragraph:

"(1) USE OF FUNDS.—

"(A) HEALTH INSURANCE COVERAGE FOR ELIGIBLE INDIVIDUALS IN ORDER TO OBTAIN QUALIFIED HEALTH INSURANCE THAT HAS GUARANTEED ISSUE AND OTHER CONSUMER PROTECTIONS.—Funds made available to a State or entity under paragraph (4)(A) of subsection (a) may be used to provide an eligible individual described in paragraph (4)(C) and such individual's qualifying family members with health insurance coverage for the 3-month period that immediately precedes the first eligible coverage month (as defined in section 35(b) of the Internal Revenue Code of 1986) in which such eligible individual and such individual's qualifying family members are covered by qualified health insurance that meets the requirements described in clauses (i) through (v) of section 35(e)(2)(A) of the Internal Revenue Code of 1986 (or such longer minimum period as is necessary in order for such eligible individual and such individual's qualifying family members to be covered by qualified health insurance that meets such requirements).

"(B) ADDITIONAL USES.—Funds made available to a State or entity under paragraph (4)(A) of subsection (a) may be used by the State or entity for the following:

"(i) HEALTH INSURANCE COVERAGE.—To assist an eligible individual and such individual's qualifying family members with enrolling in health insurance coverage and qualified health insurance or paying premiums for such coverage or insurance.

"(ii) ADMINISTRATIVE EXPENSES AND START-UP EXPENSES TO ESTABLISH GROUP HEALTH PLAN COVERAGE OPTIONS FOR QUALIFIED HEALTH INSURANCE.—To pay the administrative expenses related to the enrollment of eligible individuals and such individuals' qualifying family members in health insurance coverage and qualified health insurance, including—

"(I) eligibility verification activities;

"(II) the notification of eligible individuals of available health insurance and qualified health insurance options;

"(III) processing qualified health insurance costs credit eligibility certificates provided for under section 7527 of the Internal Revenue Code of 1986;

"(IV) providing assistance to eligible individuals in enrolling in health insurance coverage and qualified health insurance;

"(V) the development or installation of necessary data management systems; and

"(VI) any other expenses determined appropriate by the Secretary, including start-up costs and on going administrative expenses, in order for the State to treat the coverage described in subparagraphs (C) through (H) of section 35(e)(1) of the Internal Revenue Code of 1986 as qualified health insurance under that section.

"(iii) OUTREACH.—To pay for outreach to eligible individuals to inform such individuals of available health insurance and qualified health insurance options, including outreach consisting of notice to eligible individuals of such options made available after the date of enactment of this clause and direct assistance to help potentially eligible individuals and such individual's qualifying family members qualify and remain eligible for the credit established under section 35 of the Internal Revenue Code of 1986 and advance payment of such credit under section 7527 of such Code.

"(iv) BRIDGE FUNDING.—To assist potentially eligible individuals to purchase qualified health insurance coverage prior to issuance of a qualified health insurance costs credit eligibility certificate under section 7527 of the Internal Revenue Code of 1986 and commencement of advance payment, and receipt of expedited payment, under subsections (a) and (e), respectively, of that section.

"(C) RULE OF CONSTRUCTION.—The inclusion of a permitted use under this paragraph shall not be construed

as prohibiting a similar use of funds permitted under subsection (g).”; and

(2) by striking paragraph (2) and inserting the following new paragraph:

“(2) QUALIFIED HEALTH INSURANCE.—For purposes of this subsection and subsection (g), the term ‘qualified health insurance’ has the meaning given that term in section 35(e) of the Internal Revenue Code of 1986.”.

(b) FUNDING.—Section 174(c)(1) of the Workforce Investment Act of 1998 (29 U.S.C. 2919(c)(1)) is amended—

(1) in the paragraph heading, by striking “AUTHORIZATION AND APPROPRIATION FOR FISCAL YEAR 2002” and inserting “APPROPRIATIONS”; and

(2) by striking subparagraph (A) and inserting the following new subparagraph:

“(A) to carry out subsection (a)(4)(A) of section 173—

“(i) $10,000,000 for fiscal year 2002; and

“(ii) $150,000,000 for the period of fiscal years 2009 through 2010; and”.

SEC. 1899L. GAO STUDY AND REPORT.

(a) STUDY.—The Comptroller General of the United States shall conduct a study regarding the health insurance tax credit allowed under section 35 of the Internal Revenue Code of 1986.

(b) REPORT.—Not later than March 1, 2010, the Comptroller General shall submit a report to Congress regarding the results of the study conducted under subsection (a). Such report shall include an analysis of—

(1) the administrative costs—

(A) of the Federal Government with respect to such credit and the advance payment of such credit under section 7527 of such Code, and

(B) of providers of qualified health insurance with respect to providing such insurance to eligible individuals and their qualifying family members,

(2) the health status and relative risk status of eligible individuals and qualifying family members covered under such insurance,

(3) participation in such credit and the advance payment of such credit by eligible individuals and their qualifying family members, including the reasons why such individuals did or did not participate and the effect of the amendments made by this part on such participation, and

(4) the extent to which eligible individuals and their qualifying family members—

(A) obtained health insurance other than qualifying health insurance, or

(B) went without health insurance coverage.

(c) ACCESS TO RECORDS.—For purposes of conducting the study required under this section, the Comptroller General and any of his duly authorized representatives shall have access to, and the right to examine and copy, all documents, records, and other recorded information—

(1) within the possession or control of providers of qualified health insurance, and

(2) determined by the Comptroller General (or any such representative) to be relevant to the study.

The Comptroller General shall not disclose the identity of any provider of qualified health insurance or any eligible individual in making any information obtained under this section available to the public.

(d) DEFINITIONS.—Any term which is defined in section 35 of the Internal Revenue Code of 1986 shall have the same meaning when used in this section.

TITLE II—ASSISTANCE FOR UNEMPLOYED WORKERS AND STRUGGLING FAMILIES

SEC. 2000. SHORT TITLE; TABLE OF CONTENTS OF TITLE.

(a) SHORT TITLE.—This title may be cited as the “Assistance for Unemployed Workers and Struggling Families Act”.

(b) TABLE OF CONTENTS OF TITLE.—The table of contents of this title is as follows:

Subtitle A—Unemployment Insurance

SEC. 2001. EXTENSION OF EMERGENCY UNEMPLOYMENT COMPENSATION PROGRAM.

(a) IN GENERAL.—Section 4007 of the Supplemental Appropriations Act, 2008 (Public Law 110–252; 26 U.S.C. 3304 note), as amended by section 4 of the Unemployment Compensation Extension Act of 2008 (Public Law 110–449; 122 Stat. 5015), is amended—

(1) by striking “March 31, 2009” each place it appears and inserting “December 31, 2009”;

(2) in the heading for subsection (b)(2), by striking “MARCH 31, 2009” and inserting “DECEMBER 31, 2009”; and

(3) in subsection (b)(3), by striking “August 27, 2009” and inserting “May 31, 2010”.

(b) FINANCING PROVISIONS.—Section 4004 of such Act is amended by adding at the end the following:

"(e) TRANSFER OF FUNDS.—Notwithstanding any other provision of law, the Secretary of the Treasury shall transfer from the general fund of the Treasury (from funds not otherwise appropriated)—

"(1) to the extended unemployment compensation account (as established by section 905 of the Social Security Act) such sums as the Secretary of Labor estimates to be necessary to make payments to States under this title by reason of the amendments made by section 2001(a) of the Assistance for Unemployed Workers and Struggling Families Act; and

"(2) to the employment security administration account (as established by section 901 of the Social Security Act) such sums as the Secretary of Labor estimates to be necessary for purposes of assisting States in meeting administrative costs by reason of the amendments referred to in paragraph (1). There are appropriated from the general fund of the Treasury, without fiscal year limitation, the sums referred to in the preceding sentence and such sums shall not be required to be repaid.".

SEC. 2002. INCREASE IN UNEMPLOYMENT COMPENSATION BENEFITS.

(a) FEDERAL-STATE AGREEMENTS.—Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor (hereinafter in this section referred to as the "Secretary"). Any State which is a party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such agreement.

(b) PROVISIONS OF AGREEMENT.—

(1) ADDITIONAL COMPENSATION.—Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to the amount determined under the State law (before the application of this paragraph) plus an additional $25.

(2) ALLOWABLE METHODS OF PAYMENT.—Any additional compensation provided for in accordance with paragraph (1) shall be payable either—

(A) as an amount which is paid at the same time and in the same manner as any regular compensation otherwise payable for the week involved; or

(B) at the option of the State, by payments which are made separately from, but on the same weekly basis as, any regular compensation otherwise payable.

(c) NONREDUCTION RULE.—An agreement under this section shall not apply (or shall cease to apply) with respect to a State upon a determination by the Secretary that the method governing the computation of regular compensation under the State law of that State has been modified in a manner such that—

(1) the average weekly benefit amount of regular compensation which will be payable during the period of the agreement (determined disregarding any additional amounts attributable

to the modification described in subsection (b)(1)) will be less than

(2) the average weekly benefit amount of regular compensation which would otherwise have been payable during such period under the State law, as in effect on December 31, 2008.

(d) PAYMENTS TO STATES.—

(1) IN GENERAL.—

(A) FULL REIMBURSEMENT.—There shall be paid to each State which has entered into an agreement under this section an amount equal to 100 percent of—

(i) the total amount of additional compensation (as described in subsection (b)(1)) paid to individuals by the State pursuant to such agreement; and

(ii) any additional administrative expenses incurred by the State by reason of such agreement (as determined by the Secretary).

(B) TERMS OF PAYMENTS.—Sums payable to any State by reason of such State's having an agreement under this section shall be payable, either in advance or by way of reimbursement (as determined by the Secretary), in such amounts as the Secretary estimates the State will be entitled to receive under this section for each calendar month, reduced or increased, as the case may be, by any amount by which the Secretary finds that his estimates for any prior calendar month were greater or less than the amounts which should have been paid to the State. Such estimates may be made on the basis of such statistical, sampling, or other method as may be agreed upon by the Secretary and the State agency of the State involved.

(2) CERTIFICATIONS.—The Secretary shall from time to time certify to the Secretary of the Treasury for payment to each State the sums payable to such State under this section.

(3) APPROPRIATION.—There are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection.

(e) APPLICABILITY.—

(1) IN GENERAL.—An agreement entered into under this section shall apply to weeks of unemployment—

(A) beginning after the date on which such agreement is entered into; and

(B) ending before January 1, 2010.

(2) TRANSITION RULE FOR INDIVIDUALS REMAINING ENTITLED TO REGULAR COMPENSATION AS OF JANUARY 1, 2010.—In the case of any individual who, as of the date specified in paragraph (1)(B), has not yet exhausted all rights to regular compensation under the State law of a State with respect to a benefit year that began before such date, additional compensation (as described in subsection (b)(1)) shall continue to be payable to such individual for any week beginning on or after such date for which the individual is otherwise eligible for regular compensation with respect to such benefit year.

(3) TERMINATION.—Notwithstanding any other provision of this subsection, no additional compensation (as described in subsection (b)(1)) shall be payable for any week beginning after June 30, 2010.

(f) FRAUD AND OVERPAYMENTS.—The provisions of section 4005 of the Supplemental Appropriations Act, 2008 (Public Law 110–

252; 122 Stat. 2356) shall apply with respect to additional compensation (as described in subsection (b)(1)) to the same extent and in the same manner as in the case of emergency unemployment compensation.

(g) APPLICATION TO OTHER UNEMPLOYMENT BENEFITS.—

(1) IN GENERAL.—Each agreement under this section shall include provisions to provide that the purposes of the preceding provisions of this section shall be applied with respect to unemployment benefits described in subsection (i)(3) to the same extent and in the same manner as if those benefits were regular compensation.

(2) ELIGIBILITY AND TERMINATION RULES.—Additional compensation (as described in subsection (b)(1))—

(A) shall not be payable, pursuant to this subsection, with respect to any unemployment benefits described in subsection (i)(3) for any week beginning on or after the date specified in subsection (e)(1)(B), except in the case of an individual who was eligible to receive additional compensation (as so described) in connection with any regular compensation or any unemployment benefits described in subsection (i)(3) for any period of unemployment ending before such date; and

(B) shall in no event be payable for any week beginning after the date specified in subsection (e)(3).

(h) DISREGARD OF ADDITIONAL COMPENSATION FOR PURPOSES OF MEDICAID AND SCHIP.—The monthly equivalent of any additional compensation paid under this section shall be disregarded in considering the amount of income of an individual for any purposes under title XIX and title XXI of the Social Security Act.

(i) DEFINITIONS.—For purposes of this section—

(1) the terms "compensation", "regular compensation", "benefit year", "State", "State agency", "State law", and "week" have the respective meanings given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note);

(2) the term "emergency unemployment compensation" means emergency unemployment compensation under title IV of the Supplemental Appropriations Act, 2008 (Public Law 110–252; 122 Stat. 2353); and

(3) any reference to unemployment benefits described in this paragraph shall be considered to refer to—

(A) extended compensation (as defined by section 205 of the Federal-State Extended Unemployment Compensation Act of 1970); and

(B) unemployment compensation (as defined by section 85(b) of the Internal Revenue Code of 1986) provided under any program administered by a State under an agreement with the Secretary.

SEC. 2003. SPECIAL TRANSFERS FOR UNEMPLOYMENT COMPENSATION MODERNIZATION.

(a) IN GENERAL.—Section 903 of the Social Security Act (42 U.S.C. 1103) is amended by adding at the end the following:

"Special Transfers in Fiscal Years 2009, 2010, and 2011 for Modernization

"(f)(1)(A) In addition to any other amounts, the Secretary of Labor shall provide for the making of unemployment compensation modernization incentive payments (hereinafter 'incentive payments') to the accounts of the States in the Unemployment Trust Fund, by transfer from amounts reserved for that purpose in the Federal unemployment account, in accordance with succeeding provisions of this subsection.

"(B) The maximum incentive payment allowable under this subsection with respect to any State shall, as determined by the Secretary of Labor, be equal to the amount obtained by multiplying $7,000,000,000 by the same ratio as would apply under subsection (a)(2)(B) for purposes of determining such State's share of any excess amount (as described in subsection (a)(1)) that would have been subject to transfer to State accounts, as of October 1, 2008, under the provisions of subsection (a).

"(C) Of the maximum incentive payment determined under subparagraph (B) with respect to a State—

"(i) one-third shall be transferred to the account of such State upon a certification under paragraph (4)(B) that the State law of such State meets the requirements of paragraph (2); and

"(ii) the remainder shall be transferred to the account of such State upon a certification under paragraph (4)(B) that the State law of such State meets the requirements of paragraph (3).

"(2) The State law of a State meets the requirements of this paragraph if such State law—

"(A) uses a base period that includes the most recently completed calendar quarter before the start of the benefit year for purposes of determining eligibility for unemployment compensation; or

"(B) provides that, in the case of an individual who would not otherwise be eligible for unemployment compensation under the State law because of the use of a base period that does not include the most recently completed calendar quarter before the start of the benefit year, eligibility shall be determined using a base period that includes such calendar quarter.

"(3) The State law of a State meets the requirements of this paragraph if such State law includes provisions to carry out at least 2 of the following subparagraphs:

"(A) An individual shall not be denied regular unemployment compensation under any State law provisions relating to availability for work, active search for work, or refusal to accept work, solely because such individual is seeking only part-time work (as defined by the Secretary of Labor), except that the State law provisions carrying out this subparagraph may exclude an individual if a majority of the weeks of work in such individual's base period do not include part-time work (as so defined).

"(B) An individual shall not be disqualified from regular unemployment compensation for separating from employment if that separation is for any compelling family reason. For purposes of this subparagraph, the term 'compelling family reason' means the following:

"(i) Domestic violence, verified by such reasonable and confidential documentation as the State law may require, which causes the individual reasonably to believe that such individual's continued employment would jeopardize the safety of the individual or of any member of the individual's immediate family (as defined by the Secretary of Labor).

"(ii) The illness or disability of a member of the individual's immediate family (as those terms are defined by the Secretary of Labor).

"(iii) The need for the individual to accompany such individual's spouse—

"(I) to a place from which it is impractical for such individual to commute; and

"(II) due to a change in location of the spouse's employment.

"(C)(i) Weekly unemployment compensation is payable under this subparagraph to any individual who is unemployed (as determined under the State unemployment compensation law), has exhausted all rights to regular unemployment compensation under the State law, and is enrolled and making satisfactory progress in a State-approved training program or in a job training program authorized under the Workforce Investment Act of 1998, except that such compensation is not required to be paid to an individual who is receiving similar stipends or other training allowances for non-training costs.

"(ii) Each State-approved training program or job training program referred to in clause (i) shall prepare individuals who have been separated from a declining occupation, or who have been involuntarily and indefinitely separated from employment as a result of a permanent reduction of operations at the individual's place of employment, for entry into a high-demand occupation.

"(iii) The amount of unemployment compensation payable under this subparagraph to an individual for a week of unemployment shall be equal to—

"(I) the individual's average weekly benefit amount (including dependents' allowances) for the most recent benefit year, less

"(II) any deductible income, as determined under State law.

The total amount of unemployment compensation payable under this subparagraph to any individual shall be equal to at least 26 times the individual's average weekly benefit amount (including dependents' allowances) for the most recent benefit year.

"(D) Dependents' allowances are provided, in the case of any individual who is entitled to receive regular unemployment compensation and who has any dependents (as defined by State law), in an amount equal to at least $15 per dependent per week, subject to any aggregate limitation on such allowances which the State law may establish (but which aggregate limitation on the total allowance for dependents paid to an individual may not be less than $50 for each week of unemployment or 50 percent of the individual's weekly benefit amount for the benefit year, whichever is less), except that a State law may provide for a reasonable reduction in the amount of any such allowance for a week of less than total unemployment.

"(4)(A) Any State seeking an incentive payment under this subsection shall submit an application therefor at such time, in such manner, and complete with such information as the Secretary of Labor may within 60 days after the date of the enactment of this subsection prescribe (whether by regulation or otherwise), including information relating to compliance with the requirements of paragraph (2) or (3), as well as how the State intends to use the incentive payment to improve or strengthen the State's unemployment compensation program. The Secretary of Labor shall, within 30 days after receiving a complete application, notify the State agency of the State of the Secretary's findings with respect to the requirements of paragraph (2) or (3) (or both).

"(B)(i) If the Secretary of Labor finds that the State law provisions (disregarding any State law provisions which are not then currently in effect as permanent law or which are subject to discontinuation) meet the requirements of paragraph (2) or (3), as the case may be, the Secretary of Labor shall thereupon make a certification to that effect to the Secretary of the Treasury, together with a certification as to the amount of the incentive payment to be transferred to the State account pursuant to that finding. The Secretary of the Treasury shall make the appropriate transfer within 7 days after receiving such certification.

"(ii) For purposes of clause (i), State law provisions which are to take effect within 12 months after the date of their certification under this subparagraph shall be considered to be in effect as of the date of such certification.

"(C)(i) No certification of compliance with the requirements of paragraph (2) or (3) may be made with respect to any State whose State law is not otherwise eligible for certification under section 303 or approvable under section 3304 of the Federal Unemployment Tax Act.

"(ii) No certification of compliance with the requirements of paragraph (3) may be made with respect to any State whose State law is not in compliance with the requirements of paragraph (2).

"(iii) No application under subparagraph (A) may be considered if submitted before the date of the enactment of this subsection or after the latest date necessary (as specified by the Secretary of Labor) to ensure that all incentive payments under this subsection are made before October 1, 2011.

"(5)(A) Except as provided in subparagraph (B), any amount transferred to the account of a State under this subsection may be used by such State only in the payment of cash benefits to individuals with respect to their unemployment (including for dependents' allowances and for unemployment compensation under paragraph (3)(C)), exclusive of expenses of administration.

"(B) A State may, subject to the same conditions as set forth in subsection (c)(2) (excluding subparagraph (B) thereof, and deeming the reference to 'subsections (a) and (b)' in subparagraph (D) thereof to include this subsection), use any amount transferred to the account of such State under this subsection for the administration of its unemployment compensation law and public employment offices.

"(6) Out of any money in the Federal unemployment account not otherwise appropriated, the Secretary of the Treasury shall reserve $7,000,000,000 for incentive payments under this subsection. Any amount so reserved shall not be taken into account for purposes of any determination under section 902, 910, or 1203

of the amount in the Federal unemployment account as of any given time. Any amount so reserved for which the Secretary of the Treasury has not received a certification under paragraph (4)(B) by the deadline described in paragraph (4)(C)(iii) shall, upon the close of fiscal year 2011, become unrestricted as to use as part of the Federal unemployment account.

"(7) For purposes of this subsection, the terms 'benefit year', 'base period', and 'week' have the respective meanings given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note).

"Special Transfer in Fiscal Year 2009 for Administration

"(g)(1) In addition to any other amounts, the Secretary of the Treasury shall transfer from the employment security administration account to the account of each State in the Unemployment Trust Fund, within 30 days after the date of the enactment of this subsection, the amount determined with respect to such State under paragraph (2).

"(2) The amount to be transferred under this subsection to a State account shall (as determined by the Secretary of Labor and certified by such Secretary to the Secretary of the Treasury) be equal to the amount obtained by multiplying $500,000,000 by the same ratio as determined under subsection (f)(1)(B) with respect to such State.

"(3) Any amount transferred to the account of a State as a result of the enactment of this subsection may be used by the State agency of such State only in the payment of expenses incurred by it for—

"(A) the administration of the provisions of its State law carrying out the purposes of subsection (f)(2) or any subparagraph of subsection (f)(3);

"(B) improved outreach to individuals who might be eligible for regular unemployment compensation by virtue of any provisions of the State law which are described in subparagraph (A);

"(C) the improvement of unemployment benefit and unemployment tax operations, including responding to increased demand for unemployment compensation; and

"(D) staff-assisted reemployment services for unemployment compensation claimants.".

(b) REGULATIONS.—The Secretary of Labor may prescribe any regulations, operating instructions, or other guidance necessary to carry out the amendment made by subsection (a).

SEC. 2004. TEMPORARY ASSISTANCE FOR STATES WITH ADVANCES.

Section 1202(b) of the Social Security Act (42 U.S.C. 1322(b)) is amended by adding at the end the following new paragraph:

"(10)(A) With respect to the period beginning on the date of enactment of this paragraph and ending on December 31, 2010—

"(i) any interest payment otherwise due from a State under this subsection during such period shall be deemed to have been made by the State; and

"(ii) no interest shall accrue during such period on any advance or advances made under section 1201 to a State.

"(B) The provisions of subparagraph (A) shall have no effect on the requirement for interest payments under this subsection

after the period described in such subparagraph or on the accrual of interest under this subsection after such period.".

SEC. 2005. FULL FEDERAL FUNDING OF EXTENDED UNEMPLOYMENT COMPENSATION FOR A LIMITED PERIOD.

(a) IN GENERAL.—In the case of sharable extended compensation and sharable regular compensation paid for weeks of unemployment beginning after the date of the enactment of this section and before January 1, 2010, section 204(a)(1) of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note) shall be applied by substituting "100 percent of" for "one-half of".

(b) SPECIAL RULE.—At the option of a State, for any weeks of unemployment beginning after the date of the enactment of this section and before January 1, 2010, an individual's eligibility period (as described in section 203(c) of the Federal-State Extended Unemployment Compensation Act of 1970) shall, for purposes of any determination of eligibility for extended compensation under the State law of such State, be considered to include any week which begins—

(1) after the date as of which such individual exhausts all rights to emergency unemployment compensation; and

(2) during an extended benefit period that began on or before the date described in paragraph (1).

(c) LIMITED EXTENSION.—In the case of an individual who receives extended compensation with respect to 1 or more weeks of unemployment beginning after the date of the enactment of this Act and before January 1, 2010, the provisions of subsections (a) and (b) shall, at the option of a State, be applied by substituting "ending before June 1, 2010" for "before January 1, 2010".

(d) EXTENSION OF TEMPORARY FEDERAL MATCHING FOR THE FIRST WEEK OF EXTENDED BENEFITS FOR STATES WITH NO WAITING WEEK.—

(1) IN GENERAL.—Section 5 of the Unemployment Compensation Extension Act of 2008 (Public Law 110–449) is amended by striking "December 8, 2009" and inserting "May 30, 2010".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect as if included in the enactment of the Unemployment Compensation Extension Act of 2008 (Public Law 110–449).

(e) DEFINITIONS.—For purposes of this section—

(1) the terms "sharable extended compensation" and "sharable regular compensation" have the respective meanings given such terms under section 204 of the Federal-State Extended Unemployment Compensation Act of 1970;

(2) the terms "extended compensation", "State", "State law", and "week" have the respective meanings given such terms under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970;

(3) the term "emergency unemployment compensation" means benefits payable to individuals under title IV of the Supplemental Appropriations Act, 2008 with respect to their unemployment; and

(4) the term "extended benefit period" means an extended benefit period as determined in accordance with applicable

provisions of the Federal-State Extended Unemployment Compensation Act of 1970.

(f) REGULATIONS.—The Secretary of Labor may prescribe any operating instructions or regulations necessary to carry out this section.

SEC. 2006. TEMPORARY INCREASE IN EXTENDED UNEMPLOYMENT BENEFITS UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT.

(a) IN GENERAL.—Section 2(c)(2) of the Railroad Unemployment Insurance Act (45 U.S.C. 352(c)(2)) is amended by adding at the end the following:

"(D) TEMPORARY INCREASE IN EXTENDED UNEMPLOYMENT BENEFITS.—

"(i) EMPLOYEES WITH 10 OR MORE YEARS OF SERVICE.—Subject to clause (iii), in the case of an employee who has 10 or more years of service (as so defined), with respect to extended unemployment benefits—

"(I) subparagraph (A) shall be applied by substituting '130 days of unemployment' for '65 days of unemployment'; and

"(II) subparagraph (B) shall be applied by inserting '(or, in the case of unemployment benefits, 13 consecutive 14-day periods)' after '7 consecutive 14-day periods'.

"(ii) EMPLOYEES WITH LESS THAN 10 YEARS OF SERVICE.—Subject to clause (iii), in the case of an employee who has less than 10 years of service (as so defined), with respect to extended unemployment benefits, this paragraph shall apply to such an employee in the same manner as this paragraph would apply to an employee described in clause (i) if such clause had not been enacted.

"(iii) APPLICATION.—The provisions of clauses (i) and (ii) shall apply to an employee who received normal benefits for days of unemployment under this Act during the period beginning July 1, 2008, and ending on June 30, 2009, except that no extended benefit period under this paragraph shall begin after December 31, 2009. Notwithstanding the preceding sentence, no benefits shall be payable under this subparagraph and clauses (i) and (ii) shall no longer be applicable upon the exhaustion of the funds appropriated under clause (iv) for payment of benefits under this subparagraph.

"(iv) APPROPRIATION.—Out of any funds in the Treasury not otherwise appropriated, there are appropriated $20,000,000 to cover the cost of additional extended unemployment benefits provided under this subparagraph, to remain available until expended.".

(b) FUNDING FOR ADMINISTRATION.—Out of any funds in the Treasury not otherwise appropriated, there are appropriated to the Railroad Retirement Board $80,000 to cover the administrative expenses associated with the payment of additional extended unemployment benefits under section 2(c)(2)(D) of the Railroad

Unemployment Insurance Act, as added by subsection (a), to remain available until expended.

Subtitle B—Assistance for Vulnerable Individuals

SEC. 2101. EMERGENCY FUND FOR TANF PROGRAM.

(a) TEMPORARY FUND.—

(1) IN GENERAL.—Section 403 of the Social Security Act (42 U.S.C. 603) is amended by adding at the end the following:

"(c) EMERGENCY FUND.—

"(1) ESTABLISHMENT.—There is established in the Treasury of the United States a fund which shall be known as the 'Emergency Contingency Fund for State Temporary Assistance for Needy Families Programs' (in this subsection referred to as the 'Emergency Fund').

"(2) DEPOSITS INTO FUND.—

"(A) IN GENERAL.—Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for fiscal year 2009, $5,000,000,000 for payment to the Emergency Fund.

"(B) AVAILABILITY AND USE OF FUNDS.—The amounts appropriated to the Emergency Fund under subparagraph (A) shall remain available through fiscal year 2010 and shall be used to make grants to States in each of fiscal years 2009 and 2010 in accordance with the requirements of paragraph (3).

"(C) LIMITATION.—In no case may the Secretary make a grant from the Emergency Fund for a fiscal year after fiscal year 2010.

"(3) GRANTS.—

"(A) GRANT RELATED TO CASELOAD INCREASES.—

"(i) IN GENERAL.—For each calendar quarter in fiscal year 2009 or 2010, the Secretary shall make a grant from the Emergency Fund to each State that—

"(I) requests a grant under this subparagraph for the quarter; and

"(II) meets the requirement of clause (ii) for the quarter.

"(ii) CASELOAD INCREASE REQUIREMENT.—A State meets the requirement of this clause for a quarter if the average monthly assistance caseload of the State for the quarter exceeds the average monthly assistance caseload of the State for the corresponding quarter in the emergency fund base year of the State.

"(iii) AMOUNT OF GRANT.—Subject to paragraph (5), the amount of the grant to be made to a State under this subparagraph for a quarter shall be an amount equal to 80 percent of the amount (if any) by which the total expenditures of the State for basic assistance (as defined by the Secretary) in the quarter, whether under the State program funded under this part or as qualified State expenditures, exceeds the total expenditures of the State for such assistance for the corresponding quarter in the emergency fund base year of the State.

"(B) GRANT RELATED TO INCREASED EXPENDITURES FOR NON-RECURRENT SHORT TERM BENEFITS.—

"(i) IN GENERAL.—For each calendar quarter in fiscal year 2009 or 2010, the Secretary shall make a grant from the Emergency Fund to each State that—

"(I) requests a grant under this subparagraph for the quarter; and

"(II) meets the requirement of clause (ii) for the quarter.

"(ii) NON-RECURRENT SHORT TERM EXPENDITURE REQUIREMENT.—A State meets the requirement of this clause for a quarter if the total expenditures of the State for non-recurrent short term benefits in the quarter, whether under the State program funded under this part or as qualified State expenditures, exceeds the total expenditures of the State for non-recurrent short term benefits in the corresponding quarter in the emergency fund base year of the State.

"(iii) AMOUNT OF GRANT.—Subject to paragraph (5), the amount of the grant to be made to a State under this subparagraph for a quarter shall be an amount equal to 80 percent of the excess described in clause (ii).

"(C) GRANT RELATED TO INCREASED EXPENDITURES FOR SUBSIDIZED EMPLOYMENT.—

"(i) IN GENERAL.—For each calendar quarter in fiscal year 2009 or 2010, the Secretary shall make a grant from the Emergency Fund to each State that—

"(I) requests a grant under this subparagraph for the quarter; and

"(II) meets the requirement of clause (ii) for the quarter.

"(ii) SUBSIDIZED EMPLOYMENT EXPENDITURE REQUIREMENT.—A State meets the requirement of this clause for a quarter if the total expenditures of the State for subsidized employment in the quarter, whether under the State program funded under this part or as qualified State expenditures, exceeds the total such expenditures of the State in the corresponding quarter in the emergency fund base year of the State.

"(iii) AMOUNT OF GRANT.—Subject to paragraph (5), the amount of the grant to be made to a State under this subparagraph for a quarter shall be an amount equal to 80 percent of the excess described in clause (ii).

"(4) AUTHORITY TO MAKE NECESSARY ADJUSTMENTS TO DATA AND COLLECT NEEDED DATA.—In determining the size of the caseload of a State and the expenditures of a State for basic assistance, non-recurrent short-term benefits, and subsidized employment, during any period for which the State requests funds under this subsection, and during the emergency fund base year of the State, the Secretary may make appropriate adjustments to the data, on a State-by-State basis, to ensure that the data are comparable with respect to the groups of families served and the types of aid provided. The Secretary may develop a mechanism for collecting expenditure data,

including procedures which allow States to make reasonable estimates, and may set deadlines for making revisions to the data.

"(5) LIMITATION.—The total amount payable to a single State under subsection (b) and this subsection for fiscal years 2009 and 2010 combined shall not exceed 50 percent of the annual State family assistance grant.

"(6) LIMITATIONS ON USE OF FUNDS.—A State to which an amount is paid under this subsection may use the amount only as authorized by section 404.

"(7) TIMING OF IMPLEMENTATION.—The Secretary shall implement this subsection as quickly as reasonably possible, pursuant to appropriate guidance to States.

"(8) APPLICATION TO INDIAN TRIBES.—This subsection shall apply to an Indian tribe with an approved tribal family assistance plan under section 412 in the same manner as this subsection applies to a State.

"(9) DEFINITIONS.—In this subsection:

"(A) AVERAGE MONTHLY ASSISTANCE CASELOAD DEFINED.—The term 'average monthly assistance caseload' means, with respect to a State and a quarter, the number of families receiving assistance during the quarter under the State program funded under this part or as qualified State expenditures, subject to adjustment under paragraph (4).

"(B) EMERGENCY FUND BASE YEAR.—

"(i) IN GENERAL.—The term 'emergency fund base year' means, with respect to a State and a category described in clause (ii), whichever of fiscal year 2007 or 2008 is the fiscal year in which the amount described by the category with respect to the State is the lesser.

"(ii) CATEGORIES DESCRIBED.—The categories described in this clause are the following:

"(I) The average monthly assistance caseload of the State.

"(II) The total expenditures of the State for non-recurrent short term benefits, whether under the State program funded under this part or as qualified State expenditures.

"(III) The total expenditures of the State for subsidized employment, whether under the State program funded under this part or as qualified State expenditures.

"(C) QUALIFIED STATE EXPENDITURES.—The term 'qualified State expenditures' has the meaning given the term in section 409(a)(7).".

(2) REPEAL.—Effective October 1, 2010, subsection (c) of section 403 of the Social Security Act (42 U.S.C. 603) (as added by paragraph (1)) is repealed, except that paragraph (9) of such subsection shall remain in effect until October 1, 2011, but only with respect to section 407(b)(3)(A)(i) of such Act.

(b) TEMPORARY MODIFICATION OF CASELOAD REDUCTION CREDIT.—Section 407(b)(3)(A)(i) of such Act (42 U.S.C. 607(b)(3)(A)(i)) is amended by inserting "(or if the immediately preceding fiscal year is fiscal year 2008, 2009, or 2010, then, at State option, during the emergency fund base year of the State

with respect to the average monthly assistance caseload of the State (within the meaning of section 403(c)(9)), except that, if a State elects such option for fiscal year 2008, the emergency fund base year of the State with respect to such caseload shall be fiscal year 2007))" before "under the State".

(c) DISREGARD FROM LIMITATION ON TOTAL PAYMENTS TO TERRITORIES.—Section 1108(a)(2) of the Social Security Act (42 U.S.C. 1308(a)(2)) is amended by inserting "403(c)(3)," after "403(a)(5),".

(d) SUNSET OF OTHER TEMPORARY PROVISIONS.—

(1) DISREGARD FROM LIMITATION ON TOTAL PAYMENTS TO TERRITORIES.—Effective October 1, 2010, section 1108(a)(2) of the Social Security Act (42 U.S.C. 1308(a)(2)) is amended by striking "403(c)(3)," (as added by subsection (c)).

(2) CASELOAD REDUCTION CREDIT.—Effective October 1, 2011, section 407(b)(3)(A)(i) of such Act (42 U.S.C. 607(b)(3)(A)(i)) is amended by striking "(or if the immediately preceding fiscal year is fiscal year 2008, 2009, or 2010, then, at State option, during the emergency fund base year of the State with respect to the average monthly assistance caseload of the State (within the meaning of section 403(c)(9)), except that, if a State elects such option for fiscal year 2008, the emergency fund base year of the State with respect to such caseload shall be fiscal year 2007))" (as added by subsection (b)).

SEC. 2102. EXTENSION OF TANF SUPPLEMENTAL GRANTS.

(a) EXTENSION THROUGH FISCAL YEAR 2010.—Section 7101(a) of the Deficit Reduction Act of 2005 (Public Law 109–171; 120 Stat. 135), as amended by section 301(a) of the Medicare Improvements for Patients and Providers Act of 2008 (Public Law 110–275), is amended by striking "fiscal year 2009" and inserting "fiscal year 2010".

(b) CONFORMING AMENDMENT.—Section 403(a)(3)(H)(ii) of the Social Security Act (42 U.S.C. 603(a)(3)(H)(ii)) is amended to read as follows:

"(ii) subparagraph (G) shall be applied as if 'fiscal year 2010' were substituted for 'fiscal year 2001'; and".

SEC. 2103. CLARIFICATION OF AUTHORITY OF STATES TO USE TANF FUNDS CARRIED OVER FROM PRIOR YEARS TO PROVIDE TANF BENEFITS AND SERVICES.

Section 404(e) of the Social Security Act (42 U.S.C. 604(e)) is amended to read as follows:

"(e) AUTHORITY TO CARRY OVER CERTAIN AMOUNTS FOR BENEFITS OR SERVICES OR FOR FUTURE CONTINGENCIES.—A State or tribe may use a grant made to the State or tribe under this part for any fiscal year to provide, without fiscal year limitation, any benefit or service that may be provided under the State or tribal program funded under this part.".

SEC. 2104. TEMPORARY RESUMPTION OF PRIOR CHILD SUPPORT LAW.

During the period that begins on October 1, 2008, and ends on September 30, 2010, section 455(a)(1) of the Social Security Act (42 U.S.C. 655(a)(1)) shall be applied and administered as if the phrase "from amounts paid to the State under section 458 or" does not appear in such section.

Subtitle C—Economic Recovery Payments to Certain Individuals

SEC. 2201. ECONOMIC RECOVERY PAYMENT TO RECIPIENTS OF SOCIAL SECURITY, SUPPLEMENTAL SECURITY INCOME, RAILROAD RETIREMENT BENEFITS, AND VETERANS DISABILITY COMPENSATION OR PENSION BENEFITS.

(a) AUTHORITY TO MAKE PAYMENTS.—

(1) ELIGIBILITY.—

(A) IN GENERAL.—Subject to paragraph (5)(B), the Secretary of the Treasury shall disburse a $250 payment to each individual who, for any month during the 3-month period ending with the month which ends prior to the month that includes the date of the enactment of this Act, is entitled to a benefit payment described in clause (i), (ii), or (iii) of subparagraph (B) or is eligible for a SSI cash benefit described in subparagraph (C).

(B) BENEFIT PAYMENT DESCRIBED.—For purposes of subparagraph (A):

(i) TITLE II BENEFIT.—A benefit payment described in this clause is a monthly insurance benefit payable (without regard to sections 202(j)(1) and 223(b) of the Social Security Act (42 U.S.C. 402(j)(1), 423(b)) under—

(I) section 202(a) of such Act (42 U.S.C. 402(a));

(II) section 202(b) of such Act (42 U.S.C. 402(b));

(III) section 202(c) of such Act (42 U.S.C. 402(c));

(IV) section 202(d)(1)(B)(ii) of such Act (42 U.S.C. 402(d)(1)(B)(ii));

(V) section 202(e) of such Act (42 U.S.C. 402(e));

(VI) section 202(f) of such Act (42 U.S.C. 402(f));

(VII) section 202(g) of such Act (42 U.S.C. 402(g));

(VIII) section 202(h) of such Act (42 U.S.C. 402(h));

(IX) section 223(a) of such Act (42 U.S.C. 423(a));

(X) section 227 of such Act (42 U.S.C. 427); or

(XI) section 228 of such Act (42 U.S.C. 428).

(ii) RAILROAD RETIREMENT BENEFIT.—A benefit payment described in this clause is a monthly annuity or pension payment payable (without regard to section 5(a)(ii) of the Railroad Retirement Act of 1974 (45 U.S.C. 231d(a)(ii))) under—

(I) section 2(a)(1) of such Act (45 U.S.C. 231a(a)(1));

(II) section 2(c) of such Act (45 U.S.C. 231a(c));

(III) section 2(d)(1)(i) of such Act (45 U.S.C. 231a(d)(1)(i));

(IV) section 2(d)(1)(ii) of such Act (45 U.S.C. 231a(d)(1)(ii));

(V) section 2(d)(1)(iii)(C) of such Act to an adult disabled child (45 U.S.C. 231a(d)(1)(iii)(C));

(VI) section 2(d)(1)(iv) of such Act (45 U.S.C. 231a(d)(1)(iv));

(VII) section 2(d)(1)(v) of such Act (45 U.S.C. 231a(d)(1)(v)); or

(VIII) section 7(b)(2) of such Act (45 U.S.C. 231f(b)(2)) with respect to any of the benefit payments described in clause (i) of this subparagraph.

(iii) VETERANS BENEFIT.—A benefit payment described in this clause is a compensation or pension payment payable under—

(I) section 1110, 1117, 1121, 1131, 1141, or 1151 of title 38, United States Code;

(II) section 1310, 1312, 1313, 1315, 1316, or 1318 of title 38, United States Code;

(III) section 1513, 1521, 1533, 1536, 1537, 1541, 1542, or 1562 of title 38, United States Code; or

(IV) section 1805, 1815, or 1821 of title 38, United States Code,

to a veteran, surviving spouse, child, or parent as described in paragraph (2), (3), (4)(A)(ii), or (5) of section 101, title 38, United States Code, who received that benefit during any month within the 3 month period ending with the month which ends prior to the month that includes the date of the enactment of this Act.

(C) SSI CASH BENEFIT DESCRIBED.—A SSI cash benefit described in this subparagraph is a cash benefit payable under section 1611 (other than under subsection (e)(1)(B) of such section) or 1619(a) of the Social Security Act (42 U.S.C. 1382, 1382h).

(2) REQUIREMENT.—A payment shall be made under paragraph (1) only to individuals who reside in 1 of the 50 States, the District of Columbia, Puerto Rico, Guam, the United States Virgin Islands, American Samoa, or the Northern Mariana Islands. For purposes of the preceding sentence, the determination of the individual's residence shall be based on the current address of record under a program specified in paragraph (1).

(3) NO DOUBLE PAYMENTS.—An individual shall be paid only 1 payment under this section, regardless of whether the individual is entitled to, or eligible for, more than 1 benefit or cash payment described in paragraph (1).

(4) LIMITATION.—A payment under this section shall not be made—

(A) in the case of an individual entitled to a benefit specified in paragraph (1)(B)(i) or paragraph (1)(B)(ii)(VIII) if, for the most recent month of such individual's entitlement in the 3-month period described in paragraph (1), such individual's benefit under such paragraph was not payable by reason of subsection (x) or (y) of section 202 the Social Security Act (42 U.S.C. 402) or section 1129A of such Act (42 U.S.C. 1320a-8a);

(B) in the case of an individual entitled to a benefit specified in paragraph (1)(B)(iii) if, for the most recent month of such individual's entitlement in the 3 month period described in paragraph (1), such individual's benefit under such paragraph was not payable, or was reduced, by reason of section 1505, 5313, or 5313B of title 38, United States Code;

(C) in the case of an individual entitled to a benefit specified in paragraph (1)(C) if, for such most recent month, such individual's benefit under such paragraph was not payable by reason of subsection (e)(1)(A) or (e)(4) of section 1611 (42 U.S.C. 1382) or section 1129A of such Act (42 U.S.C. 1320a-8a); or

(D) in the case of any individual whose date of death occurs before the date on which the individual is certified under subsection (b) to receive a payment under this section.

(5) TIMING AND MANNER OF PAYMENTS.—

(A) IN GENERAL.—The Secretary of the Treasury shall commence disbursing payments under this section at the earliest practicable date but in no event later than 120 days after the date of enactment of this Act. The Secretary of the Treasury may disburse any payment electronically to an individual in such manner as if such payment was a benefit payment or cash benefit to such individual under the applicable program described in subparagraph (B) or (C) of paragraph (1).

(B) DEADLINE.—No payments shall be disbursed under this section after December 31, 2010, regardless of any determinations of entitlement to, or eligibility for, such payments made after such date.

(b) IDENTIFICATION OF RECIPIENTS.—The Commissioner of Social Security, the Railroad Retirement Board, and the Secretary of Veterans Affairs shall certify the individuals entitled to receive payments under this section and provide the Secretary of the Treasury with the information needed to disburse such payments. A certification of an individual shall be unaffected by any subsequent determination or redetermination of the individual's entitlement to, or eligibility for, a benefit specified in subparagraph (B) or (C) of subsection (a)(1).

(c) TREATMENT OF PAYMENTS.—

(1) PAYMENT TO BE DISREGARDED FOR PURPOSES OF ALL FEDERAL AND FEDERALLY ASSISTED PROGRAMS.—A payment under subsection (a) shall not be regarded as income and shall not be regarded as a resource for the month of receipt and the following 9 months, for purposes of determining the eligibility of the recipient (or the recipient's spouse or family) for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds.

(2) PAYMENT NOT CONSIDERED INCOME FOR PURPOSES OF TAXATION.—A payment under subsection (a) shall not be considered as gross income for purposes of the Internal Revenue Code of 1986.

(3) PAYMENTS PROTECTED FROM ASSIGNMENT.—The provisions of sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407, 1383(d)(1)), section 14(a) of the Railroad Retirement Act of 1974 (45 U.S.C. 231m(a)), and section 5301 of title 38, United States Code, shall apply to any payment

made under subsection (a) as if such payment was a benefit payment or cash benefit to such individual under the applicable program described in subparagraph (B) or (C) of subsection (a)(1).

(4) PAYMENTS SUBJECT TO OFFSET.—Notwithstanding paragraph (3), for purposes of section 3716 of title 31, United States Code, any payment made under this section shall not be considered a benefit payment or cash benefit made under the applicable program described in subparagraph (B) or (C) of subsection (a)(1) and all amounts paid shall be subject to offset to collect delinquent debts.

(d) PAYMENT TO REPRESENTATIVE PAYEES AND FIDUCIARIES.—

(1) IN GENERAL.—In any case in which an individual who is entitled to a payment under subsection (a) and whose benefit payment or cash benefit described in paragraph (1) of that subsection is paid to a representative payee or fiduciary, the payment under subsection (a) shall be made to the individual's representative payee or fiduciary and the entire payment shall be used only for the benefit of the individual who is entitled to the payment.

(2) APPLICABILITY.—

(A) PAYMENT ON THE BASIS OF A TITLE II OR SSI BENEFIT.—Section 1129(a)(3) of the Social Security Act (42 U.S.C. 1320a–8(a)(3)) shall apply to any payment made on the basis of an entitlement to a benefit specified in paragraph (1)(B)(i) or (1)(C) of subsection (a) in the same manner as such section applies to a payment under title II or XVI of such Act.

(B) PAYMENT ON THE BASIS OF A RAILROAD RETIREMENT BENEFIT.—Section 13 of the Railroad Retirement Act (45 U.S.C. 231l) shall apply to any payment made on the basis of an entitlement to a benefit specified in paragraph (1)(B)(ii) of subsection (a) in the same manner as such section applies to a payment under such Act.

(C) PAYMENT ON THE BASIS OF A VETERANS BENEFIT.—Sections 5502, 6106, and 6108 of title 38, United States Code, shall apply to any payment made on the basis of an entitlement to a benefit specified in paragraph (1)(B)(iii) of subsection (a) in the same manner as those sections apply to a payment under that title.

(e) APPROPRIATION.—Out of any sums in the Treasury of the United States not otherwise appropriated, the following sums are appropriated for the period of fiscal years 2009 through 2011, to remain available until expended, to carry out this section:

(1) For the Secretary of the Treasury, $131,000,000 for administrative costs incurred in carrying out this section, section 2202, section 36A of the Internal Revenue Code of 1986 (as added by this Act), and other provisions of this Act or the amendments made by this Act relating to the Internal Revenue Code of 1986.

(2) For the Commissioner of Social Security—

(A) such sums as may be necessary for payments to individuals certified by the Commissioner of Social Security as entitled to receive a payment under this section; and

(B) $90,000,000 for the Social Security Administration's Limitation on Administrative Expenses for costs incurred in carrying out this section.

(3) For the Railroad Retirement Board—

(A) such sums as may be necessary for payments to individuals certified by the Railroad Retirement Board as entitled to receive a payment under this section; and

(B) $1,400,000 to the Railroad Retirement Board's Limitation on Administration for administrative costs incurred in carrying out this section.

(4)(A) For the Secretary of Veterans Affairs—

(i) such sums as may be necessary for the Compensation and Pensions account, for payments to individuals certified by the Secretary of Veterans Affairs as entitled to receive a payment under this section; and

(ii) $100,000 for the Information Systems Technology account and $7,100,000 for the General Operating Expenses account for administrative costs incurred in carrying out this section.

(B) The Department of Veterans Affairs Compensation and Pensions account shall hereinafter be available for payments authorized under subsection (a)(1)(A) to individuals entitled to a benefit payment described in subsection (a)(1)(B)(iii).

SEC. 2202. SPECIAL CREDIT FOR CERTAIN GOVERNMENT RETIREES.

(a) IN GENERAL.—In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by subtitle A of the Internal Revenue Code of 1986 for the first taxable year beginning in 2009 an amount equal $250 ($500 in the case of a joint return where both spouses are eligible individuals).

(b) ELIGIBLE INDIVIDUAL.—For purposes of this section—

(1) IN GENERAL.—The term "eligible individual" means any individual—

(A) who receives during the first taxable year beginning in 2009 any amount as a pension or annuity for service performed in the employ of the United States or any State, or any instrumentality thereof, which is not considered employment for purposes of chapter 21 of the Internal Revenue Code of 1986, and

(B) who does not receive a payment under section 2201 during such taxable year.

(2) IDENTIFICATION NUMBER REQUIREMENT.—Such term shall not include any individual who does not include on the return of tax for the taxable year—

(A) such individual's social security account number, and

(B) in the case of a joint return, the social security account number of one of the taxpayers on such return.

For purposes of the preceding sentence, the social security account number shall not include a TIN (as defined in section 7701(a)(41) of the Internal Revenue Code of 1986) issued by the Internal Revenue Service. Any omission of a correct social security account number required under this subparagraph shall be treated as a mathematical or clerical error for purposes of applying section 6213(g)(2) of such Code to such omission.

(c) TREATMENT OF CREDIT.—

(1) REFUNDABLE CREDIT.—

(A) IN GENERAL.—The credit allowed by subsection (a) shall be treated as allowed by subpart C of part IV of

subchapter A of chapter 1 of the Internal Revenue Code of 1986.

(B) APPROPRIATIONS.—For purposes of section 1324(b)(2) of title 31, United States Code, the credit allowed by subsection (a) shall be treated in the same manner a refund from the credit allowed under section 36A of the Internal Revenue Code of 1986 (as added by this Act).

(2) DEFICIENCY RULES.—For purposes of section 6211(b)(4)(A) of the Internal Revenue Code of 1986, the credit allowable by subsection (a) shall be treated in the same manner as the credit allowable under section 36A of the Internal Revenue Code of 1986 (as added by this Act).

(d) REFUNDS DISREGARDED IN THE ADMINISTRATION OF FEDERAL PROGRAMS AND FEDERALLY ASSISTED PROGRAMS.—Any credit or refund allowed or made to any individual by reason of this section shall not be taken into account as income and shall not be taken into account as resources for the month of receipt and the following 2 months, for purposes of determining the eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds.

TITLE III—PREMIUM ASSISTANCE FOR COBRA BENEFITS

SEC. 3000. TABLE OF CONTENTS.

The table of contents of this title is as follows:

SEC. 3001. PREMIUM ASSISTANCE FOR COBRA BENEFITS.

(a) PREMIUM ASSISTANCE FOR COBRA CONTINUATION COVERAGE FOR INDIVIDUALS AND THEIR FAMILIES.—

(1) PROVISION OF PREMIUM ASSISTANCE.—

(A) REDUCTION OF PREMIUMS PAYABLE.—In the case of any premium for a period of coverage beginning on or after the date of the enactment of this Act for COBRA continuation coverage with respect to any assistance eligible individual, such individual shall be treated for purposes of any COBRA continuation provision as having paid the amount of such premium if such individual pays (or a person other than such individual's employer pays on behalf of such individual) 35 percent of the amount of such premium (as determined without regard to this subsection).

(B) PLAN ENROLLMENT OPTION.—

(i) IN GENERAL.—Notwithstanding the COBRA continuation provisions, an assistance eligible individual may, not later than 90 days after the date of notice of the plan enrollment option described in this subparagraph, elect to enroll in coverage under a plan offered by the employer involved, or the employee organization involved (including, for this purpose, a joint board of trustees of a multiemployer trust

affiliated with one or more multiemployer plans), that is different than coverage under the plan in which such individual was enrolled at the time the qualifying event occurred, and such coverage shall be treated as COBRA continuation coverage for purposes of the applicable COBRA continuation coverage provision.

(ii) REQUIREMENTS.—An assistance eligible individual may elect to enroll in different coverage as described in clause (i) only if—

(I) the employer involved has made a determination that such employer will permit assistance eligible individuals to enroll in different coverage as provided for this subparagraph;

(II) the premium for such different coverage does not exceed the premium for coverage in which the individual was enrolled at the time the qualifying event occurred;

(III) the different coverage in which the individual elects to enroll is coverage that is also offered to the active employees of the employer at the time at which such election is made; and

(IV) the different coverage is not—

(aa) coverage that provides only dental, vision, counseling, or referral services (or a combination of such services);

(bb) a flexible spending arrangement (as defined in section 106(c)(2) of the Internal Revenue Code of 1986); or

(cc) coverage that provides coverage for services or treatments furnished in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination of such care).

(C) PREMIUM REIMBURSEMENT.—For provisions providing the balance of such premium, see section 6432 of the Internal Revenue Code of 1986, as added by paragraph (12).

(2) LIMITATION OF PERIOD OF PREMIUM ASSISTANCE.—

(A) IN GENERAL.—Paragraph (1)(A) shall not apply with respect to any assistance eligible individual for months of coverage beginning on or after the earlier of—

(i) the first date that such individual is eligible for coverage under any other group health plan (other than coverage consisting of only dental, vision, counseling, or referral services (or a combination thereof), coverage under a flexible spending arrangement (as defined in section 106(c)(2) of the Internal Revenue Code of 1986), or coverage of treatment that is furnished in an on-site medical facility maintained by the employer and that consists primarily of first-aid services, prevention and wellness care, or similar care (or a combination thereof)) or is eligible for benefits under title XVIII of the Social Security Act, or

(ii) the earliest of—

(I) the date which is 9 months after the first day of the first month that paragraph (1)(A) applies with respect to such individual,

(II) the date following the expiration of the maximum period of continuation coverage required under the applicable COBRA continuation coverage provision, or

(III) the date following the expiration of the period of continuation coverage allowed under paragraph (4)(B)(ii).

(B) TIMING OF ELIGIBILITY FOR ADDITIONAL COVERAGE.—For purposes of subparagraph (A)(i), an individual shall not be treated as eligible for coverage under a group health plan before the first date on which such individual could be covered under such plan.

(C) NOTIFICATION REQUIREMENT.—An assistance eligible individual shall notify in writing the group health plan with respect to which paragraph (1)(A) applies if such paragraph ceases to apply by reason of subparagraph (A)(i). Such notice shall be provided to the group health plan in such time and manner as may be specified by the Secretary of Labor.

(3) ASSISTANCE ELIGIBLE INDIVIDUAL.—For purposes of this section, the term "assistance eligible individual" means any qualified beneficiary if—

(A) at any time during the period that begins with September 1, 2008, and ends with December 31, 2009, such qualified beneficiary is eligible for COBRA continuation coverage,

(B) such qualified beneficiary elects such coverage, and

(C) the qualifying event with respect to the COBRA continuation coverage consists of the involuntary termination of the covered employee's employment and occurred during such period.

(4) EXTENSION OF ELECTION PERIOD AND EFFECT ON COVERAGE.—

(A) IN GENERAL.—For purposes of applying section 605(a) of the Employee Retirement Income Security Act of 1974, section 4980B(f)(5)(A) of the Internal Revenue Code of 1986, section 2205(a) of the Public Health Service Act, and section 8905a(c)(2) of title 5, United States Code, in the case of an individual who does not have an election of COBRA continuation coverage in effect on the date of the enactment of this Act but who would be an assistance eligible individual if such election were so in effect, such individual may elect the COBRA continuation coverage under the COBRA continuation coverage provisions containing such sections during the period beginning on the date of the enactment of this Act and ending 60 days after the date on which the notification required under paragraph (7)(C) is provided to such individual.

(B) COMMENCEMENT OF COVERAGE; NO REACH-BACK.—Any COBRA continuation coverage elected by a qualified beneficiary during an extended election period under subparagraph (A)—

(i) shall commence with the first period of coverage beginning on or after the date of the enactment of this Act, and

(ii) shall not extend beyond the period of COBRA continuation coverage that would have been required under the applicable COBRA continuation coverage provision if the coverage had been elected as required under such provision.

(C) PREEXISTING CONDITIONS.—With respect to a qualified beneficiary who elects COBRA continuation coverage pursuant to subparagraph (A), the period—

(i) beginning on the date of the qualifying event, and

(ii) ending with the beginning of the period described in subparagraph (B)(i),

shall be disregarded for purposes of determining the 63-day periods referred to in section 701(c)(2) of the Employee Retirement Income Security Act of 1974, section 9801(c)(2) of the Internal Revenue Code of 1986, and section 2701(c)(2) of the Public Health Service Act.

(5) EXPEDITED REVIEW OF DENIALS OF PREMIUM ASSISTANCE.—In any case in which an individual requests treatment as an assistance eligible individual and is denied such treatment by the group health plan, the Secretary of Labor (or the Secretary of Health and Human Services in connection with COBRA continuation coverage which is provided other than pursuant to part 6 of subtitle B of title I of the Employee Retirement Income Security Act of 1974), in consultation with the Secretary of the Treasury, shall provide for expedited review of such denial. An individual shall be entitled to such review upon application to such Secretary in such form and manner as shall be provided by such Secretary. Such Secretary shall make a determination regarding such individual's eligibility within 15 business days after receipt of such individual's application for review under this paragraph. Either Secretary's determination upon review of the denial shall be de novo and shall be the final determination of such Secretary. A reviewing court shall grant deference to such Secretary's determination. The provisions of this paragraph, paragraphs (1) through (4), and paragraph (7) shall be treated as provisions of title I of the Employee Retirement Income Security Act of 1974 for purposes of part 5 of subtitle B of such title.

(6) DISREGARD OF SUBSIDIES FOR PURPOSES OF FEDERAL AND STATE PROGRAMS.—Notwithstanding any other provision of law, any premium reduction with respect to an assistance eligible individual under this subsection shall not be considered income or resources in determining eligibility for, or the amount of assistance or benefits provided under, any other public benefit provided under Federal law or the law of any State or political subdivision thereof.

(7) NOTICES TO INDIVIDUALS.—

(A) GENERAL NOTICE.—

(i) IN GENERAL.—In the case of notices provided under section 606(a)(4) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1166(4)), section 4980B(f)(6)(D) of the Internal Revenue Code of 1986, section 2206(4) of the Public Health Service Act (42

U.S.C. 300bb-6(4)), or section 8905a(f)(2)(A) of title 5, United States Code, with respect to individuals who, during the period described in paragraph (3)(A), become entitled to elect COBRA continuation coverage, the requirements of such sections shall not be treated as met unless such notices include an additional notification to the recipient of—

(I) the availability of premium reduction with respect to such coverage under this subsection, and

(II) the option to enroll in different coverage if the employer permits assistance eligible individuals to elect enrollment in different coverage (as described in paragraph (1)(B)).

(ii) ALTERNATIVE NOTICE.—In the case of COBRA continuation coverage to which the notice provision under such sections does not apply, the Secretary of Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, shall, in consultation with administrators of the group health plans (or other entities) that provide or administer the COBRA continuation coverage involved, provide rules requiring the provision of such notice.

(iii) FORM.—The requirement of the additional notification under this subparagraph may be met by amendment of existing notice forms or by inclusion of a separate document with the notice otherwise required.

(B) SPECIFIC REQUIREMENTS.—Each additional notification under subparagraph (A) shall include—

(i) the forms necessary for establishing eligibility for premium reduction under this subsection,

(ii) the name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium reduction,

(iii) a description of the extended election period provided for in paragraph (4)(A),

(iv) a description of the obligation of the qualified beneficiary under paragraph (2)(C) to notify the plan providing continuation coverage of eligibility for subsequent coverage under another group health plan or eligibility for benefits under title XVIII of the Social Security Act and the penalty provided under section 6720C of the Internal Revenue Code of 1986 for failure to so notify the plan,

(v) a description, displayed in a prominent manner, of the qualified beneficiary's right to a reduced premium and any conditions on entitlement to the reduced premium, and

(vi) a description of the option of the qualified beneficiary to enroll in different coverage if the employer permits such beneficiary to elect to enroll in such different coverage under paragraph (1)(B).

(C) NOTICE IN CONNECTION WITH EXTENDED ELECTION PERIODS.—In the case of any assistance eligible individual

(or any individual described in paragraph (4)(A)) who became entitled to elect COBRA continuation coverage before the date of the enactment of this Act, the administrator of the group health plan (or other entity) involved shall provide (within 60 days after the date of enactment of this Act) for the additional notification required to be provided under subparagraph (A) and failure to provide such notice shall be treated as a failure to meet the notice requirements under the applicable COBRA continuation provision.

(D) MODEL NOTICES.—Not later than 30 days after the date of enactment of this Act—

(i) the Secretary of the Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, shall prescribe models for the additional notification required under this paragraph (other than the additional notification described in clause (ii)), and

(ii) in the case of any additional notification provided pursuant to subparagraph (A) under section 8905a(f)(2)(A) of title 5, United States Code, the Office of Personnel Management shall prescribe a model for such additional notification.

(8) REGULATIONS.—The Secretary of the Treasury may prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this subsection, including the prevention of fraud and abuse under this subsection, except that the Secretary of Labor and the Secretary of Health and Human Services may prescribe such regulations (including interim final regulations) or other guidance as may be necessary or appropriate to carry out the provisions of paragraphs (5), (7), and (9).

(9) OUTREACH.—The Secretary of Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, shall provide outreach consisting of public education and enrollment assistance relating to premium reduction provided under this subsection. Such outreach shall target employers, group health plan administrators, public assistance programs, States, insurers, and other entities as determined appropriate by such Secretaries. Such outreach shall include an initial focus on those individuals electing continuation coverage who are referred to in paragraph (7)(C). Information on such premium reduction, including enrollment, shall also be made available on websites of the Departments of Labor, Treasury, and Health and Human Services.

(10) DEFINITIONS.—For purposes of this section—

(A) ADMINISTRATOR.—The term "administrator" has the meaning given such term in section 3(16)(A) of the Employee Retirement Income Security Act of 1974.

(B) COBRA CONTINUATION COVERAGE.—The term "COBRA continuation coverage" means continuation coverage provided pursuant to part 6 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 (other than under section 609), title XXII of the Public Health Service Act, section 4980B of the Internal Revenue Code of 1986 (other than subsection (f)(1) of such section insofar as it relates to pediatric vaccines), or section 8905a

of title 5, United States Code, or under a State program that provides comparable continuation coverage. Such term does not include coverage under a health flexible spending arrangement under a cafeteria plan within the meaning of section 125 of the Internal Revenue Code of 1986.

(C) COBRA CONTINUATION PROVISION.—The term "COBRA continuation provision" means the provisions of law described in subparagraph (B).

(D) COVERED EMPLOYEE.—The term "covered employee" has the meaning given such term in section 607(2) of the Employee Retirement Income Security Act of 1974.

(E) QUALIFIED BENEFICIARY.—The term "qualified beneficiary" has the meaning given such term in section 607(3) of the Employee Retirement Income Security Act of 1974.

(F) GROUP HEALTH PLAN.—The term "group health plan" has the meaning given such term in section 607(1) of the Employee Retirement Income Security Act of 1974.

(G) STATE.—The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(H) PERIOD OF COVERAGE.—Any reference in this subsection to a period of coverage shall be treated as a reference to a monthly or shorter period of coverage with respect to which premiums are charged with respect to such coverage.

(11) REPORTS.—

(A) INTERIM REPORT.—The Secretary of the Treasury shall submit an interim report to the Committee on Education and Labor, the Committee on Ways and Means, and the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions and the Committee on Finance of the Senate regarding the premium reduction provided under this subsection that includes—

(i) the number of individuals provided such assistance as of the date of the report; and

(ii) the total amount of expenditures incurred (with administrative expenditures noted separately) in connection with such assistance as of the date of the report.

(B) FINAL REPORT.—As soon as practicable after the last period of COBRA continuation coverage for which premium reduction is provided under this section, the Secretary of the Treasury shall submit a final report to each Committee referred to in subparagraph (A) that includes—

(i) the number of individuals provided premium reduction under this section;

(ii) the average dollar amount (monthly and annually) of premium reductions provided to such individuals; and

(iii) the total amount of expenditures incurred (with administrative expenditures noted separately) in connection with premium reduction under this section.

(12) COBRA PREMIUM ASSISTANCE.—

(A) IN GENERAL.—Subchapter B of chapter 65 of the Internal Revenue Code of 1986, as amended by this Act, is amended by adding at the end the following new section:

"SEC. 6432. COBRA PREMIUM ASSISTANCE.

"(a) IN GENERAL.—The person to whom premiums are payable under COBRA continuation coverage shall be reimbursed as provided in subsection (c) for the amount of premiums not paid by assistance eligible individuals by reason of section 3002(a) of the Health Insurance Assistance for the Unemployed Act of 2009.

"(b) PERSON ENTITLED TO REIMBURSEMENT.—For purposes of subsection (a), except as otherwise provided by the Secretary, the person to whom premiums are payable under COBRA continuation coverage shall be treated as being—

"(1) in the case of any group health plan which is a multiemployer plan (as defined in section 3(37) of the Employee Retirement Income Security Act of 1974), the plan,

"(2) in the case of any group health plan not described in paragraph (1)—

"(A) which is subject to the COBRA continuation provisions contained in—

"(i) the Internal Revenue Code of 1986,

"(ii) the Employee Retirement Income Security Act of 1974,

"(iii) the Public Health Service Act, or

"(iv) title 5, United States Code, or

"(B) under which some or all of the coverage is not provided by insurance,

the employer maintaining the plan, and

"(3) in the case of any group health plan not described in paragraph (1) or (2), the insurer providing the coverage under the group health plan.

"(c) METHOD OF REIMBURSEMENT.—Except as otherwise provided by the Secretary—

"(1) TREATMENT AS PAYMENT OF PAYROLL TAXES.—Each person entitled to reimbursement under subsection (a) (and filing a claim for such reimbursement at such time and in such manner as the Secretary may require) shall be treated for purposes of this title and section 1324(b)(2) of title 31, United States Code, as having paid to the Secretary, on the date that the assistance eligible individual's premium payment is received, payroll taxes in an amount equal to the portion of such reimbursement which relates to such premium. To the extent that the amount treated as paid under the preceding sentence exceeds the amount of such person's liability for such taxes, the Secretary shall credit or refund such excess in the same manner as if it were an overpayment of such taxes.

"(2) OVERSTATEMENTS.—Any overstatement of the reimbursement to which a person is entitled under this section (and any amount paid by the Secretary as a result of such overstatement) shall be treated as an underpayment of payroll taxes by such person and may be assessed and collected by the Secretary in the same manner as payroll taxes.

"(3) REIMBURSEMENT CONTINGENT ON PAYMENT OF REMAINING PREMIUM.—No reimbursement may be made under this section to a person with respect to any assistance eligible individual until after the reduced premium required under

section 3002(a)(1)(A) of such Act with respect to such individual has been received.

"(d) DEFINITIONS.—For purposes of this section—

"(1) PAYROLL TAXES.—The term 'payroll taxes' means—

"(A) amounts required to be deducted and withheld for the payroll period under section 3402 (relating to wage withholding),

"(B) amounts required to be deducted for the payroll period under section 3102 (relating to FICA employee taxes), and

"(C) amounts of the taxes imposed for the payroll period under section 3111 (relating to FICA employer taxes).

"(2) PERSON.—The term 'person' includes any governmental entity.

"(e) REPORTING.—Each person entitled to reimbursement under subsection (a) for any period shall submit such reports (at such time and in such manner) as the Secretary may require, including—

"(1) an attestation of involuntary termination of employment for each covered employee on the basis of whose termination entitlement to reimbursement is claimed under subsection (a),

"(2) a report of the amount of payroll taxes offset under subsection (a) for the reporting period and the estimated offsets of such taxes for the subsequent reporting period in connection with reimbursements under subsection (a), and

"(3) a report containing the TINs of all covered employees, the amount of subsidy reimbursed with respect to each covered employee and qualified beneficiaries, and a designation with respect to each covered employee as to whether the subsidy reimbursement is for coverage of 1 individual or 2 or more individuals.

"(f) REGULATIONS.—The Secretary shall issue such regulations or other guidance as may be necessary or appropriate to carry out this section, including—

"(1) the requirement to report information or the establishment of other methods for verifying the correct amounts of reimbursements under this section, and

"(2) the application of this section to group health plans that are multiemployer plans (as defined in section 3(37) of the Employee Retirement Income Security Act of 1974).".

(B) SOCIAL SECURITY TRUST FUNDS HELD HARMLESS.—In determining any amount transferred or appropriated to any fund under the Social Security Act, section 6432 of the Internal Revenue Code of 1986 shall not be taken into account.

(C) CLERICAL AMENDMENT.—The table of sections for subchapter B of chapter 65 of the Internal Revenue Code of 1986 is amended by adding at the end the following new item:

"Sec. 6432. COBRA premium assistance.".

(D) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to premiums to which subsection (a)(1)(A) applies.

(E) SPECIAL RULE.—

(i) IN GENERAL.—In the case of an assistance eligible individual who pays, with respect to the first

period of COBRA continuation coverage to which subsection (a)(1)(A) applies or the immediately subsequent period, the full premium amount for such coverage, the person to whom such payment is payable shall—

(I) make a reimbursement payment to such individual for the amount of such premium paid in excess of the amount required to be paid under subsection (a)(1)(A); or

(II) provide credit to the individual for such amount in a manner that reduces one or more subsequent premium payments that the individual is required to pay under such subsection for the coverage involved.

(ii) REIMBURSING EMPLOYER.—A person to which clause (i) applies shall be reimbursed as provided for in section 6432 of the Internal Revenue Code of 1986 for any payment made, or credit provided, to the employee under such clause.

(iii) PAYMENT OR CREDITS.—Unless it is reasonable to believe that the credit for the excess payment in clause (i)(II) will be used by the assistance eligible individual within 180 days of the date on which the person receives from the individual the payment of the full premium amount, a person to which clause (i) applies shall make the payment required under such clause to the individual within 60 days of such payment of the full premium amount. If, as of any day within the 180-day period, it is no longer reasonable to believe that the credit will be used during that period, payment equal to the remainder of the credit outstanding shall be made to the individual within 60 days of such day.

(13) PENALTY FOR FAILURE TO NOTIFY HEALTH PLAN OF CESSATION OF ELIGIBILITY FOR PREMIUM ASSISTANCE.—

(A) IN GENERAL.—Part I of subchapter B of chapter 68 of the Internal Revenue Code of 1986 is amended by adding at the end the following new section:

"SEC. 6720C. PENALTY FOR FAILURE TO NOTIFY HEALTH PLAN OF CESSATION OF ELIGIBILITY FOR COBRA PREMIUM ASSISTANCE.

"(a) IN GENERAL.—Any person required to notify a group health plan under section 3002(a)(2)(C)) of the Health Insurance Assistance for the Unemployed Act of 2009 who fails to make such a notification at such time and in such manner as the Secretary of Labor may require shall pay a penalty of 110 percent of the premium reduction provided under such section after termination of eligibility under such subsection.

"(b) REASONABLE CAUSE EXCEPTION.—No penalty shall be imposed under subsection (a) with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect.".

(B) CLERICAL AMENDMENT.—The table of sections of part I of subchapter B of chapter 68 of such Code is amended by adding at the end the following new item:

"Sec. 6720C. Penalty for failure to notify health plan of cessation of eligibility for COBRA premium assistance.".

(C) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to failures occurring after the date of the enactment of this Act.

(14) COORDINATION WITH HCTC.—

(A) IN GENERAL.—Subsection (g) of section 35 of the Internal Revenue Code of 1986 is amended by redesignating paragraph (9) as paragraph (10) and inserting after paragraph (8) the following new paragraph:

"(9) COBRA PREMIUM ASSISTANCE.—In the case of an assistance eligible individual who receives premium reduction for COBRA continuation coverage under section 3002(a) of the Health Insurance Assistance for the Unemployed Act of 2009 for any month during the taxable year, such individual shall not be treated as an eligible individual, a certified individual, or a qualifying family member for purposes of this section or section 7527 with respect to such month.".

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall apply to taxable years ending after the date of the enactment of this Act.

(15) EXCLUSION OF COBRA PREMIUM ASSISTANCE FROM GROSS INCOME.—

(A) IN GENERAL.—Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting after section 139B the following new section:

"SEC. 139C. COBRA PREMIUM ASSISTANCE.

"In the case of an assistance eligible individual (as defined in section 3002 of the Health Insurance Assistance for the Unemployed Act of 2009), gross income does not include any premium reduction provided under subsection (a) of such section.".

(B) CLERICAL AMENDMENT.—The table of sections for part III of subchapter B of chapter 1 of such Code is amended by inserting after the item relating to section 139B the following new item:

"Sec. 139C. COBRA premium assistance.".

(C) EFFECTIVE DATE.—The amendments made by this paragraph shall apply to taxable years ending after the date of the enactment of this Act.

(b) ELIMINATION OF PREMIUM SUBSIDY FOR HIGH-INCOME INDIVIDUALS.—

(1) RECAPTURE OF SUBSIDY FOR HIGH-INCOME INDIVIDUALS.—If—

(A) premium assistance is provided under this section with respect to any COBRA continuation coverage which covers the taxpayer, the taxpayer's spouse, or any dependent (within the meaning of section 152 of the Internal Revenue Code of 1986, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) of the taxpayer during any portion of the taxable year, and

(B) the taxpayer's modified adjusted gross income for such taxable year exceeds $125,000 ($250,000 in the case of a joint return),

then the tax imposed by chapter 1 of such Code with respect to the taxpayer for such taxable year shall be increased by the amount of such assistance.

(2) PHASE-IN OF RECAPTURE.—

(A) IN GENERAL.—In the case of a taxpayer whose modified adjusted gross income for the taxable year does not exceed $145,000 ($290,000 in the case of a joint return), the increase in the tax imposed under paragraph (1) shall not exceed the phase-in percentage of such increase (determined without regard to this paragraph).

(B) PHASE-IN PERCENTAGE.—For purposes of this subsection, the term "phase-in percentage" means the ratio (expressed as a percentage) obtained by dividing—

(i) the excess of described in subparagraph (B) of paragraph (1), by

(ii) $20,000 ($40,000 in the case of a joint return).

(3) OPTION FOR HIGH-INCOME INDIVIDUALS TO WAIVE ASSISTANCE AND AVOID RECAPTURE.—Notwithstanding subsection (a)(3), an individual shall not be treated as an assistance eligible individual for purposes of this section and section 6432 of the Internal Revenue Code of 1986 if such individual—

(A) makes a permanent election (at such time and in such form and manner as the Secretary of the Treasury may prescribe) to waive the right to the premium assistance provided under this section, and

(B) notifies the entity to whom premiums are reimbursed under section 6432(a) of such Code of such election.

(4) MODIFIED ADJUSTED GROSS INCOME.—For purposes of this subsection, the term "modified adjusted gross income" means the adjusted gross income (as defined in section 62 of the Internal Revenue Code of 1986) of the taxpayer for the taxable year increased by any amount excluded from gross income under section 911, 931, or 933 of such Code.

(5) CREDITS NOT ALLOWED AGAINST TAX, ETC.—For purposes determining regular tax liability under section 26(b) of such Code, the increase in tax under this subsection shall not be treated as a tax imposed under chapter 1 of such Code.

(6) REGULATIONS.—The Secretary of the Treasury shall issue such regulations or other guidance as are necessary or appropriate to carry out this subsection, including requirements that the entity to whom premiums are reimbursed under section 6432(a) of the Internal Revenue Code of 1986 report to the Secretary, and to each assistance eligible individual, the amount of premium assistance provided under subsection (a) with respect to each such individual.

(7) EFFECTIVE DATE.—The provisions of this subsection shall apply to taxable years ending after the date of the enactment of this Act.

TITLE IV—MEDICARE AND MEDICAID HEALTH INFORMATION TECHNOLOGY; MISCELLANEOUS MEDICARE PROVISIONS

SEC. 4001. TABLE OF CONTENTS OF TITLE.

The table of contents of this title is as follows:

Subtitle A—Medicare Incentives

SEC. 4101. INCENTIVES FOR ELIGIBLE PROFESSIONALS.

(a) INCENTIVE PAYMENTS.—Section 1848 of the Social Security Act (42 U.S.C. 1395w–4) is amended by adding at the end the following new subsection:

"(o) INCENTIVES FOR ADOPTION AND MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(1) INCENTIVE PAYMENTS.—

"(A) IN GENERAL.—

"(i) IN GENERAL.—Subject to the succeeding subparagraphs of this paragraph, with respect to covered professional services furnished by an eligible professional during a payment year (as defined in subparagraph (E)), if the eligible professional is a meaningful EHR user (as determined under paragraph (2)) for the EHR reporting period with respect to such year, in addition to the amount otherwise paid under this part, there also shall be paid to the eligible professional (or to an employer or facility in the cases described in clause (A) of section 1842(b)(6)), from the Federal Supplementary Medical Insurance Trust Fund established under section 1841 an amount equal to 75 percent of the Secretary's estimate (based on claims submitted not later than 2 months after the end of the payment year) of the allowed charges under this part for all such covered professional services furnished by the eligible professional during such year.

"(ii) NO INCENTIVE PAYMENTS WITH RESPECT TO YEARS AFTER 2016.—No incentive payments may be made under this subsection with respect to a year after 2016.

"(B) LIMITATIONS ON AMOUNTS OF INCENTIVE PAYMENTS.—

"(i) IN GENERAL.—In no case shall the amount of the incentive payment provided under this paragraph for an eligible professional for a payment year exceed the applicable amount specified under this subparagraph with respect to such eligible professional and such year.

"(ii) AMOUNT.—Subject to clauses (iii) through (v), the applicable amount specified in this subparagraph for an eligible professional is as follows:

"(I) For the first payment year for such professional, $15,000 (or, if the first payment year for such eligible professional is 2011 or 2012, $18,000).

"(II) For the second payment year for such professional, $12,000.

"(III) For the third payment year for such professional, $8,000.

"(IV) For the fourth payment year for such professional, $4,000.

"(V) For the fifth payment year for such professional, $2,000.

"(VI) For any succeeding payment year for such professional, $0.

"(iii) PHASE DOWN FOR ELIGIBLE PROFESSIONALS FIRST ADOPTING EHR AFTER 2013.—If the first payment year for an eligible professional is after 2013, then the amount specified in this subparagraph for a payment year for such professional is the same as the amount specified in clause (ii) for such payment year for an eligible professional whose first payment year is 2013.

"(iv) INCREASE FOR CERTAIN ELIGIBLE PROFESSIONALS.—In the case of an eligible professional who predominantly furnishes services under this part in an area that is designated by the Secretary (under section 332(a)(1)(A) of the Public Health Service Act) as a health professional shortage area, the amount that would otherwise apply for a payment year for such professional under subclauses (I) through (V) of clause (ii) shall be increased by 10 percent. In implementing the preceding sentence, the Secretary may, as determined appropriate, apply provisions of subsections (m) and (u) of section 1833 in a similar manner as such provisions apply under such subsection.

"(v) NO INCENTIVE PAYMENT IF FIRST ADOPTING AFTER 2014.—If the first payment year for an eligible professional is after 2014 then the applicable amount specified in this subparagraph for such professional for such year and any subsequent year shall be $0.

"(C) NON-APPLICATION TO HOSPITAL-BASED ELIGIBLE PROFESSIONALS.—

"(i) IN GENERAL.—No incentive payment may be made under this paragraph in the case of a hospital-based eligible professional.

"(ii) HOSPITAL-BASED ELIGIBLE PROFESSIONAL.—For purposes of clause (i), the term 'hospital-based eligible professional' means, with respect to covered professional services furnished by an eligible professional during the EHR reporting period for a payment year, an eligible professional, such as a pathologist, anesthesiologist, or emergency physician, who furnishes substantially all of such services in a hospital setting (whether inpatient or outpatient) and through the use of the facilities and equipment, including qualified electronic health records, of the hospital. The determination of whether an eligible professional is a hospital-based eligible professional shall be made on the basis of the site of service (as defined by the Secretary) and without regard to any employment or billing arrangement between the eligible professional and any other provider.

"(D) PAYMENT.—

"(i) FORM OF PAYMENT.—The payment under this paragraph may be in the form of a single consolidated payment or in the form of such periodic installments as the Secretary may specify.

"(ii) COORDINATION OF APPLICATION OF LIMITATION FOR PROFESSIONALS IN DIFFERENT PRACTICES.—In the case of an eligible professional furnishing covered professional services in more than one practice (as specified by the Secretary), the Secretary shall establish rules to coordinate the incentive payments, including the application of the limitation on amounts of such incentive payments under this paragraph, among such practices.

"(iii) COORDINATION WITH MEDICAID.—The Secretary shall seek, to the maximum extent practicable, to avoid duplicative requirements from Federal and State governments to demonstrate meaningful use of certified EHR technology under this title and title XIX. The Secretary may also adjust the reporting periods under such title and such subsections in order to carry out this clause.

"(E) PAYMENT YEAR DEFINED.—

"(i) IN GENERAL.—For purposes of this subsection, the term 'payment year' means a year beginning with 2011.

"(ii) FIRST, SECOND, ETC. PAYMENT YEAR.—The term 'first payment year' means, with respect to covered professional services furnished by an eligible professional, the first year for which an incentive payment is made for such services under this subsection. The terms 'second payment year', 'third payment year', 'fourth payment year', and 'fifth payment year' mean, with respect to covered professional services furnished by such eligible professional, each successive year immediately following the first payment year for such professional.

"(2) MEANINGFUL EHR USER.—

"(A) IN GENERAL.—For purposes of paragraph (1), an eligible professional shall be treated as a meaningful EHR

user for an EHR reporting period for a payment year (or, for purposes of subsection (a)(7), for an EHR reporting period under such subsection for a year) if each of the following requirements is met:

"(i) MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—The eligible professional demonstrates to the satisfaction of the Secretary, in accordance with subparagraph (C)(i), that during such period the professional is using certified EHR technology in a meaningful manner, which shall include the use of electronic prescribing as determined to be appropriate by the Secretary.

"(ii) INFORMATION EXCHANGE.—The eligible professional demonstrates to the satisfaction of the Secretary, in accordance with subparagraph (C)(i), that during such period such certified EHR technology is connected in a manner that provides, in accordance with law and standards applicable to the exchange of information, for the electronic exchange of health information to improve the quality of health care, such as promoting care coordination.

"(iii) REPORTING ON MEASURES USING EHR.—Subject to subparagraph (B)(ii) and using such certified EHR technology, the eligible professional submits information for such period, in a form and manner specified by the Secretary, on such clinical quality measures and such other measures as selected by the Secretary under subparagraph (B)(i).

The Secretary may provide for the use of alternative means for meeting the requirements of clauses (i), (ii), and (iii) in the case of an eligible professional furnishing covered professional services in a group practice (as defined by the Secretary). The Secretary shall seek to improve the use of electronic health records and health care quality over time by requiring more stringent measures of meaningful use selected under this paragraph.

"(B) REPORTING ON MEASURES.—

"(i) SELECTION.—The Secretary shall select measures for purposes of subparagraph (A)(iii) but only consistent with the following:

"(I) The Secretary shall provide preference to clinical quality measures that have been endorsed by the entity with a contract with the Secretary under section 1890(a).

"(II) Prior to any measure being selected under this subparagraph, the Secretary shall publish in the Federal Register such measure and provide for a period of public comment on such measure.

"(ii) LIMITATION.—The Secretary may not require the electronic reporting of information on clinical quality measures under subparagraph (A)(iii) unless the Secretary has the capacity to accept the information electronically, which may be on a pilot basis.

"(iii) COORDINATION OF REPORTING OF INFORMATION.—In selecting such measures, and in establishing the form and manner for reporting measures under subparagraph (A)(iii), the Secretary shall seek to avoid

redundant or duplicative reporting otherwise required, including reporting under subsection (k)(2)(C).

"(C) DEMONSTRATION OF MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY AND INFORMATION EXCHANGE.—

"(i) IN GENERAL.—A professional may satisfy the demonstration requirement of clauses (i) and (ii) of subparagraph (A) through means specified by the Secretary, which may include—

"(I) an attestation;

"(II) the submission of claims with appropriate coding (such as a code indicating that a patient encounter was documented using certified EHR technology);

"(III) a survey response;

"(IV) reporting under subparagraph (A)(iii); and

"(V) other means specified by the Secretary.

"(ii) USE OF PART D DATA.—Notwithstanding sections 1860D–15(d)(2)(B) and 1860D–15(f)(2), the Secretary may use data regarding drug claims submitted for purposes of section 1860D–15 that are necessary for purposes of subparagraph (A).

"(3) APPLICATION.—

"(A) PHYSICIAN REPORTING SYSTEM RULES.—Paragraphs (5), (6), and (8) of subsection (k) shall apply for purposes of this subsection in the same manner as they apply for purposes of such subsection.

"(B) COORDINATION WITH OTHER PAYMENTS.—The provisions of this subsection shall not be taken into account in applying the provisions of subsection (m) of this section and of section 1833(m) and any payment under such provisions shall not be taken into account in computing allowable charges under this subsection.

"(C) LIMITATIONS ON REVIEW.—There shall be no administrative or judicial review under section 1869, section 1878, or otherwise, of—

"(i) the methodology and standards for determining payment amounts under this subsection and payment adjustments under subsection (a)(7)(A), including the limitation under paragraph (1)(B) and coordination under clauses (ii) and (iii) of paragraph (1)(D);

"(ii) the methodology and standards for determining a meaningful EHR user under paragraph (2), including selection of measures under paragraph (2)(B), specification of the means of demonstrating meaningful EHR use under paragraph (2)(C), and the hardship exception under subsection (a)(7)(B);

"(iii) the methodology and standards for determining a hospital-based eligible professional under paragraph (1)(C); and

"(iv) the specification of reporting periods under paragraph (5) and the selection of the form of payment under paragraph (1)(D)(i).

"(D) POSTING ON WEBSITE.—The Secretary shall post on the Internet website of the Centers for Medicare & Medicaid Services, in an easily understandable format, a list of the names, business addresses, and business phone

numbers of the eligible professionals who are meaningful EHR users and, as determined appropriate by the Secretary, of group practices receiving incentive payments under paragraph (1).

"(4) CERTIFIED EHR TECHNOLOGY DEFINED.—For purposes of this section, the term 'certified EHR technology' means a qualified electronic health record (as defined in section 3000(13) of the Public Health Service Act) that is certified pursuant to section 3001(c)(5) of such Act as meeting standards adopted under section 3004 of such Act that are applicable to the type of record involved (as determined by the Secretary, such as an ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals).

"(5) DEFINITIONS.—For purposes of this subsection:

"(A) COVERED PROFESSIONAL SERVICES.—The term 'covered professional services' has the meaning given such term in subsection (k)(3).

"(B) EHR REPORTING PERIOD.—The term 'EHR reporting period' means, with respect to a payment year, any period (or periods) as specified by the Secretary.

"(C) ELIGIBLE PROFESSIONAL.—The term 'eligible professional' means a physician, as defined in section 1861(r).".

(b) INCENTIVE PAYMENT ADJUSTMENT.—Section 1848(a) of the Social Security Act (42 U.S.C. 1395w–4(a)) is amended by adding at the end the following new paragraph:

"(7) INCENTIVES FOR MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(A) ADJUSTMENT.—

"(i) IN GENERAL.—Subject to subparagraphs (B) and (D), with respect to covered professional services furnished by an eligible professional during 2015 or any subsequent payment year, if the eligible professional is not a meaningful EHR user (as determined under subsection (o)(2)) for an EHR reporting period for the year, the fee schedule amount for such services furnished by such professional during the year (including the fee schedule amount for purposes of determining a payment based on such amount) shall be equal to the applicable percent of the fee schedule amount that would otherwise apply to such services under this subsection (determined after application of paragraph (3) but without regard to this paragraph).

"(ii) APPLICABLE PERCENT.—Subject to clause (iii), for purposes of clause (i), the term 'applicable percent' means—

"(I) for 2015, 99 percent (or, in the case of an eligible professional who was subject to the application of the payment adjustment under section 1848(a)(5) for 2014, 98 percent);

"(II) for 2016, 98 percent; and

"(III) for 2017 and each subsequent year, 97 percent.

"(iii) AUTHORITY TO DECREASE APPLICABLE PERCENTAGE FOR 2018 AND SUBSEQUENT YEARS.—For 2018 and each subsequent year, if the Secretary finds

that the proportion of eligible professionals who are meaningful EHR users (as determined under subsection (o)(2)) is less than 75 percent, the applicable percent shall be decreased by 1 percentage point from the applicable percent in the preceding year, but in no case shall the applicable percent be less than 95 percent.

"(B) SIGNIFICANT HARDSHIP EXCEPTION.—The Secretary may, on a case-by-case basis, exempt an eligible professional from the application of the payment adjustment under subparagraph (A) if the Secretary determines, subject to annual renewal, that compliance with the requirement for being a meaningful EHR user would result in a significant hardship, such as in the case of an eligible professional who practices in a rural area without sufficient Internet access. In no case may an eligible professional be granted an exemption under this subparagraph for more than 5 years.

"(C) APPLICATION OF PHYSICIAN REPORTING SYSTEM RULES.—Paragraphs (5), (6), and (8) of subsection (k) shall apply for purposes of this paragraph in the same manner as they apply for purposes of such subsection.

"(D) NON-APPLICATION TO HOSPITAL-BASED ELIGIBLE PROFESSIONALS.—No payment adjustment may be made under subparagraph (A) in the case of hospital-based eligible professionals (as defined in subsection (o)(1)(C)(ii)).

"(E) DEFINITIONS.—For purposes of this paragraph:

"(i) COVERED PROFESSIONAL SERVICES.—The term 'covered professional services' has the meaning given such term in subsection (k)(3).

"(ii) EHR REPORTING PERIOD.—The term 'EHR reporting period' means, with respect to a year, a period (or periods) specified by the Secretary.

"(iii) ELIGIBLE PROFESSIONAL.—The term 'eligible professional' means a physician, as defined in section 1861(r).".

(c) APPLICATION TO CERTAIN MA-AFFILIATED ELIGIBLE PROFESSIONALS.—Section 1853 of the Social Security Act (42 U.S.C. 1395w–23) is amended by adding at the end the following new subsection:

"(l) APPLICATION OF ELIGIBLE PROFESSIONAL INCENTIVES FOR CERTAIN MA ORGANIZATIONS FOR ADOPTION AND MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(1) IN GENERAL.—Subject to paragraphs (3) and (4), in the case of a qualifying MA organization, the provisions of sections 1848(o) and 1848(a)(7) shall apply with respect to eligible professionals described in paragraph (2) of the organization who the organization attests under paragraph (6) to be meaningful EHR users in a similar manner as they apply to eligible professionals under such sections. Incentive payments under paragraph (3) shall be made to and payment adjustments under paragraph (4) shall apply to such qualifying organizations.

"(2) ELIGIBLE PROFESSIONAL DESCRIBED.—With respect to a qualifying MA organization, an eligible professional described in this paragraph is an eligible professional (as defined for purposes of section 1848(o)) who—

"(A)(i) is employed by the organization; or

"(ii)(I) is employed by, or is a partner of, an entity that through contract with the organization furnishes at least 80 percent of the entity's Medicare patient care services to enrollees of such organization; and

"(II) furnishes at least 80 percent of the professional services of the eligible professional covered under this title to enrollees of the organization; and

"(B) furnishes, on average, at least 20 hours per week of patient care services.

"(3) ELIGIBLE PROFESSIONAL INCENTIVE PAYMENTS.—

"(A) IN GENERAL.—In applying section 1848(o) under paragraph (1), instead of the additional payment amount under section 1848(o)(1)(A) and subject to subparagraph (B), the Secretary may substitute an amount determined by the Secretary to the extent feasible and practical to be similar to the estimated amount in the aggregate that would be payable if payment for services furnished by such professionals was payable under part B instead of this part.

"(B) AVOIDING DUPLICATION OF PAYMENTS.—

"(i) IN GENERAL.—In the case of an eligible professional described in paragraph (2)—

"(I) that is eligible for the maximum incentive payment under section 1848(o)(1)(A) for the same payment period, the payment incentive shall be made only under such section and not under this subsection; and

"(II) that is eligible for less than such maximum incentive payment for the same payment period, the payment incentive shall be made only under this subsection and not under section 1848(o)(1)(A).

"(ii) METHODS.—In the case of an eligible professional described in paragraph (2) who is eligible for an incentive payment under section 1848(o)(1)(A) but is not described in clause (i) for the same payment period, the Secretary shall develop a process—

"(I) to ensure that duplicate payments are not made with respect to an eligible professional both under this subsection and under section 1848(o)(1)(A); and

"(II) to collect data from Medicare Advantage organizations to ensure against such duplicate payments.

"(C) FIXED SCHEDULE FOR APPLICATION OF LIMITATION ON INCENTIVE PAYMENTS FOR ALL ELIGIBLE PROFESSIONALS.—In applying section 1848(o)(1)(B)(ii) under subparagraph (A), in accordance with rules specified by the Secretary, a qualifying MA organization shall specify a year (not earlier than 2011) that shall be treated as the first payment year for all eligible professionals with respect to such organization.

"(4) PAYMENT ADJUSTMENT.—

"(A) IN GENERAL.—In applying section 1848(a)(7) under paragraph (1), instead of the payment adjustment being an applicable percent of the fee schedule amount for a year under such section, subject to subparagraph (D), the

payment adjustment under paragraph (1) shall be equal to the percent specified in subparagraph (B) for such year of the payment amount otherwise provided under this section for such year.

"(B) SPECIFIED PERCENT.—The percent specified under this subparagraph for a year is 100 percent minus a number of percentage points equal to the product of—

"(i) the number of percentage points by which the applicable percent (under section 1848(a)(7)(A)(ii)) for the year is less than 100 percent; and

"(ii) the Medicare physician expenditure proportion specified in subparagraph (C) for the year.

"(C) MEDICARE PHYSICIAN EXPENDITURE PROPORTION.—The Medicare physician expenditure proportion under this subparagraph for a year is the Secretary's estimate of the proportion, of the expenditures under parts A and B that are not attributable to this part, that are attributable to expenditures for physicians' services.

"(D) APPLICATION OF PAYMENT ADJUSTMENT.—In the case that a qualifying MA organization attests that not all eligible professionals of the organization are meaningful EHR users with respect to a year, the Secretary shall apply the payment adjustment under this paragraph based on the proportion of all such eligible professionals of the organization that are not meaningful EHR users for such year.

"(5) QUALIFYING MA ORGANIZATION DEFINED.—In this subsection and subsection (m), the term 'qualifying MA organization' means a Medicare Advantage organization that is organized as a health maintenance organization (as defined in section 2791(b)(3) of the Public Health Service Act).

"(6) MEANINGFUL EHR USER ATTESTATION.—For purposes of this subsection and subsection (m), a qualifying MA organization shall submit an attestation, in a form and manner specified by the Secretary which may include the submission of such attestation as part of submission of the initial bid under section 1854(a)(1)(A)(iv), identifying—

"(A) whether each eligible professional described in paragraph (2), with respect to such organization is a meaningful EHR user (as defined in section 1848(o)(2)) for a year specified by the Secretary; and

"(B) whether each eligible hospital described in subsection (m)(1), with respect to such organization, is a meaningful EHR user (as defined in section 1886(n)(3)) for an applicable period specified by the Secretary.

"(7) POSTING ON WEBSITE.—The Secretary shall post on the Internet website of the Centers for Medicare & Medicaid Services, in an easily understandable format, a list of the names, business addresses, and business phone numbers of—

"(A) each qualifying MA organization receiving an incentive payment under this subsection for eligible professionals of the organization; and

"(B) the eligible professionals of such organization for which such incentive payment is based.

"(8) LIMITATION ON REVIEW.—There shall be no administrative or judicial review under section 1869, section 1878, or otherwise, of—

"(A) the methodology and standards for determining payment amounts and payment adjustments under this subsection, including avoiding duplication of payments under paragraph (3)(B) and the specification of rules for the fixed schedule for application of limitation on incentive payments for all eligible professionals under paragraph (3)(C);

"(B) the methodology and standards for determining eligible professionals under paragraph (2); and

"(C) the methodology and standards for determining a meaningful EHR user under section 1848(o)(2), including specification of the means of demonstrating meaningful EHR use under section 1848(o)(3)(C) and selection of measures under section 1848(o)(3)(B).".

(d) STUDY AND REPORT RELATING TO MA ORGANIZATIONS.—

(1) STUDY.—The Secretary of Health and Human Services shall conduct a study on the extent to which and manner in which payment incentives and adjustments (such as under sections 1848(o) and 1848(a)(7) of the Social Security Act) could be made available to professionals, as defined in 1861(r), who are not eligible for HIT incentive payments under section 1848(o) and receive payments for Medicare patient services nearly-exclusively through contractual arrangements with one or more Medicare Advantage organizations, or an intermediary organization or organizations with contracts with Medicare Advantage organizations. Such study shall assess approaches for measuring meaningful use of qualified EHR technology among such professionals and mechanisms for delivering incentives and adjustments to those professionals, including through incentive payments and adjustments through Medicare Advantage organizations or intermediary organizations.

(2) REPORT.—Not later than 120 days after the date of the enactment of this Act, the Secretary of Health and Human Services shall submit to Congress a report on the findings and the conclusions of the study conducted under paragraph (1), together with recommendations for such legislation and administrative action as the Secretary determines appropriate.

(e) CONFORMING AMENDMENTS.—Section 1853 of the Social Security Act (42 U.S.C. 1395w–23) is amended—

(1) in subsection (a)(1)(A), by striking "and (i)" and inserting "(i), and (l)";

(2) in subsection (c)—

(A) in paragraph (1)(D)(i), by striking "section 1886(h)" and inserting "sections 1848(o) and 1886(h)"; and

(B) in paragraph (6)(A), by inserting after "under part B," the following: "excluding expenditures attributable to subsections (a)(7) and (o) of section 1848,"; and

(3) in subsection (f), by inserting "and for payments under subsection (l)" after "with the organization".

(f) CONFORMING AMENDMENTS TO E-PRESCRIBING.—

(1) Section 1848(a)(5)(A) of the Social Security Act (42 U.S.C. 1395w–4(a)(5)(A)) is amended—

(A) in clause (i), by striking "or any subsequent year" and inserting ", 2013 or 2014"; and

(B) in clause (ii), by striking "and each subsequent year".

(2) Section 1848(m)(2) of such Act (42 U.S.C. 1395w–4(m)(2)) is amended—

(A) in subparagraph (A), by striking "For 2009" and inserting "Subject to subparagraph (D), for 2009"; and

(B) by adding at the end the following new subparagraph:

"(D) LIMITATION WITH RESPECT TO EHR INCENTIVE PAYMENTS.—The provisions of this paragraph shall not apply to an eligible professional (or, in the case of a group practice under paragraph (3)(C), to the group practice) if, for the EHR reporting period the eligible professional (or group practice) receives an incentive payment under subsection (o)(1)(A) with respect to a certified EHR technology (as defined in subsection (o)(4)) that has the capability of electronic prescribing.".

SEC. 4102. INCENTIVES FOR HOSPITALS.

(a) INCENTIVE PAYMENT.—

(1) IN GENERAL.—Section 1886 of the Social Security Act (42 U.S.C. 1395ww) is amended by adding at the end the following new subsection:

"(n) INCENTIVES FOR ADOPTION AND MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(1) IN GENERAL.—Subject to the succeeding provisions of this subsection, with respect to inpatient hospital services furnished by an eligible hospital during a payment year (as defined in paragraph (2)(G)), if the eligible hospital is a meaningful EHR user (as determined under paragraph (3)) for the EHR reporting period with respect to such year, in addition to the amount otherwise paid under this section, there also shall be paid to the eligible hospital, from the Federal Hospital Insurance Trust Fund established under section 1817, an amount equal to the applicable amount specified in paragraph (2)(A) for the hospital for such payment year.

"(2) PAYMENT AMOUNT.—

"(A) IN GENERAL.—Subject to the succeeding subparagraphs of this paragraph, the applicable amount specified in this subparagraph for an eligible hospital for a payment year is equal to the product of the following:

"(i) INITIAL AMOUNT.—The sum of—

"(I) the base amount specified in subparagraph (B); plus

"(II) the discharge related amount specified in subparagraph (C) for a 12-month period selected by the Secretary with respect to such payment year.

"(ii) MEDICARE SHARE.—The Medicare share as specified in subparagraph (D) for the eligible hospital for a period selected by the Secretary with respect to such payment year.

"(iii) TRANSITION FACTOR.—The transition factor specified in subparagraph (E) for the eligible hospital for the payment year.

"(B) BASE AMOUNT.—The base amount specified in this subparagraph is $2,000,000.

"(C) DISCHARGE RELATED AMOUNT.—The discharge related amount specified in this subparagraph for a 12-

month period selected by the Secretary shall be determined as the sum of the amount, estimated based upon total discharges for the eligible hospital (regardless of any source of payment) for the period, for each discharge up to the 23,000th discharge as follows:

"(i) For the first through 1,149th discharge, $0.

"(ii) For the 1,150th through the 23,000th discharge, $200.

"(iii) For any discharge greater than the 23,000th, $0.

"(D) MEDICARE SHARE.—The Medicare share specified under this subparagraph for an eligible hospital for a period selected by the Secretary for a payment year is equal to the fraction—

"(i) the numerator of which is the sum (for such period and with respect to the eligible hospital) of—

"(I) the estimated number of inpatient-bed-days (as established by the Secretary) which are attributable to individuals with respect to whom payment may be made under part A; and

"(II) the estimated number of inpatient-bed-days (as so established) which are attributable to individuals who are enrolled with a Medicare Advantage organization under part C; and

"(ii) the denominator of which is the product of—

"(I) the estimated total number of inpatient-bed-days with respect to the eligible hospital during such period; and

"(II) the estimated total amount of the eligible hospital's charges during such period, not including any charges that are attributable to charity care (as such term is used for purposes of hospital cost reporting under this title), divided by the estimated total amount of the hospital's charges during such period.

Insofar as the Secretary determines that data are not available on charity care necessary to calculate the portion of the formula specified in clause (ii)(II), the Secretary shall use data on uncompensated care and may adjust such data so as to be an appropriate proxy for charity care including a downward adjustment to eliminate bad debt data from uncompensated care data. In the absence of the data necessary, with respect to a hospital, for the Secretary to compute the amount described in clause (ii)(II), the amount under such clause shall be deemed to be 1. In the absence of data, with respect to a hospital, necessary to compute the amount described in clause (i)(II), the amount under such clause shall be deemed to be 0.

"(E) TRANSITION FACTOR SPECIFIED.—

"(i) IN GENERAL.—Subject to clause (ii), the transition factor specified in this subparagraph for an eligible hospital for a payment year is as follows:

"(I) For the first payment year for such hospital, 1.

"(II) For the second payment year for such hospital, ¾.

"(III) For the third payment year for such hospital, ½.

"(IV) For the fourth payment year for such hospital, ¼.

"(V) For any succeeding payment year for such hospital, 0.

"(ii) PHASE DOWN FOR ELIGIBLE HOSPITALS FIRST ADOPTING EHR AFTER 2013.—If the first payment year for an eligible hospital is after 2013, then the transition factor specified in this subparagraph for a payment year for such hospital is the same as the amount specified in clause (i) for such payment year for an eligible hospital for which the first payment year is 2013. If the first payment year for an eligible hospital is after 2015 then the transition factor specified in this subparagraph for such hospital and for such year and any subsequent year shall be 0.

"(F) FORM OF PAYMENT.—The payment under this subsection for a payment year may be in the form of a single consolidated payment or in the form of such periodic installments as the Secretary may specify.

"(G) PAYMENT YEAR DEFINED.—

"(i) IN GENERAL.—For purposes of this subsection, the term 'payment year' means a fiscal year beginning with fiscal year 2011.

"(ii) FIRST, SECOND, ETC. PAYMENT YEAR.—The term 'first payment year' means, with respect to inpatient hospital services furnished by an eligible hospital, the first fiscal year for which an incentive payment is made for such services under this subsection. The terms 'second payment year', 'third payment year', and 'fourth payment year' mean, with respect to an eligible hospital, each successive year immediately following the first payment year for that hospital.

"(3) MEANINGFUL EHR USER.—

"(A) IN GENERAL.—For purposes of paragraph (1), an eligible hospital shall be treated as a meaningful EHR user for an EHR reporting period for a payment year (or, for purposes of subsection (b)(3)(B)(ix), for an EHR reporting period under such subsection for a fiscal year) if each of the following requirements are met:

"(i) MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—The eligible hospital demonstrates to the satisfaction of the Secretary, in accordance with subparagraph (C)(i), that during such period the hospital is using certified EHR technology in a meaningful manner.

"(ii) INFORMATION EXCHANGE.—The eligible hospital demonstrates to the satisfaction of the Secretary, in accordance with subparagraph (C)(i), that during such period such certified EHR technology is connected in a manner that provides, in accordance with law and standards applicable to the exchange of information, for the electronic exchange of health information to improve the quality of health care, such as promoting care coordination.

"(iii) REPORTING ON MEASURES USING EHR.—Subject to subparagraph (B)(ii) and using such certified EHR technology, the eligible hospital submits information for such period, in a form and manner specified by the Secretary, on such clinical quality measures and such other measures as selected by the Secretary under subparagraph (B)(i).

The Secretary shall seek to improve the use of electronic health records and health care quality over time by requiring more stringent measures of meaningful use selected under this paragraph.

"(B) REPORTING ON MEASURES.—

"(i) SELECTION.—The Secretary shall select measures for purposes of subparagraph (A)(iii) but only consistent with the following:

"(I) The Secretary shall provide preference to clinical quality measures that have been selected for purposes of applying subsection (b)(3)(B)(viii) or that have been endorsed by the entity with a contract with the Secretary under section 1890(a).

"(II) Prior to any measure (other than a clinical quality measure that has been selected for purposes of applying subsection (b)(3)(B)(viii)) being selected under this subparagraph, the Secretary shall publish in the Federal Register such measure and provide for a period of public comment on such measure.

"(ii) LIMITATIONS.—The Secretary may not require the electronic reporting of information on clinical quality measures under subparagraph (A)(iii) unless the Secretary has the capacity to accept the information electronically, which may be on a pilot basis.

"(iii) COORDINATION OF REPORTING OF INFORMATION.—In selecting such measures, and in establishing the form and manner for reporting measures under subparagraph (A)(iii), the Secretary shall seek to avoid redundant or duplicative reporting with reporting otherwise required, including reporting under subsection (b)(3)(B)(viii).

"(C) DEMONSTRATION OF MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY AND INFORMATION EXCHANGE.—

"(i) IN GENERAL.—An eligible hospital may satisfy the demonstration requirement of clauses (i) and (ii) of subparagraph (A) through means specified by the Secretary, which may include—

"(I) an attestation;

"(II) the submission of claims with appropriate coding (such as a code indicating that inpatient care was documented using certified EHR technology);

"(III) a survey response;

"(IV) reporting under subparagraph (A)(iii); and

"(V) other means specified by the Secretary.

"(ii) USE OF PART D DATA.—Notwithstanding sections 1860D–15(d)(2)(B) and 1860D–15(f)(2), the Secretary may use data regarding drug claims submitted for purposes of section 1860D–15 that are necessary for purposes of subparagraph (A).

"(4) APPLICATION.—

"(A) LIMITATIONS ON REVIEW.—There shall be no administrative or judicial review under section 1869, section 1878, or otherwise, of—

"(i) the methodology and standards for determining payment amounts under this subsection and payment adjustments under subsection (b)(3)(B)(ix), including selection of periods under paragraph (2) for determining, and making estimates or using proxies of, discharges under paragraph (2)(C) and inpatient-bed-days, hospital charges, charity charges, and Medicare share under paragraph (2)(D);

"(ii) the methodology and standards for determining a meaningful EHR user under paragraph (3), including selection of measures under paragraph (3)(B), specification of the means of demonstrating meaningful EHR use under paragraph (3)(C), and the hardship exception under subsection (b)(3)(B)(ix)(II); and

"(iii) the specification of EHR reporting periods under paragraph (6)(B) and the selection of the form of payment under paragraph (2)(F).

"(B) POSTING ON WEBSITE.—The Secretary shall post on the Internet website of the Centers for Medicare & Medicaid Services, in an easily understandable format, a list of the names of the eligible hospitals that are meaningful EHR users under this subsection or subsection (b)(3)(B)(ix) (and a list of the names of critical access hospitals to which paragraph (3) or (4) of section 1814(l) applies), and other relevant data as determined appropriate by the Secretary. The Secretary shall ensure that an eligible hospital (or critical access hospital) has the opportunity to review the other relevant data that are to be made public with respect to the hospital (or critical access hospital) prior to such data being made public.

"(5) CERTIFIED EHR TECHNOLOGY DEFINED.—The term 'certified EHR technology' has the meaning given such term in section 1848(o)(4).

"(6) DEFINITIONS.—For purposes of this subsection:

"(A) EHR REPORTING PERIOD.—The term 'EHR reporting period' means, with respect to a payment year, any period (or periods) as specified by the Secretary.

"(B) ELIGIBLE HOSPITAL.—The term 'eligible hospital' means a subsection (d) hospital.".

(2) CRITICAL ACCESS HOSPITALS.—Section 1814(l) of the Social Security Act (42 U.S.C. 1395f(l)) is amended—

(A) in paragraph (1), by striking "paragraph (2)" and inserting "the subsequent paragraphs of this subsection"; and

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

"(3)(A) The following rules shall apply in determining payment and reasonable costs under paragraph (1) for costs described in subparagraph (C) for a critical access hospital that would be a

meaningful EHR user (as would be determined under paragraph (3) of section 1886(n)) for an EHR reporting period for a cost reporting period beginning during a payment year if such critical access hospital was treated as an eligible hospital under such section:

"(i) The Secretary shall compute reasonable costs by expensing such costs in a single payment year and not depreciating such costs over a period of years (and shall include as costs with respect to cost reporting periods beginning during a payment year costs from previous cost reporting periods to the extent they have not been fully depreciated as of the period involved).

"(ii) There shall be substituted for the Medicare share that would otherwise be applied under paragraph (1) a percent (not to exceed 100 percent) equal to the sum of—

"(I) the Medicare share (as would be specified under paragraph (2)(D) of section 1886(n)) for such critical access hospital if such critical access hospital was treated as an eligible hospital under such section; and

"(II) 20 percentage points.

"(B) The payment under this paragraph with respect to a critical access hospital shall be paid through a prompt interim payment (subject to reconciliation) after submission and review of such information (as specified by the Secretary) necessary to make such payment, including information necessary to apply this paragraph. In no case may payment under this paragraph be made with respect to a cost reporting period beginning during a payment year after 2015 and in no case may a critical access hospital receive payment under this paragraph with respect to more than 4 consecutive payment years.

"(C) The costs described in this subparagraph are costs for the purchase of certified EHR technology to which purchase depreciation (excluding interest) would apply if payment was made under paragraph (1) and not under this paragraph.

"(D) For purposes of this paragraph, paragraph (4), and paragraph (5), the terms 'certified EHR technology', 'eligible hospital', 'EHR reporting period', and 'payment year' have the meanings given such terms in sections 1886(n).".

(b) INCENTIVE MARKET BASKET ADJUSTMENT.—

(1) IN GENERAL.—Section 1886(b)(3)(B) of the Social Security Act (42 U.S.C. 1395ww(b)(3)(B)) is amended—

(A) in clause (viii)(I), by inserting "(or, beginning with fiscal year 2015, by one-quarter)" after "2.0 percentage points"; and

(B) by adding at the end the following new clause:

"(ix)(I) For purposes of clause (i) for fiscal year 2015 and each subsequent fiscal year, in the case of an eligible hospital (as defined in subsection (n)(6)(A)) that is not a meaningful EHR user (as defined in subsection (n)(3)) for an EHR reporting period for such fiscal year, three-quarters of the applicable percentage increase otherwise applicable under clause (i) for such fiscal year shall be reduced by 33⅓ percent for fiscal year 2015, 66⅔ percent for fiscal year 2016, and 100 percent for fiscal year 2017 and each subsequent fiscal year. Such reduction shall apply only with respect to the fiscal year involved and the Secretary shall not take into account such reduction in computing the applicable percentage increase under clause (i) for a subsequent fiscal year.

"(II) The Secretary may, on a case-by-case basis, exempt a subsection (d) hospital from the application of subclause (I) with respect to a fiscal year if the Secretary determines, subject to annual renewal, that requiring such hospital to be a meaningful EHR user during such fiscal year would result in a significant hardship, such as in the case of a hospital in a rural area without sufficient Internet access. In no case may a hospital be granted an exemption under this subclause for more than 5 years.

"(III) For fiscal year 2015 and each subsequent fiscal year, a State in which hospitals are paid for services under section 1814(b)(3) shall adjust the payments to each subsection (d) hospital in the State that is not a meaningful EHR user (as defined in subsection (n)(3)) in a manner that is designed to result in an aggregate reduction in payments to hospitals in the State that is equivalent to the aggregate reduction that would have occurred if payments had been reduced to each subsection (d) hospital in the State in a manner comparable to the reduction under the previous provisions of this clause. The State shall report to the Secretary the methodology it will use to make the payment adjustment under the previous sentence.

"(IV) For purposes of this clause, the term 'EHR reporting period' means, with respect to a fiscal year, any period (or periods) as specified by the Secretary.".

(2) CRITICAL ACCESS HOSPITALS.—Section 1814(l) of the Social Security Act (42 U.S.C. 1395f(l)), as amended by subsection (a)(2), is further amended by adding at the end the following new paragraphs:

"(4)(A) Subject to subparagraph (C), for cost reporting periods beginning in fiscal year 2015 or a subsequent fiscal year, in the case of a critical access hospital that is not a meaningful EHR user (as would be determined under paragraph (3) of section 1886(n) if such critical access hospital was treated as an eligible hospital under such section) for an EHR reporting period with respect to such fiscal year, paragraph (1) shall be applied by substituting the applicable percent under subparagraph (B) for the percent described in such paragraph (1).

"(B) The percent described in this subparagraph is—

"(i) for fiscal year 2015, 100.66 percent;

"(ii) for fiscal year 2016, 100.33 percent; and

"(iii) for fiscal year 2017 and each subsequent fiscal year, 100 percent.

"(C) The provisions of subclause (II) of section 1886(b)(3)(B)(ix) shall apply with respect to subparagraph (A) for a critical access hospital with respect to a cost reporting period beginning in a fiscal year in the same manner as such subclause applies with respect to subclause (I) of such section for a subsection (d) hospital with respect to such fiscal year.

"(5) There shall be no administrative or judicial review under section 1869, section 1878, or otherwise, of—

"(A) the methodology and standards for determining the amount of payment and reasonable cost under paragraph (3) and payment adjustments under paragraph (4), including selection of periods under section 1886(n)(2) for determining, and making estimates or using proxies of, inpatient-bed-days, hospital charges, charity charges, and Medicare share under subparagraph (D) of section 1886(n)(2);

"(B) the methodology and standards for determining a meaningful EHR user under section 1886(n)(3) as would apply if the hospital was treated as an eligible hospital under section 1886(n), and the hardship exception under paragraph (4)(C);

"(C) the specification of EHR reporting periods under section 1886(n)(6)(B) as applied under paragraphs (3) and (4); and

"(D) the identification of costs for purposes of paragraph (3)(C).".

(c) APPLICATION TO CERTAIN MA-AFFILIATED ELIGIBLE HOSPITALS.—Section 1853 of the Social Security Act (42 U.S.C. 1395w–23), as amended by section 4101(c), is further amended by adding at the end the following new subsection:

"(m) APPLICATION OF ELIGIBLE HOSPITAL INCENTIVES FOR CERTAIN MA ORGANIZATIONS FOR ADOPTION AND MEANINGFUL USE OF CERTIFIED EHR TECHNOLOGY.—

"(1) APPLICATION.—Subject to paragraphs (3) and (4), in the case of a qualifying MA organization, the provisions of sections 1886(n) and 1886(b)(3)(B)(ix) shall apply with respect to eligible hospitals described in paragraph (2) of the organization which the organization attests under subsection (l)(6) to be meaningful EHR users in a similar manner as they apply to eligible hospitals under such sections. Incentive payments under paragraph (3) shall be made to and payment adjustments under paragraph (4) shall apply to such qualifying organizations.

"(2) ELIGIBLE HOSPITAL DESCRIBED.—With respect to a qualifying MA organization, an eligible hospital described in this paragraph is an eligible hospital (as defined in section 1886(n)(6)(A)) that is under common corporate governance with such organization and serves individuals enrolled under an MA plan offered by such organization.

"(3) ELIGIBLE HOSPITAL INCENTIVE PAYMENTS.—

"(A) IN GENERAL.—In applying section 1886(n)(2) under paragraph (1), instead of the additional payment amount under section 1886(n)(2), there shall be substituted an amount determined by the Secretary to be similar to the estimated amount in the aggregate that would be payable if payment for services furnished by such hospitals was payable under part A instead of this part. In implementing the previous sentence, the Secretary—

"(i) shall, insofar as data to determine the discharge related amount under section 1886(n)(2)(C) for an eligible hospital are not available to the Secretary, use such alternative data and methodology to estimate such discharge related amount as the Secretary determines appropriate; and

"(ii) shall, insofar as data to determine the medicare share described in section 1886(n)(2)(D) for an eligible hospital are not available to the Secretary, use such alternative data and methodology to estimate such share, which data and methodology may include use of the inpatient-bed-days (or discharges) with respect to an eligible hospital during the appropriate period which are attributable to both individuals for

whom payment may be made under part A or individuals enrolled in an MA plan under a Medicare Advantage organization under this part as a proportion of the estimated total number of patient-bed-days (or discharges) with respect to such hospital during such period.

"(B) AVOIDING DUPLICATION OF PAYMENTS.—

"(i) IN GENERAL.—In the case of a hospital that for a payment year is an eligible hospital described in paragraph (2) and for which at least one-third of their discharges (or bed-days) of Medicare patients for the year are covered under part A, payment for the payment year shall be made only under section 1886(n) and not under this subsection.

"(ii) METHODS.—In the case of a hospital that is an eligible hospital described in paragraph (2) and also is eligible for an incentive payment under section 1886(n) but is not described in clause (i) for the same payment period, the Secretary shall develop a process—

"(I) to ensure that duplicate payments are not made with respect to an eligible hospital both under this subsection and under section 1886(n); and

"(II) to collect data from Medicare Advantage organizations to ensure against such duplicate payments.

"(4) PAYMENT ADJUSTMENT.—

"(A) Subject to paragraph (3), in the case of a qualifying MA organization (as defined in section 1853(l)(5)), if, according to the attestation of the organization submitted under subsection (l)(6) for an applicable period, one or more eligible hospitals (as defined in section 1886(n)(6)(A)) that are under common corporate governance with such organization and that serve individuals enrolled under a plan offered by such organization are not meaningful EHR users (as defined in section 1886(n)(3)) with respect to a period, the payment amount payable under this section for such organization for such period shall be the percent specified in subparagraph (B) for such period of the payment amount otherwise provided under this section for such period.

"(B) SPECIFIED PERCENT.—The percent specified under this subparagraph for a year is 100 percent minus a number of percentage points equal to the product of—

"(i) the number of the percentage point reduction effected under section 1886(b)(3)(B)(ix)(I) for the period; and

"(ii) the Medicare hospital expenditure proportion specified in subparagraph (C) for the year.

"(C) MEDICARE HOSPITAL EXPENDITURE PROPORTION.—The Medicare hospital expenditure proportion under this subparagraph for a year is the Secretary's estimate of the proportion, of the expenditures under parts A and B that are not attributable to this part, that are attributable to expenditures for inpatient hospital services.

"(D) APPLICATION OF PAYMENT ADJUSTMENT.—In the case that a qualifying MA organization attests that not all eligible hospitals are meaningful EHR users with respect to an applicable period, the Secretary shall apply the payment adjustment under this paragraph based on a methodology specified by the Secretary, taking into account the proportion of such eligible hospitals, or discharges from such hospitals, that are not meaningful EHR users for such period.

"(5) POSTING ON WEBSITE.—The Secretary shall post on the Internet website of the Centers for Medicare & Medicaid Services, in an easily understandable format—

"(A) a list of the names, business addresses, and business phone numbers of each qualifying MA organization receiving an incentive payment under this subsection for eligible hospitals described in paragraph (2); and

"(B) a list of the names of the eligible hospitals for which such incentive payment is based.

"(6) LIMITATIONS ON REVIEW.—There shall be no administrative or judicial review under section 1869, section 1878, or otherwise, of—

"(A) the methodology and standards for determining payment amounts and payment adjustments under this subsection, including avoiding duplication of payments under paragraph (3)(B);

"(B) the methodology and standards for determining eligible hospitals under paragraph (2); and

"(C) the methodology and standards for determining a meaningful EHR user under section 1886(n)(3), including specification of the means of demonstrating meaningful EHR use under subparagraph (C) of such section and selection of measures under subparagraph (B) of such section.".

(d) CONFORMING AMENDMENTS.—

(1) Section 1814(b) of the Social Security Act (42 U.S.C. 1395f(b)) is amended—

(A) in paragraph (3), in the matter preceding subparagraph (A), by inserting ", subject to section 1886(d)(3)(B)(ix)(III)," after "then"; and

(B) by adding at the end the following: "For purposes of applying paragraph (3), there shall be taken into account incentive payments, and payment adjustments under subsection (b)(3)(B)(ix) or (n) of section 1886.".

(2) Section 1851(i)(1) of the Social Security Act (42 U.S.C. 1395w–21(i)(1)) is amended by striking "and 1886(h)(3)(D)" and inserting "1886(h)(3)(D), and 1853(m)".

(3) Section 1853 of the Social Security Act (42 U.S.C. 1395w–23), as amended by section 4101(d), is amended—

(A) in subsection (c)—

(i) in paragraph (1)(D)(i), by striking "1848(o)" and inserting ", 1848(o), and 1886(n)"; and

(ii) in paragraph (6)(A), by inserting "and subsections (b)(3)(B)(ix) and (n) of section 1886" after "section 1848"; and

(B) in subsection (f), by inserting "and subsection (m)" after "under subsection (l)".

SEC. 4103. TREATMENT OF PAYMENTS AND SAVINGS; IMPLEMENTATION FUNDING.

(a) PREMIUM HOLD HARMLESS.—

(1) IN GENERAL.—Section 1839(a)(1) of the Social Security Act (42 U.S.C. 1395r(a)(1)) is amended by adding at the end the following: "In applying this paragraph there shall not be taken into account additional payments under section 1848(o) and section 1853(l)(3) and the Government contribution under section 1844(a)(3).".

(2) PAYMENT.—Section 1844(a) of such Act (42 U.S.C. 1395w(a)) is amended—

(A) in paragraph (2), by striking the period at the end and inserting "; plus"; and

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

"(3) a Government contribution equal to the amount of payment incentives payable under sections 1848(o) and 1853(l)(3).".

(b) MEDICARE IMPROVEMENT FUND.—Section 1898 of the Social Security Act (42 U.S.C. 1395iii), as added by section 7002(a) of the Supplemental Appropriations Act, 2008 (Public Law 110–252) and as amended by section 188(a)(2) of the Medicare Improvements for Patients and Providers Act of 2008 (Public Law 110–275; 122 Stat. 2589) and by section 6 of the QI Program Supplemental Funding Act of 2008, is amended—

(1) in subsection (a)—

(A) by inserting "medicare" before "fee-for-service"; and

(B) by inserting before the period at the end the following: "including, but not limited to, an increase in the conversion factor under section 1848(d) to address, in whole or in part, any projected shortfall in the conversion factor for 2014 relative to the conversion factor for 2008 and adjustments to payments for items and services furnished by providers of services and suppliers under such original medicare fee-for-service program"; and

(2) in subsection (b)—

(A) in paragraph (1), by striking "during fiscal year 2014," and all that follows and inserting the following: "during—

"(A) fiscal year 2014, $22,290,000,000; and

"(B) fiscal year 2020 and each subsequent fiscal year, the Secretary's estimate, as of July 1 of the fiscal year, of the aggregate reduction in expenditures under this title during the preceding fiscal year directly resulting from the reduction in payment amounts under sections 1848(a)(7), 1853(l)(4), 1853(m)(4), and 1886(b)(3)(B)(ix).."; and

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

"(4) NO EFFECT ON PAYMENTS IN SUBSEQUENT YEARS.—In the case that expenditures from the Fund are applied to, or otherwise affect, a payment rate for an item or service under this title for a year, the payment rate for such item or service shall be computed for a subsequent year as if such application or effect had never occurred.".

(c) IMPLEMENTATION FUNDING.—In addition to funds otherwise available, out of any funds in the Treasury not otherwise appropriated, there are appropriated to the Secretary of Health and Human Services for the Center for Medicare & Medicaid Services

Program Management Account, $100,000,000 for each of fiscal years 2009 through 2015 and $45,000,000 for fiscal year 2016, which shall be available for purposes of carrying out the provisions of (and amendments made by) this subtitle. Amounts appropriated under this subsection for a fiscal year shall be available until expended.

SEC. 4104. STUDIES AND REPORTS ON HEALTH INFORMATION TECHNOLOGY.

(a) STUDY AND REPORT ON APPLICATION OF EHR PAYMENT INCENTIVES FOR PROVIDERS NOT RECEIVING OTHER INCENTIVE PAYMENTS.—

(1) STUDY.—

(A) IN GENERAL.—The Secretary of Health and Human Services shall conduct a study to determine the extent to which and manner in which payment incentives (such as under title XVIII or XIX of the Social Security Act) and other funding for purposes of implementing and using certified EHR technology (as defined in section 1848(o)(4) of the Social Security Act, as added by section 4101(a)) should be made available to health care providers who are receiving minimal or no payment incentives or other funding under this Act, under title XIII of division A, under title XVIII or XIX of such Act, or otherwise, for such purposes.

(B) DETAILS OF STUDY.—Such study shall include an examination of—

(i) the adoption rates of certified EHR technology by such health care providers;

(ii) the clinical utility of such technology by such health care providers;

(iii) whether the services furnished by such health care providers are appropriate for or would benefit from the use of such technology;

(iv) the extent to which such health care providers work in settings that might otherwise receive an incentive payment or other funding under this Act, under title XIII of division A, under title XVIII or XIX of the Social Security Act, or otherwise;

(v) the potential costs and the potential benefits of making payment incentives and other funding available to such health care providers; and

(vi) any other issues the Secretary deems to be appropriate.

(2) REPORT.—Not later than June 30, 2010, the Secretary shall submit to Congress a report on the findings and conclusions of the study conducted under paragraph (1).

(b) STUDY AND REPORT ON AVAILABILITY OF OPEN SOURCE HEALTH INFORMATION TECHNOLOGY SYSTEMS.—

(1) STUDY.—

(A) IN GENERAL.—The Secretary of Health and Human Services shall, in consultation with the Under Secretary for Health of the Veterans Health Administration, the Director of the Indian Health Service, the Secretary of Defense, the Director of the Agency for Healthcare Research and Quality, the Administrator of the Health Resources and Services Administration, and the Chairman

of the Federal Communications Commission, conduct a study on—

(i) the current availability of open source health information technology systems to Federal safety net providers (including small, rural providers);

(ii) the total cost of ownership of such systems in comparison to the cost of proprietary commercial products available;

(iii) the ability of such systems to respond to the needs of, and be applied to, various populations (including children and disabled individuals); and

(iv) the capacity of such systems to facilitate interoperability.

(B) CONSIDERATIONS.—In conducting the study under subparagraph (A), the Secretary of Health and Human Services shall take into account the circumstances of smaller health care providers, health care providers located in rural or other medically underserved areas, and safety net providers that deliver a significant level of health care to uninsured individuals, Medicaid beneficiaries, SCHIP beneficiaries, and other vulnerable individuals.

(2) REPORT.—Not later than October 1, 2010, the Secretary of Health and Human Services shall submit to Congress a report on the findings and the conclusions of the study conducted under paragraph (1), together with recommendations for such legislation and administrative action as the Secretary determines appropriate.

Subtitle B—Medicaid Incentives

SEC. 4201. MEDICAID PROVIDER HIT ADOPTION AND OPERATION PAYMENTS; IMPLEMENTATION FUNDING.

(a) IN GENERAL.—Section 1903 of the Social Security Act (42 U.S.C. 1396b) is amended—

(1) in subsection (a)(3)—

(A) by striking "and" at the end of subparagraph (D);

(B) by striking "plus" at the end of subparagraph (E) and inserting "and"; and

(C) by adding at the end the following new subparagraph:

"(F)(i) 100 percent of so much of the sums expended during such quarter as are attributable to payments to Medicaid providers described in subsection (t)(1) to encourage the adoption and use of certified EHR technology; and

"(ii) 90 percent of so much of the sums expended during such quarter as are attributable to payments for reasonable administrative expenses related to the administration of payments described in clause (i) if the State meets the condition described in subsection (t)(9); plus"; and

(2) by inserting after subsection (s) the following new subsection:

"(t)(1) For purposes of subsection (a)(3)(F), the payments described in this paragraph to encourage the adoption and use of certified EHR technology are payments made by the State in accordance with this subsection —

"(A) to Medicaid providers described in paragraph (2)(A) not in excess of 85 percent of net average allowable costs (as defined in paragraph (3)(E)) for certified EHR technology (and support services including maintenance and training that is for, or is necessary for the adoption and operation of, such technology) with respect to such providers; and

"(B) to Medicaid providers described in paragraph (2)(B) not in excess of the maximum amount permitted under paragraph (5) for the provider involved.

"(2) In this subsection and subsection (a)(3)(F), the term 'Medicaid provider' means—

"(A) an eligible professional (as defined in paragraph (3)(B))—

"(i) who is not hospital-based and has at least 30 percent of the professional's patient volume (as estimated in accordance with a methodology established by the Secretary) attributable to individuals who are receiving medical assistance under this title;

"(ii) who is not described in clause (i), who is a pediatrician, who is not hospital-based, and who has at least 20 percent of the professional's patient volume (as estimated in accordance with a methodology established by the Secretary) attributable to individuals who are receiving medical assistance under this title; and

"(iii) who practices predominantly in a Federally qualified health center or rural health clinic and has at least 30 percent of the professional's patient volume (as estimated in accordance with a methodology established by the Secretary) attributable to needy individuals (as defined in paragraph (3)(F)); and

"(B)(i) a children's hospital, or

"(ii) an acute-care hospital that is not described in clause (i) and that has at least 10 percent of the hospital's patient volume (as estimated in accordance with a methodology established by the Secretary) attributable to individuals who are receiving medical assistance under this title.

An eligible professional shall not qualify as a Medicaid provider under this subsection unless any right to payment under sections 1848(o) and 1853(l) with respect to the eligible professional has been waived in a manner specified by the Secretary. For purposes of calculating patient volume under subparagraph (A)(iii), insofar as it is related to uncompensated care, the Secretary may require the adjustment of such uncompensated care data so that it would be an appropriate proxy for charity care, including a downward adjustment to eliminate bad debt data from uncompensated care. In applying subparagraphs (A) and (B)(ii), the methodology established by the Secretary for patient volume shall include individuals enrolled in a Medicaid managed care plan (under section 1903(m) or section 1932).

"(3) In this subsection and subsection (a)(3)(F):

"(A) The term 'certified EHR technology' means a qualified electronic health record (as defined in 3000(13) of the Public Health Service Act) that is certified pursuant to section 3001(c)(5) of such Act as meeting standards adopted under section 3004 of such Act that are applicable to the type of record involved (as determined by the Secretary, such as an

ambulatory electronic health record for office-based physicians or an inpatient hospital electronic health record for hospitals).

"(B) The term 'eligible professional' means a—

"(i) physician;

"(ii) dentist;

"(iii) certified nurse mid-wife;

"(iv) nurse practitioner; and

"(v) physician assistant insofar as the assistant is practicing in a rural health clinic that is led by a physician assistant or is practicing in a Federally qualified health center that is so led.

"(C) The term 'average allowable costs' means, with respect to certified EHR technology of Medicaid providers described in paragraph (2)(A) for—

"(i) the first year of payment with respect to such a provider, the average costs for the purchase and initial implementation or upgrade of such technology (and support services including training that is for, or is necessary for the adoption and initial operation of, such technology) for such providers, as determined by the Secretary based upon studies conducted under paragraph (4)(C); and

"(ii) a subsequent year of payment with respect to such a provider, the average costs not described in clause (i) relating to the operation, maintenance, and use of such technology for such providers, as determined by the Secretary based upon studies conducted under paragraph (4)(C).

"(D) The term 'hospital-based' means, with respect to an eligible professional, a professional (such as a pathologist, anesthesiologist, or emergency physician) who furnishes substantially all of the individual's professional services in a hospital setting (whether inpatient or outpatient) and through the use of the facilities and equipment, including qualified electronic health records, of the hospital. The determination of whether an eligible professional is a hospital-based eligible professional shall be made on the basis of the site of service (as defined by the Secretary) and without regard to any employment or billing arrangement between the eligible professional and any other provider.

"(E) The term 'net average allowable costs' means, with respect to a Medicaid provider described in paragraph (2)(A), average allowable costs reduced by any payment that is made to such Medicaid provider from any other source (other than under this subsection or by a State or local government) that is directly attributable to payment for certified EHR technology or support services described in subparagraph (C).

"(F) The term 'needy individual' means, with respect to a Medicaid provider, an individual—

"(i) who is receiving assistance under this title;

"(ii) who is receiving assistance under title XXI;

"(iii) who is furnished uncompensated care by the provider; or

"(iv) for whom charges are reduced by the provider on a sliding scale basis based on an individual's ability to pay.

"(4)(A) With respect to a Medicaid provider described in paragraph (2)(A), subject to subparagraph (B), in no case shall—

"(i) the net average allowable costs under this subsection for the first year of payment (which may not be later than 2016), which is intended to cover the costs described in paragraph (3)(C)(i), exceed $25,000 (or such lesser amount as the Secretary determines based on studies conducted under subparagraph (C));

"(ii) the net average allowable costs under this subsection for a subsequent year of payment, which is intended to cover costs described in paragraph (3)(C)(ii), exceed $10,000; and

"(iii) payments be made for costs described in clause (ii) after 2021 or over a period of longer than 5 years.

"(B) In the case of Medicaid provider described in paragraph (2)(A)(ii), the dollar amounts specified in subparagraph (A) shall be ⅔ of the dollar amounts otherwise specified.

"(C) For the purposes of determining average allowable costs under this subsection, the Secretary shall study the average costs to Medicaid providers described in paragraph (2)(A) of purchase and initial implementation and upgrade of certified EHR technology described in paragraph (3)(C)(i) and the average costs to such providers of operations, maintenance, and use of such technology described in paragraph (3)(C)(ii). In determining such costs for such providers, the Secretary may utilize studies of such amounts submitted by States.

"(5)(A) In no case shall the payments described in paragraph (1)(B) with respect to a Medicaid provider described in paragraph (2)(B) exceed—

"(i) in the aggregate the product of—

"(I) the overall hospital EHR amount for the provider computed under subparagraph (B); and

"(II) the Medicaid share for such provider computed under subparagraph (C);

"(ii) in any year 50 percent of the product described in clause (i); and

"(iii) in any 2-year period 90 percent of such product.

"(B) For purposes of this paragraph, the overall hospital EHR amount, with respect to a Medicaid provider, is the sum of the applicable amounts specified in section 1886(n)(2)(A) for such provider for the first 4 payment years (as estimated by the Secretary) determined as if the Medicare share specified in clause (ii) of such section were 1. The Secretary shall establish, in consultation with the State, the overall hospital EHR amount for each such Medicaid provider eligible for payments under paragraph (1)(B). For purposes of this subparagraph in computing the amounts under section 1886(n)(2)(C) for payment years after the first payment year, the Secretary shall assume that in subsequent payment years discharges increase at the average annual rate of growth of the most recent 3 years for which discharge data are available per year.

"(C) The Medicaid share computed under this subparagraph, for a Medicaid provider for a period specified by the Secretary, shall be calculated in the same manner as the Medicare share under section 1886(n)(2)(D) for such a hospital and period, except that there shall be substituted for the numerator under clause (i) of such section the amount that is equal to the number of inpatient-bed-days (as established by the Secretary) which are attributable to individuals who are receiving medical assistance

under this title and who are not described in section 1886(n)(2)(D)(i). In computing inpatient-bed-days under the previous sentence, the Secretary shall take into account inpatient-bed-days attributable to inpatient-bed-days that are paid for individuals enrolled in a Medicaid managed care plan (under section 1903(m) or section 1932).

"(D) In no case may the payments described in paragraph (1)(B) with respect to a Medicaid provider described in paragraph (2)(B) be paid—

"(i) for any year beginning after 2016 unless the provider has been provided payment under paragraph (1)(B) for the previous year; and

"(ii) over a period of more than 6 years of payment.

"(6) Payments described in paragraph (1) are not in accordance with this subsection unless the following requirements are met:

"(A)(i) The State provides assurances satisfactory to the Secretary that amounts received under subsection (a)(3)(F) with respect to payments to a Medicaid provider are paid, subject to clause (ii), directly to such provider (or to an employer or facility to which such provider has assigned payments) without any deduction or rebate.

"(ii) Amounts described in clause (i) may also be paid to an entity promoting the adoption of certified EHR technology, as designated by the State, if participation in such a payment arrangement is voluntary for the eligible professional involved and if such entity does not retain more than 5 percent of such payments for costs not related to certified EHR technology (and support services including maintenance and training) that is for, or is necessary for the operation of, such technology.

"(B) A Medicaid provider described in paragraph (2)(A) is responsible for payment of the remaining 15 percent of the net average allowable cost.

"(C)(i) Subject to clause (ii), with respect to payments to a Medicaid provider—

"(I) for the first year of payment to the Medicaid provider under this subsection, the Medicaid provider demonstrates that it is engaged in efforts to adopt, implement, or upgrade certified EHR technology; and

"(II) for a year of payment, other than the first year of payment to the Medicaid provider under this subsection, the Medicaid provider demonstrates meaningful use of certified EHR technology through a means that is approved by the State and acceptable to the Secretary, and that may be based upon the methodologies applied under section 1848(o) or 1886(n).

"(ii) In the case of a Medicaid provider who has completed adopting, implementing, or upgrading such technology prior to the first year of payment to the Medicaid provider under this subsection, clause (i)(I) shall not apply and clause (i)(II) shall apply to each year of payment to the Medicaid provider under this subsection, including the first year of payment.

"(D) To the extent specified by the Secretary, the certified EHR technology is compatible with State or Federal administrative management systems.

For purposes of subparagraph (B), a Medicaid provider described in paragraph (2)(A) may accept payments for the costs described

in such subparagraph from a State or local government. For purposes of subparagraph (C), in establishing the means described in such subparagraph, which may include clinical quality reporting to the State, the State shall ensure that populations with unique needs, such as children, are appropriately addressed.

"(7) With respect to Medicaid providers described in paragraph (2)(A), the Secretary shall ensure coordination of payment with respect to such providers under sections 1848(o) and 1853(l) and under this subsection to assure no duplication of funding. Such coordination shall include, to the extent practicable, a data matching process between State Medicaid agencies and the Centers for Medicare & Medicaid Services using national provider identifiers. For such purposes, the Secretary may require the submission of such data relating to payments to such Medicaid providers as the Secretary may specify.

"(8) In carrying out paragraph (6)(C), the State and Secretary shall seek, to the maximum extent practicable, to avoid duplicative requirements from Federal and State governments to demonstrate meaningful use of certified EHR technology under this title and title XVIII. In doing so, the Secretary may deem satisfaction of requirements for such meaningful use for a payment year under title XVIII to be sufficient to qualify as meaningful use under this subsection. The Secretary may also specify the reporting periods under this subsection in order to carry out this paragraph.

"(9) In order to be provided Federal financial participation under subsection (a)(3)(F)(ii), a State must demonstrate to the satisfaction of the Secretary, that the State—

"(A) is using the funds provided for the purposes of administering payments under this subsection, including tracking of meaningful use by Medicaid providers;

"(B) is conducting adequate oversight of the program under this subsection, including routine tracking of meaningful use attestations and reporting mechanisms; and

"(C) is pursuing initiatives to encourage the adoption of certified EHR technology to promote health care quality and the exchange of health care information under this title, subject to applicable laws and regulations governing such exchange.

"(10) The Secretary shall periodically submit reports to the Committee on Energy and Commerce of the House of Representatives and the Committee on Finance of the Senate on status, progress, and oversight of payments described in paragraph (1), including steps taken to carry out paragraph (7). Such reports shall also describe the extent of adoption of certified EHR technology among Medicaid providers resulting from the provisions of this subsection and any improvements in health outcomes, clinical quality, or efficiency resulting from such adoption.".

(b) IMPLEMENTATION FUNDING.—In addition to funds otherwise available, out of any funds in the Treasury not otherwise appropriated, there are appropriated to the Secretary of Health and Human Services for the Centers for Medicare & Medicaid Services Program Management Account, $40,000,000 for each of fiscal years 2009 through 2015 and $20,000,000 for fiscal year 2016, which shall be available for purposes of carrying out the provisions of (and the amendments made by) this section. Amounts appropriated under this subsection for a fiscal year shall be available until expended.

Subtitle C—Miscellaneous Medicare Provisions

SEC. 4301. MORATORIA ON CERTAIN MEDICARE REGULATIONS.

(a) DELAY IN PHASE OUT OF MEDICARE HOSPICE BUDGET NEUTRALITY ADJUSTMENT FACTOR DURING FISCAL YEAR 2009.—Notwithstanding any other provision of law, including the final rule published on August 8, 2008, 73 Federal Register 46464 et seq., relating to Medicare Program; Hospice Wage Index for Fiscal Year 2009, the Secretary of Health and Human Services shall not phase out or eliminate the budget neutrality adjustment factor in the Medicare hospice wage index before October 1, 2009, and the Secretary shall recompute and apply the final Medicare hospice wage index for fiscal year 2009 as if there had been no reduction in the budget neutrality adjustment factor.

(b) NON-APPLICATION OF PHASED-OUT INDIRECT MEDICAL EDUCATION (IME) ADJUSTMENT FACTOR FOR FISCAL YEAR 2009.—

(1) IN GENERAL.—Section 412.322 of title 42, Code of Federal Regulations, shall be applied without regard to paragraph (c) of such section, and the Secretary of Health and Human Services shall recompute payments for discharges occurring on or after October 1, 2008, as if such paragraph had never been in effect.

(2) NO EFFECT ON SUBSEQUENT YEARS.—Nothing in paragraph (1) shall be construed as having any effect on the application of paragraph (d) of section 412.322 of title 42, Code of Federal Regulations.

(c) FUNDING FOR IMPLEMENTATION.—In addition to funds otherwise available, for purposes of implementing the provisions of subsections (a) and (b), including costs incurred in reprocessing claims in carrying out such provisions, the Secretary of Health and Human Services shall provide for the transfer from the Federal Hospital Insurance Trust Fund established under section 1817 of the Social Security Act (42 U.S.C. 1395i) to the Centers for Medicare & Medicaid Services Program Management Account of $2,000,000 for fiscal year 2009.

SEC. 4302. LONG-TERM CARE HOSPITAL TECHNICAL CORRECTIONS.

(a) PAYMENT.—Subsection (c) of section 114 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Public Law 110–173) is amended—

(1) in paragraph (1)—

(A) by amending the heading to read as follows: "DELAY IN APPLICATION OF 25 PERCENT PATIENT THRESHOLD PAYMENT ADJUSTMENT";

(B) by striking "the date of the enactment of this Act" and inserting "July 1, 2007,"; and

(C) in subparagraph (A), by inserting "or to a long-term care hospital, or satellite facility, that as of December 29, 2007, was co-located with an entity that is a provider-based, off-campus location of a subsection (d) hospital which did not provide services payable under section 1886(d) of the Social Security Act at the off-campus location" after "freestanding long-term care hospitals"; and

(2) in paragraph (2)—

(A) in subparagraph (B)(ii), by inserting "or that is described in section 412.22(h)(3)(i) of such title" before the period; and

(B) in subparagraph (C), by striking "the date of the enactment of this Act" and inserting "October 1, 2007 (or July 1, 2007, in the case of a satellite facility described in section 412.22(h)(3)(i) of title 42, Code of Federal Regulations)".

(b) MORATORIUM.—Subsection (d)(3)(A) of such section is amended by striking "if the hospital or facility" and inserting "if the hospital or facility obtained a certificate of need for an increase in beds that is in a State for which such certificate of need is required and that was issued on or after April 1, 2005, and before December 29, 2007, or if the hospital or facility".

(c) EFFECTIVE DATE.—The amendments made by this section shall be effective and apply as if included in the enactment of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Public Law 110–173).

TITLE V—STATE FISCAL RELIEF

SEC. 5000. PURPOSES; TABLE OF CONTENTS.

(a) PURPOSES.—The purposes of this title are as follows:

(1) To provide fiscal relief to States in a period of economic downturn.

(2) To protect and maintain State Medicaid programs during a period of economic downturn, including by helping to avert cuts to provider payment rates and benefits or services, and to prevent constrictions of income eligibility requirements for such programs, but not to promote increases in such requirements.

(b) TABLE OF CONTENTS.—The table of contents for this title is as follows:

TITLE V—STATE FISCAL RELIEF

SEC. 5001. TEMPORARY INCREASE OF MEDICAID FMAP.

(a) PERMITTING MAINTENANCE OF FMAP.—Subject to subsections (e), (f), and (g), if the FMAP determined without regard to this section for a State for—

(1) fiscal year 2009 is less than the FMAP as so determined for fiscal year 2008, the FMAP for the State for fiscal year 2008 shall be substituted for the State's FMAP for fiscal year 2009, before the application of this section;

(2) fiscal year 2010 is less than the FMAP as so determined for fiscal year 2008 or fiscal year 2009 (after the application of paragraph (1)), the greater of such FMAP for the State for fiscal year 2008 or fiscal year 2009 shall be substituted

for the State's FMAP for fiscal year 2010, before the application of this section; and

(3) fiscal year 2011 is less than the FMAP as so determined for fiscal year 2008, fiscal year 2009 (after the application of paragraph (1)), or fiscal year 2010 (after the application of paragraph (2)), the greatest of such FMAP for the State for fiscal year 2008, fiscal year 2009, or fiscal year 2010 shall be substituted for the State's FMAP for fiscal year 2011, before the application of this section, but only for the first calendar quarter in fiscal year 2011.

(b) GENERAL 6.2 PERCENTAGE POINT INCREASE.—

(1) IN GENERAL.—Subject to subsections (e), (f), and (g) and paragraph (2), for each State for calendar quarters during the recession adjustment period (as defined in subsection (h)(3)), the FMAP (after the application of subsection (a)) shall be increased (without regard to any limitation otherwise specified in section 1905(b) of the Social Security Act (42 U.S.C. 1396d(b))) by 6.2 percentage points.

(2) SPECIAL ELECTION FOR TERRITORIES.—In the case of a State that is not one of the 50 States or the District of Columbia, paragraph (1) shall only apply if the State makes a one-time election, in a form and manner specified by the Secretary and for the entire recession adjustment period, to apply the increase in FMAP under paragraph (1) and a 15 percent increase under subsection (d) instead of applying a 30 percent increase under subsection (d).

(c) ADDITIONAL RELIEF BASED ON INCREASE IN UNEMPLOYMENT.—

(1) IN GENERAL.—Subject to subsections (e), (f), and (g), if a State is a qualifying State under paragraph (2) for a calendar quarter occurring during the recession adjustment period, the FMAP for the State shall be further increased by the number of percentage points equal to the product of—

(A) the State percentage applicable for the State under section 1905(b) of the Social Security Act (42 U.S.C. 1396d(b)) after the application of subsection (a) and after the application of ½ of the increase under subsection (b); and

(B) the applicable percent determined in paragraph (3) for the calendar quarter (or, if greater, for a previous such calendar quarter).

(2) QUALIFYING CRITERIA.—

(A) IN GENERAL.—For purposes of paragraph (1), a State qualifies for additional relief under this subsection for a calendar quarter occurring during the recession adjustment period if the State is 1 of the 50 States or the District of Columbia and the State satisfies any of the following criteria for the quarter:

(i) The State unemployment increase percentage (as defined in paragraph (4)) for the quarter is at least 1.5 percentage points but less than 2.5 percentage points.

(ii) The State unemployment increase percentage for the quarter is at least 2.5 percentage points but less than 3.5 percentage points.

(iii) The State unemployment increase percentage for the quarter is at least 3.5 percentage points.

(B) MAINTENANCE OF STATUS.—If a State qualifies for additional relief under this subsection for a calendar quarter, it shall be deemed to have qualified for such relief for each subsequent calendar quarter ending before July 1, 2010.

(3) APPLICABLE PERCENT.—

(A) IN GENERAL.—For purposes of paragraph (1), subject to subparagraph (B), the applicable percent is—

(i) 5.5 percent, if the State satisfies the criteria described in paragraph (2)(A)(i) for the calendar quarter;

(ii) 8.5 percent if the State satisfies the criteria described in paragraph (2)(A)(ii) for the calendar quarter; and

(iii) 11.5 percent if the State satisfies the criteria described in paragraph (2)(A)(iii) for the calendar quarter.

(B) MAINTENANCE OF HIGHER APPLICABLE PERCENT.—

(i) HOLD HARMLESS PERIOD.—If the percent applied to a State under subparagraph (A) for any calendar quarter in the recession adjustment period beginning on or after January 1, 2009, and ending before July 1, 2010, (determined without regard to this subparagraph) is less than the percent applied for the preceding quarter (as so determined), the higher applicable percent shall continue in effect for each subsequent calendar quarter ending before July 1, 2010.

(ii) NOTICE OF LOWER APPLICABLE PERCENT.—The Secretary shall notify a State at least 60 days prior to applying any lower applicable percent to the State under this paragraph.

(4) COMPUTATION OF STATE UNEMPLOYMENT INCREASE PERCENTAGE.—

(A) IN GENERAL.—In this subsection, the "State unemployment increase percentage" for a State for a calendar quarter is equal to the number of percentage points (if any) by which—

(i) the average monthly unemployment rate for the State for months in the most recent previous 3-consecutive-month period for which data are available, subject to subparagraph (C); exceeds

(ii) the lowest average monthly unemployment rate for the State for any 3-consecutive-month period preceding the period described in clause (i) and beginning on or after January 1, 2006.

(B) AVERAGE MONTHLY UNEMPLOYMENT RATE DEFINED.—In this paragraph, the term "average monthly unemployment rate" means the average of the monthly number unemployed, divided by the average of the monthly civilian labor force, seasonally adjusted, as determined based on the most recent monthly publications of the Bureau of Labor Statistics of the Department of Labor.

(C) SPECIAL RULE.—With respect to—

(i) the first 2 calendar quarters of the recession adjustment period, the most recent previous 3-consecutive-month period described in subparagraph (A)(i)

shall be the 3-consecutive-month period beginning with October 2008; and

(ii) the last 2 calendar quarters of the recession adjustment period, the most recent previous 3-consecutive-month period described in such subparagraph shall be the 3-consecutive-month period beginning with December 2009, or, if it results in a higher applicable percent under paragraph (3), the 3-consecutive-month period beginning with January 2010.

(d) INCREASE IN CAP ON MEDICAID PAYMENTS TO TERRITORIES.—Subject to subsections (f) and (g), with respect to entire fiscal years occurring during the recession adjustment period and with respect to fiscal years only a portion of which occurs during such period (and in proportion to the portion of the fiscal year that occurs during such period), the amounts otherwise determined for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa under subsections (f) and (g) of section 1108 of the Social Security Act (42 6 U.S.C. 1308) shall each be increased by 30 percent (or, in the case of an election under subsection (b)(2), 15 percent). In the case of such an election by a territory, subsection (a)(1) of such section shall be applied without regard to any increase in payment made to the territory under part E of title IV of such Act that is attributable to the increase in FMAP effected under subsection (b) for the territory.

(e) SCOPE OF APPLICATION.—The increases in the FMAP for a State under this section shall apply for purposes of title XIX of the Social Security Act and shall not apply with respect to—

(1) disproportionate share hospital payments described in section 1923 of such Act (42 U.S.C. 1396r–4);

(2) payments under title IV of such Act (42 U.S.C. 601 et seq.) (except that the increases under subsections (a) and (b) shall apply to payments under part E of title IV of such Act (42 U.S.C. 670 et seq.) and, for purposes of the application of this section to the District of Columbia, payments under such part shall be deemed to be made on the basis of the FMAP applied with respect to such District for purposes of title XIX and as increased under subsection (b));

(3) payments under title XXI of such Act (42 U.S.C. 1397aa et seq.);

(4) any payments under title XIX of such Act that are based on the enhanced FMAP described in section 2105(b) of such Act (42 U.S.C. 1397ee(b)); or

(5) any payments under title XIX of such Act that are attributable to expenditures for medical assistance provided to individuals made eligible under a State plan under title XIX of the Social Security Act (including under any waiver under such title or under section 1115 of such Act (42 U.S.C. 1315)) because of income standards (expressed as a percentage of the poverty line) for eligibility for medical assistance that are higher than the income standards (as so expressed) for such eligibility as in effect on July 1, 2008, (including as such standards were proposed to be in effect under a State law enacted but not effective as of such date or a State plan amendment or waiver request under title XIX of such Act that was pending approval on such date).

(f) STATE INELIGIBILITY; LIMITATION; SPECIAL RULES.—

(1) MAINTENANCE OF ELIGIBILITY REQUIREMENTS.—

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), a State is not eligible for an increase in its FMAP under subsection (a), (b), or (c), or an increase in a cap amount under subsection (d), if eligibility standards, methodologies, or procedures under its State plan under title XIX of the Social Security Act (including any waiver under such title or under section 1115 of such Act (42 U.S.C. 1315)) are more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) as in effect on July 1, 2008.

(B) STATE REINSTATEMENT OF ELIGIBILITY PERMITTED.—Subject to subparagraph (C), a State that has restricted eligibility standards, methodologies, or procedures under its State plan under title XIX of the Social Security Act (including any waiver under such title or under section 1115 of such Act (42 U.S.C. 1315)) after July 1, 2008, is no longer ineligible under subparagraph (A) beginning with the first calendar quarter in which the State has reinstated eligibility standards, methodologies, or procedures that are no more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) as in effect on July 1, 2008.

(C) SPECIAL RULES.—A State shall not be ineligible under subparagraph (A)—

(i) for the calendar quarters before July 1, 2009, on the basis of a restriction that was applied after July 1, 2008, and before the date of the enactment of this Act, if the State prior to July 1, 2009, has reinstated eligibility standards, methodologies, or procedures that are no more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) as in effect on July 1, 2008; or

(ii) on the basis of a restriction that was directed to be made under State law as in effect on July 1, 2008, and would have been in effect as of such date, but for a delay in the effective date of a waiver under section 1115 of such Act with respect to such restriction.

(2) COMPLIANCE WITH PROMPT PAY REQUIREMENTS.—

(A) APPLICATION TO PRACTITIONERS.—

(i) IN GENERAL.—Subject to the succeeding provisions of this subparagraph, no State shall be eligible for an increased FMAP rate as provided under this section for any claim received by a State from a practitioner subject to the terms of section 1902(a)(37)(A) of the Social Security Act (42 U.S.C. 1396a(a)(37)(A)) for such days during any period in which that State has failed to pay claims in accordance with such section as applied under title XIX of such Act.

(ii) REPORTING REQUIREMENT.—Each State shall report to the Secretary, on a quarterly basis, its compliance with the requirements of clause (i) as such requirements pertain to claims made for covered services during each month of the preceding quarter.

(iii) WAIVER AUTHORITY.—The Secretary may waive the application of clause (i) to a State, or the

reporting requirement imposed under clause (ii), during any period in which there are exigent circumstances, including natural disasters, that prevent the timely processing of claims or the submission of such a report.

(iv) APPLICATION TO CLAIMS.—Clauses (i) and (ii) shall only apply to claims made for covered services after the date of enactment of this Act.

(B) APPLICATION TO NURSING FACILITIES AND HOSPITALS.—

(i) IN GENERAL.—Subject to clause (ii), the provisions of subparagraph (A) shall apply with respect to a nursing facility or hospital, insofar as it is paid under title XIX of the Social Security Act on the basis of submission of claims, in the same or similar manner (but within the same timeframe) as such provisions apply to practitioners described in such subparagraph.

(ii) GRACE PERIOD.—Notwithstanding clause (i), no period of ineligibility shall be imposed against a State prior to June 1, 2009, on the basis of the State failing to pay a claim in accordance with such clause.

(3) STATE'S APPLICATION TOWARD RAINY DAY FUND.—A State is not eligible for an increase in its FMAP under subsection (b) or (c), or an increase in a cap amount under subsection (d), if any amounts attributable (directly or indirectly) to such increase are deposited or credited into any reserve or rainy day fund of the State.

(4) NO WAIVER AUTHORITY.—Except as provided in paragraph (2)(A)(iii), the Secretary may not waive the application of this subsection or subsection (g) under section 1115 of the Social Security Act or otherwise.

(5) LIMITATION OF FMAP TO 100 PERCENT.—In no case shall an increase in FMAP under this section result in an FMAP that exceeds 100 percent.

(6) TREATMENT OF CERTAIN EXPENDITURES.—With respect to expenditures described in section 2105(a)(1)(B) of the Social Security Act (42 U.S.C. 1397ee(a)(1)(B)), as in effect before April 1, 2009, that are made during the period beginning on October 1, 2008, and ending on March 31, 2009, any additional Federal funds that are paid to a State as a result of this section that are attributable to such expenditures shall not be counted against any allotment under section 2104 of such Act (42 U.S.C. 1397dd).

(g) REQUIREMENTS.—

(1) STATE REPORTS.—Each State that is paid additional Federal funds as a result of this section shall, not later than September 30, 2011, submit a report to the Secretary, in such form and such manner as the Secretary shall determine, regarding how the additional Federal funds were expended.

(2) ADDITIONAL REQUIREMENT FOR CERTAIN STATES.—In the case of a State that requires political subdivisions within the State to contribute toward the non-Federal share of expenditures under the State Medicaid plan required under section 1902(a)(2) of the Social Security Act (42 U.S.C. 1396a(a)(2)), the State is not eligible for an increase in its FMAP under subsection (b) or (c), or an increase in a cap amount under subsection (d), if it requires that such political subdivisions

pay for quarters during the recession adjustment period a greater percentage of the non-Federal share of such expenditures, or a greater percentage of the non-Federal share of payments under section 1923, than the respective percentage that would have been required by the State under such plan on September 30, 2008, prior to application of this section.

(h) DEFINITIONS.—In this section, except as otherwise provided:

(1) FMAP.—The term "FMAP" means the Federal medical assistance percentage, as defined in section 1905(b) of the Social Security Act (42 U.S.C. 1396d(b)), as determined without regard to this section except as otherwise specified.

(2) POVERTY LINE.—The term "poverty line" has the meaning given such term in section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)), including any revision required by such section.

(3) RECESSION ADJUSTMENT PERIOD.—The term "recession adjustment period" means the period beginning on October 1, 2008, and ending on December 31, 2010.

(4) SECRETARY.—The term "Secretary" means the Secretary of Health and Human Services.

(5) STATE.—The term "State" has the meaning given such term in section 1101(a)(1) of the Social Security Act (42 U.S.C. 1301(a)(1)) for purposes of title XIX of the Social Security Act (42 U.S.C. 1396 et seq.).

(i) SUNSET.—This section shall not apply to items and services furnished after the end of the recession adjustment period.

(j) LIMITATION ON FMAP CHANGE.—The increase in FMAP effected under section 614 of the Children's Health Insurance Program Reauthorization Act of 2009 shall not apply in the computation of the enhanced FMAP under title XXI or XIX of the Social Security Act for any period (notwithstanding subsection (i)).

SEC. 5002. TEMPORARY INCREASE IN DSH ALLOTMENTS DURING RECESSION.

Section 1923(f)(3) of the Social Security Act (42 U.S.C. 1396r–4(f)(3)) is amended—

(1) in subparagraph (A), by striking "paragraph (6)" and inserting "paragraph (6) and subparagraph (E)"; and

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

"(E) TEMPORARY INCREASE IN ALLOTMENTS DURING RECESSION.—

"(i) IN GENERAL.—Subject to clause (ii), the DSH allotment for any State—

"(I) for fiscal year 2009 is equal to 102.5 percent of the DSH allotment that would be determined under this paragraph for the State for fiscal year 2009 without application of this subparagraph, notwithstanding subparagraphs (B) and (C);

"(II) for fiscal year 2010 is equal to 102.5 percent of the DSH allotment for the State for fiscal year 2009, as determined under subclause (I); and

"(III) for each succeeding fiscal year is equal to the DSH allotment for the State under this paragraph determined without applying subclauses (I) and (II).

"(ii) APPLICATION.—Clause (i) shall not apply to a State for a year in the case that the DSH allotment for such State for such year under this paragraph determined without applying clause (i) would grow higher than the DSH allotment specified under clause (i) for the State for such year.".

SEC. 5003. EXTENSION OF MORATORIA ON CERTAIN MEDICAID FINAL REGULATIONS.

(a) FINAL REGULATIONS RELATING TO OPTIONAL CASE MANAGEMENT SERVICES AND ALLOWABLE PROVIDER TAXES.—Section 7001(a)(3)(A) of the Supplemental Appropriations Act, 2008 (Public Law 110–252) is amended by striking "April 1, 2009" and inserting "July 1, 2009".

(b) FINAL REGULATION RELATING TO SCHOOL-BASED ADMINISTRATION AND SCHOOL-BASED TRANSPORTATION.—Section 206 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Public Law 110–173), as amended by section 7001(a)(2) of the Supplemental Appropriations Act, 2008 (Public Law 110–252), is amended by inserting "(July 1, 2009, in the case of the final regulation relating to school-based administration and school-based transportation)" after "April 1, 2009,".

(c) FINAL REGULATION RELATING TO OUTPATIENT HOSPITAL FACILITY SERVICES.—Notwithstanding any other provision of law, with respect to expenditures for services furnished during the period beginning on December 8, 2008, and ending on June 30, 2009, the Secretary of Health and Human Services shall not take any action (through promulgation of regulation, issuance of regulatory guidance, use of Federal payment audit procedures, or other administrative action, policy, or practice, including a Medical Assistance Manual transmittal or letter to State Medicaid directors) to implement the final regulation relating to clarification of the definition of outpatient hospital facility services under the Medicaid program published on November 7, 2008 (73 Federal Register 66187).

(d) SENSE OF CONGRESS.—It is the sense of Congress that the Secretary of Health and Human Services should not promulgate as final regulations any of the following proposed Medicaid regulations:

(1) COST LIMITS FOR CERTAIN PROVIDERS.—The proposed regulation published on January 18, 2007, (72 Federal Register 2236) (and the purported final regulation published on May 29, 2007 (72 Federal Register 29748) and determined by the United States District Court for the District of Columbia to have been "improperly promulgated", *Alameda County Medical Center, et al., v. Leavitt, et al.,* Civil Action No. 08-0422, Mem. at 4 (D.D.C. May 23, 2008)).

(2) PAYMENTS FOR GRADUATE MEDICAL EDUCATION.—The proposed regulation published on May 23, 2007 (72 Federal Register 28930).

(3) REHABILITATIVE SERVICES.—The proposed regulation published on August 13, 2007 (72 Federal Register 45201).

SEC. 5004. EXTENSION OF TRANSITIONAL MEDICAL ASSISTANCE (TMA).

(a) 18-MONTH EXTENSION.—

(1) IN GENERAL.—Sections 1902(e)(1)(B) and 1925(f) of the Social Security Act (42 U.S.C. 1396a(e)(1)(B), 1396r–6(f)) are

each amended by striking "September 30, 2003" and inserting "December 31, 2010".

(2) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on July 1, 2009.

(b) STATE OPTION OF INITIAL 12-MONTH ELIGIBILITY.—Section 1925 of the Social Security Act (42 U.S.C. 1396r–6) is amended—

(1) in subsection (a)(1), by inserting "but subject to paragraph (5)" after "Notwithstanding any other provision of this title";

(2) by adding at the end of subsection (a) the following:

"(5) OPTION OF 12-MONTH INITIAL ELIGIBILITY PERIOD.—A State may elect to treat any reference in this subsection to a 6-month period (or 6 months) as a reference to a 12-month period (or 12 months). In the case of such an election, subsection (b) shall not apply."; and

(3) in subsection (b)(1), by inserting "but subject to subsection (a)(5)" after "Notwithstanding any other provision of this title".

(c) REMOVAL OF REQUIREMENT FOR PREVIOUS RECEIPT OF MEDICAL ASSISTANCE.—Section 1925(a)(1) of such Act (42 U.S.C. 1396r–6(a)(1)), as amended by subsection (b)(1), is further amended—

(1) by inserting "subparagraph (B) and" before "paragraph (5)";

(2) by redesignating the matter after "REQUIREMENT.—" as a subparagraph (A) with the heading "IN GENERAL.—" and with the same indentation as subparagraph (B) (as added by paragraph (3)); and

(3) by adding at the end the following:

"(B) STATE OPTION TO WAIVE REQUIREMENT FOR 3 MONTHS BEFORE RECEIPT OF MEDICAL ASSISTANCE.—A State may, at its option, elect also to apply subparagraph (A) in the case of a family that was receiving such aid for fewer than three months or that had applied for and was eligible for such aid for fewer than 3 months during the 6 immediately preceding months described in such subparagraph.".

(d) CMS REPORT ON ENROLLMENT AND PARTICIPATION RATES UNDER TMA.—Section 1925 of such Act (42 U.S.C. 1396r–6), as amended by this section, is further amended by adding at the end the following new subsection:

"(g) COLLECTION AND REPORTING OF PARTICIPATION INFORMATION.—

"(1) COLLECTION OF INFORMATION FROM STATES.—Each State shall collect and submit to the Secretary (and make publicly available), in a format specified by the Secretary, information on average monthly enrollment and average monthly participation rates for adults and children under this section and of the number and percentage of children who become ineligible for medical assistance under this section whose medical assistance is continued under another eligibility category or who are enrolled under the State's child health plan under title XXI. Such information shall be submitted at the same time and frequency in which other enrollment information under this title is submitted to the Secretary.

"(2) ANNUAL REPORTS TO CONGRESS.—Using the information submitted under paragraph (1), the Secretary shall submit

to Congress annual reports concerning enrollment and participation rates described in such paragraph.".

(e) EFFECTIVE DATE.—The amendments made by subsections (b) through (d) shall take effect on July 1, 2009.

SEC. 5005. EXTENSION OF THE QUALIFYING INDIVIDUAL (QI) PROGRAM.

(a) EXTENSION.—Section 1902(a)(10)(E)(iv) of the Social Security Act (42 U.S.C. 1396a(a)(10)(E)(iv)) is amended by striking "December 2009" and inserting "December 2010".

(b) EXTENDING TOTAL AMOUNT AVAILABLE FOR ALLOCATION.—Section 1933(g) of such Act (42 U.S.C. 1396u–3(g)) is amended—

(1) in paragraph (2)—

(A) by striking "and" at the end of subparagraph (K);

(B) in subparagraph (L), by striking the period at the end and inserting a semicolon; and

(C) by adding at the end the following new subparagraphs:

"(M) for the period that begins on January 1, 2010, and ends on September 30, 2010, the total allocation amount is $412,500,000; and

"(N) for the period that begins on October 1, 2010, and ends on December 31, 2010, the total allocation amount is $150,000,000."; and

(2) in paragraph (3), in the matter preceding subparagraph (A), by striking "or (L)" and inserting "(L), or (N)".

SEC. 5006. PROTECTIONS FOR INDIANS UNDER MEDICAID AND CHIP.

(a) PREMIUMS AND COST SHARING PROTECTION UNDER MEDICAID.—

(1) IN GENERAL.—Section 1916 of the Social Security Act (42 U.S.C. 1396o) is amended—

(A) in subsection (a), in the matter preceding paragraph (1), by striking "and (i)" and inserting ", (i), and (j)"; and

(B) by adding at the end the following new subsection:

"(j) NO PREMIUMS OR COST SHARING FOR INDIANS FURNISHED ITEMS OR SERVICES DIRECTLY BY INDIAN HEALTH PROGRAMS OR THROUGH REFERRAL UNDER CONTRACT HEALTH SERVICES.—

"(1) NO COST SHARING FOR ITEMS OR SERVICES FURNISHED TO INDIANS THROUGH INDIAN HEALTH PROGRAMS.—

"(A) IN GENERAL.—No enrollment fee, premium, or similar charge, and no deduction, copayment, cost sharing, or similar charge shall be imposed against an Indian who is furnished an item or service directly by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization or through referral under contract health services for which payment may be made under this title.

"(B) NO REDUCTION IN AMOUNT OF PAYMENT TO INDIAN HEALTH PROVIDERS.—Payment due under this title to the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization, or a health care provider through referral under contract health services for the furnishing of an item or service to an Indian who is eligible for assistance under such title, may not be reduced by the amount of any enrollment fee, premium, or similar charge, or any deduction, copayment, cost

sharing, or similar charge that would be due from the Indian but for the operation of subparagraph (A).

"(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed as restricting the application of any other limitations on the imposition of premiums or cost sharing that may apply to an individual receiving medical assistance under this title who is an Indian.".

(2) CONFORMING AMENDMENT.—Section 1916A(b)(3) of such Act (42 U.S.C. 1396o–1(b)(3)) is amended—

(A) in subparagraph (A), by adding at the end the following new clause:

"(vii) An Indian who is furnished an item or service directly by the Indian Health Service, an Indian Tribe, Tribal Organization or Urban Indian Organization or through referral under contract health services."; and

(B) in subparagraph (B), by adding at the end the following new clause:

"(x) Items and services furnished to an Indian directly by the Indian Health Service, an Indian Tribe, Tribal Organization or Urban Indian Organization or through referral under contract health services.".

(b) TREATMENT OF CERTAIN PROPERTY FROM RESOURCES FOR MEDICAID AND CHIP ELIGIBILITY.—

(1) MEDICAID.—Section 1902 of the Social Security Act (42 U.S.C. 1396a), as amended by sections 203(c) and 211(a)(1)(A)(ii) of the Children's Health Insurance Program Reauthorization Act of 2009 (Public Law 111–3), is amended by adding at the end the following new subsection:

"(ff) Notwithstanding any other requirement of this title or any other provision of Federal or State law, a State shall disregard the following property from resources for purposes of determining the eligibility of an individual who is an Indian for medical assistance under this title:

"(1) Property, including real property and improvements, that is held in trust, subject to Federal restrictions, or otherwise under the supervision of the Secretary of the Interior, located on a reservation, including any federally recognized Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established by the Alaska Native Claims Settlement Act, and Indian allotments on or near a reservation as designated and approved by the Bureau of Indian Affairs of the Department of the Interior.

"(2) For any federally recognized Tribe not described in paragraph (1), property located within the most recent boundaries of a prior Federal reservation.

"(3) Ownership interests in rents, leases, royalties, or usage rights related to natural resources (including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish, and shellfish) resulting from the exercise of federally protected rights.

"(4) Ownership interests in or usage rights to items not covered by paragraphs (1) through (3) that have unique religious, spiritual, traditional, or cultural significance or rights that support subsistence or a traditional lifestyle according to applicable tribal law or custom.".

(2) APPLICATION TO CHIP.—Section 2107(e)(1) of such Act (42 U.S.C. 1397gg(e)(1)), as amended by sections 203(a)(2),

203(d)(2), 214(b), 501(d)(2), and 503(a)(1) of the Children's Health Insurance Program Reauthorization Act of 2009 (Public Law 111–3), is amended—

(A) by redesignating subparagraphs (C) through (I), as subparagraphs (D) through (J), respectively; and

(B) by inserting after subparagraph (B), the following new subparagraph:

"(C) Section 1902(ff) (relating to disregard of certain property for purposes of making eligibility determinations).".

(c) CONTINUATION OF CURRENT LAW PROTECTIONS OF CERTAIN INDIAN PROPERTY FROM MEDICAID ESTATE RECOVERY.—Section 1917(b)(3) of the Social Security Act (42 U.S.C. 1396p(b)(3)) is amended—

(1) by inserting "(A)" after "(3)"; and

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

"(B) The standards specified by the Secretary under subparagraph (A) shall require that the procedures established by the State agency under subparagraph (A) exempt income, resources, and property that are exempt from the application of this subsection as of April 1, 2003, under manual instructions issued to carry out this subsection (as in effect on such date) because of the Federal responsibility for Indian Tribes and Alaska Native Villages. Nothing in this subparagraph shall be construed as preventing the Secretary from providing additional estate recovery exemptions under this title for Indians.".

(d) RULES APPLICABLE UNDER MEDICAID AND CHIP TO MANAGED CARE ENTITIES WITH RESPECT TO INDIAN ENROLLEES AND INDIAN HEALTH CARE PROVIDERS AND INDIAN MANAGED CARE ENTITIES.—

(1) IN GENERAL.—Section 1932 of the Social Security Act (42 U.S.C. 1396u–2) is amended by adding at the end the following new subsection:

"(h) SPECIAL RULES WITH RESPECT TO INDIAN ENROLLEES, INDIAN HEALTH CARE PROVIDERS, AND INDIAN MANAGED CARE ENTITIES.—

"(1) ENROLLEE OPTION TO SELECT AN INDIAN HEALTH CARE PROVIDER AS PRIMARY CARE PROVIDER.—In the case of a non-Indian Medicaid managed care entity that—

"(A) has an Indian enrolled with the entity; and

"(B) has an Indian health care provider that is participating as a primary care provider within the network of the entity,

insofar as the Indian is otherwise eligible to receive services from such Indian health care provider and the Indian health care provider has the capacity to provide primary care services to such Indian, the contract with the entity under section 1903(m) or under section 1905(t)(3) shall require, as a condition of receiving payment under such contract, that the Indian shall be allowed to choose such Indian health care provider as the Indian's primary care provider under the entity.

"(2) ASSURANCE OF PAYMENT TO INDIAN HEALTH CARE PROVIDERS FOR PROVISION OF COVERED SERVICES.—Each contract with a managed care entity under section 1903(m) or under section 1905(t)(3) shall require any such entity, as a condition of receiving payment under such contract, to satisfy the following requirements:

"(A) DEMONSTRATION OF ACCESS TO INDIAN HEALTH CARE PROVIDERS AND APPLICATION OF ALTERNATIVE PAYMENT ARRANGEMENTS.—Subject to subparagraph (C), to—

"(i) demonstrate that the number of Indian health care providers that are participating providers with respect to such entity are sufficient to ensure timely access to covered Medicaid managed care services for those Indian enrollees who are eligible to receive services from such providers; and

"(ii) agree to pay Indian health care providers, whether such providers are participating or nonparticipating providers with respect to the entity, for covered Medicaid managed care services provided to those Indian enrollees who are eligible to receive services from such providers at a rate equal to the rate negotiated between such entity and the provider involved or, if such a rate has not been negotiated, at a rate that is not less than the level and amount of payment which the entity would make for the services if the services were furnished by a participating provider which is not an Indian health care provider.

The Secretary shall establish procedures for applying the requirements of clause (i) in States where there are no or few Indian health providers.

"(B) PROMPT PAYMENT.—To agree to make prompt payment (consistent with rule for prompt payment of providers under section 1932(f)) to Indian health care providers that are participating providers with respect to such entity or, in the case of an entity to which subparagraph (A)(ii) or (C) applies, that the entity is required to pay in accordance with that subparagraph.

"(C) APPLICATION OF SPECIAL PAYMENT REQUIREMENTS FOR FEDERALLY-QUALIFIED HEALTH CENTERS AND FOR SERVICES PROVIDED BY CERTAIN INDIAN HEALTH CARE PROVIDERS.—

"(i) FEDERALLY-QUALIFIED HEALTH CENTERS.—

"(I) MANAGED CARE ENTITY PAYMENT REQUIREMENT.—To agree to pay any Indian health care provider that is a federally-qualified health center under this title but not a participating provider with respect to the entity, for the provision of covered Medicaid managed care services by such provider to an Indian enrollee of the entity at a rate equal to the amount of payment that the entity would pay a federally-qualified health center that is a participating provider with respect to the entity but is not an Indian health care provider for such services.

"(II) CONTINUED APPLICATION OF STATE REQUIREMENT TO MAKE SUPPLEMENTAL PAYMENT.—Nothing in subclause (I) or subparagraph (A) or (B) shall be construed as waiving the application of section 1902(bb)(5) regarding the State plan requirement to make any supplemental payment due under such section to a federally-qualified health center for services furnished by such center to an enrollee of a managed care entity (regardless

of whether the federally-qualified health center is or is not a participating provider with the entity).

"(ii) PAYMENT RATE FOR SERVICES PROVIDED BY CERTAIN INDIAN HEALTH CARE PROVIDERS.—If the amount paid by a managed care entity to an Indian health care provider that is not a federally-qualified health center for services provided by the provider to an Indian enrollee with the managed care entity is less than the rate that applies to the provision of such services by the provider under the State plan, the plan shall provide for payment to the Indian health care provider, whether the provider is a participating or nonparticipating provider with respect to the entity, of the difference between such applicable rate and the amount paid by the managed care entity to the provider for such services.

"(D) CONSTRUCTION.—Nothing in this paragraph shall be construed as waiving the application of section 1902(a)(30)(A) (relating to application of standards to assure that payments are consistent with efficiency, economy, and quality of care).

"(3) SPECIAL RULE FOR ENROLLMENT FOR INDIAN MANAGED CARE ENTITIES.—Regarding the application of a Medicaid managed care program to Indian Medicaid managed care entities, an Indian Medicaid managed care entity may restrict enrollment under such program to Indians in the same manner as Indian Health Programs may restrict the delivery of services to Indians.

"(4) DEFINITIONS.—For purposes of this subsection:

"(A) INDIAN HEALTH CARE PROVIDER.—The term 'Indian health care provider' means an Indian Health Program or an Urban Indian Organization.

"(B) INDIAN MEDICAID MANAGED CARE ENTITY.—The term 'Indian Medicaid managed care entity' means a managed care entity that is controlled (within the meaning of the last sentence of section 1903(m)(1)(C)) by the Indian Health Service, a Tribe, Tribal Organization, or Urban Indian Organization, or a consortium, which may be composed of 1 or more Tribes, Tribal Organizations, or Urban Indian Organizations, and which also may include the Service.

"(C) NON-INDIAN MEDICAID MANAGED CARE ENTITY.—The term 'non-Indian Medicaid managed care entity' means a managed care entity that is not an Indian Medicaid managed care entity.

"(D) COVERED MEDICAID MANAGED CARE SERVICES.—The term 'covered Medicaid managed care services' means, with respect to an individual enrolled with a managed care entity, items and services for which benefits are available with respect to the individual under the contract between the entity and the State involved.

"(E) MEDICAID MANAGED CARE PROGRAM.—The term 'Medicaid managed care program' means a program under sections 1903(m), 1905(t), and 1932 and includes a managed care program operating under a waiver under section 1915(b) or 1115 or otherwise.".

(2) APPLICATION TO CHIP.—Section 2107(e)(1) of such Act (42 U.S.C. 1397gg(1)), as amended by subsection (b)(2), is amended—

(A) by redesignating subparagraph (J) as subparagraph (K); and

(B) by inserting after subparagraph (I) the following new subparagraph:

"(J) Subsections (a)(2)(C) and (h) of section 1932.".

(e) CONSULTATION ON MEDICAID, CHIP, AND OTHER HEALTH CARE PROGRAMS FUNDED UNDER THE SOCIAL SECURITY ACT INVOLVING INDIAN HEALTH PROGRAMS AND URBAN INDIAN ORGANIZATIONS.—

(1) CONSULTATION WITH TRIBAL TECHNICAL ADVISORY GROUP (TTAG).—The Secretary of Health and Human Services shall maintain within the Centers for Medicaid & Medicare Services (CMS) a Tribal Technical Advisory Group (TTAG), which was first established in accordance with requirements of the charter dated September 30, 2003, and the Secretary of Health and Human Services shall include in such Group a representative of a national urban Indian health organization and a representative of the Indian Health Service. The inclusion of a representative of a national urban Indian health organization in such Group shall not affect the nonapplication of the Federal Advisory Committee Act (5 U.S.C. App.) to such Group.

(2) SOLICITATION OF ADVICE UNDER MEDICAID AND CHIP.—

(A) MEDICAID STATE PLAN AMENDMENT.—Section 1902(a) of the Social Security Act (42 U.S.C. 1396a(a)), as amended by section 501(d)(1) of the Children's Health Insurance Program Reauthorization Act of 2009 (Public Law 111–3), (42 U.S.C. 1396a(a)) is amended—

(i) in paragraph (71), by striking "and" at the end;

(ii) in paragraph (72), by striking the period at the end and inserting "; and"; and

(iii) by inserting after paragraph (72), the following new paragraph:

"(73) in the case of any State in which 1 or more Indian Health Programs or Urban Indian Organizations furnishes health care services, provide for a process under which the State seeks advice on a regular, ongoing basis from designees of such Indian Health Programs and Urban Indian Organizations on matters relating to the application of this title that are likely to have a direct effect on such Indian Health Programs and Urban Indian Organizations and that—

"(A) shall include solicitation of advice prior to submission of any plan amendments, waiver requests, and proposals for demonstration projects likely to have a direct effect on Indians, Indian Health Programs, or Urban Indian Organizations; and

"(B) may include appointment of an advisory committee and of a designee of such Indian Health Programs and Urban Indian Organizations to the medical care advisory committee advising the State on its State plan under this title.".

(B) APPLICATION TO CHIP.—Section 2107(e)(1) of such Act (42 U.S.C. 1397gg(1)), as amended by subsections (b)(2) and (d) (2), is amended—

(i) by redesignating subparagraphs (B), (C), (D), (E), (F), (G), (H), (I), (J), and (K) as subparagraphs (D), (F), (B), (E), (G), (I), (H), (J), (K), and (L), respectively;

(ii) by moving such subparagraphs so as to appear in alphabetical order; and

(iii) by inserting after subparagraph (B) (as so redesiganted and moved) the following new subparagraph:

"(C) Section 1902(a)(73) (relating to requiring certain States to seek advice from designees of Indian Health Programs and Urban Indian Organizations).".

(3) RULE OF CONSTRUCTION.—Nothing in the amendments made by this subsection shall be construed as superseding existing advisory committees, working groups, guidance, or other advisory procedures established by the Secretary of Health and Human Services or by any State with respect to the provision of health care to Indians.

(f) EFFECTIVE DATE.—The amendments made by this section shall take effect on July 1, 2009.

SEC. 5007. FUNDING FOR OVERSIGHT AND IMPLEMENTATION.

(a) OVERSIGHT.—For purposes of ensuring the proper expenditure of Federal funds under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.), there is appropriated to the Office of the Inspector General of the Department of Health and Human Services, out of any money in the Treasury not otherwise appropriated and without further appropriation, $31,250,000 for fiscal year 2009, which shall remain available for expenditure until September 30, 2011, and shall be in addition to any other amounts appropriated or made available to such Office for such purposes.

(b) IMPLEMENTATION OF INCREASED FMAP.—For purposes of carrying out section 5001, there is appropriated to the Secretary of Health and Human Services, out of any money in the Treasury not otherwise appropriated and without further appropriation, $5,000,000 for fiscal year 2009, which shall remain available for expenditure until September 30, 2011, and shall be in addition to any other amounts appropriated or made available to such Secretary for such purposes.

SEC. 5008. GAO STUDY AND REPORT REGARDING STATE NEEDS DURING PERIODS OF NATIONAL ECONOMIC DOWNTURN.

(a) IN GENERAL.—The Comptroller General of the United States shall study the period of national economic downturn in effect on the date of enactment of this Act, as well as previous periods of national economic downturn since 1974, for the purpose of developing recommendations for addressing the needs of States during such periods. As part of such analysis, the Comptroller General shall study the past and projected effects of temporary increases in the Federal medical assistance percentage under the Medicaid program with respect to such periods.

(b) REPORT.—Not later than April 1, 2011, the Comptroller General of the United States shall submit a report to the appropriate committees of Congress on the results of the study conducted under paragraph (1). Such report shall include the following:

(1) Such recommendations as the Comptroller General determines appropriate for modifying the national economic downturn assistance formula for temporary adjustment of the

Federal medical assistance percentage under Medicaid (also referred to as a "countercyclical FMAP") described in GAO report number GAO–07–97 to improve the effectiveness of the application of such percentage in addressing the needs of States during periods of national economic downturn, including recommendations for—

(A) improvements to the factors that would begin and end the application of such percentage;

(B) how the determination of the amount of such percentage could be adjusted to address State and regional economic variations during such periods; and

(C) how the determination of the amount of such percentage could be adjusted to be more responsive to actual Medicaid costs incurred by States during such periods.

(2) An analysis of the impact on States during such periods of—

(A) declines in private health benefits coverage;

(B) declines in State revenues; and

(C) caseload maintenance and growth under Medicaid, the Children's Health Insurance Program, or any other publicly-funded programs to provide health benefits coverage for State residents.

(3) Identification of, and recommendations for addressing, the effects on States of any other specific economic indicators that the Comptroller General determines appropriate.

TITLE VI—BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM

SEC. 6000. TABLE OF CONTENTS.

The table of contents of this title is as follows:

SEC. 6001. BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM.

(a) The Assistant Secretary of Commerce for Communications and Information (Assistant Secretary), in consultation with the Federal Communications Commission (Commission), shall establish a national broadband service development and expansion program in conjunction with the technology opportunities program, which shall be referred to as the Broadband Technology Opportunities Program. The Assistant Secretary shall ensure that the program complements and enhances and does not conflict with other Federal broadband initiatives and programs.

(b) The purposes of the program are to—

(1) provide access to broadband service to consumers residing in unserved areas of the United States;

(2) provide improved access to broadband service to consumers residing in underserved areas of the United States;

(3) provide broadband education, awareness, training, access, equipment, and support to—

(A) schools, libraries, medical and healthcare providers, community colleges and other institutions of higher education, and other community support organizations and

entities to facilitate greater use of broadband service by or through these organizations;

(B) organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations; and

(C) job-creating strategic facilities located within a State-designated economic zone, Economic Development District designated by the Department of Commerce, Renewal Community or Empowerment Zone designated by the Department of Housing and Urban Development, or Enterprise Community designated by the Department of Agriculture;

(4) improve access to, and use of, broadband service by public safety agencies; and

(5) stimulate the demand for broadband, economic growth, and job creation.

(c) The Assistant Secretary may consult a State, the District of Columbia, or territory or possession of the United States with respect to—

(1) the identification of areas described in subsection (b)(1) or (2) located in that State; and

(2) the allocation of grant funds within that State for projects in or affecting the State.

(d) The Assistant Secretary shall—

(1) establish and implement the grant program as expeditiously as practicable;

(2) ensure that all awards are made before the end of fiscal year 2010;

(3) seek such assurances as may be necessary or appropriate from grantees under the program that they will substantially complete projects supported by the program in accordance with project timelines, not to exceed 2 years following an award; and

(4) report on the status of the program to the Committees on Appropriations of the House of Representatives and the Senate, the Committee on Energy and Commerce of the House of Representatives, and the Committee on Commerce, Science, and Transportation of the Senate, every 90 days.

(e) To be eligible for a grant under the program, an applicant shall—

(1)(A) be a State or political subdivision thereof, the District of Columbia, a territory or possession of the United States, an Indian tribe (as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(b)) or native Hawaiian organization;

(B) a nonprofit—

(i) foundation,

(ii) corporation,

(iii) institution, or

(iv) association; or

(C) any other entity, including a broadband service or infrastructure provider, that the Assistant Secretary finds by rule to be in the public interest. In establishing such rule, the Assistant Secretary shall to the extent practicable promote the purposes of this section in a technologically neutral manner;

(2) submit an application, at such time, in such form, and containing such information as the Assistant Secretary may require;

(3) provide a detailed explanation of how any amount received under the program will be used to carry out the purposes of this section in an efficient and expeditious manner, including a showing that the project would not have been implemented during the grant period without Federal grant assistance;

(4) demonstrate, to the satisfaction of the Assistant Secretary, that it is capable of carrying out the project or function to which the application relates in a competent manner in compliance with all applicable Federal, State, and local laws;

(5) demonstrate, to the satisfaction of the Assistant Secretary, that it will appropriate (if the applicant is a State or local government agency) or otherwise unconditionally obligate, from non-Federal sources, funds required to meet the requirements of subsection (f);

(6) disclose to the Assistant Secretary the source and amount of other Federal or State funding sources from which the applicant receives, or has applied for, funding for activities or projects to which the application relates; and

(7) provide such assurances and procedures as the Assistant Secretary may require to ensure that grant funds are used and accounted for in an appropriate manner.

(f) The Federal share of any project may not exceed 80 percent, except that the Assistant Secretary may increase the Federal share of a project above 80 percent if—

(1) the applicant petitions the Assistant Secretary for a waiver; and

(2) the Assistant Secretary determines that the petition demonstrates financial need.

(g) The Assistant Secretary may make competitive grants under the program to—

(1) acquire equipment, instrumentation, networking capability, hardware and software, digital network technology, and infrastructure for broadband services;

(2) construct and deploy broadband service related infrastructure;

(3) ensure access to broadband service by community anchor institutions;

(4) facilitate access to broadband service by low-income, unemployed, aged, and otherwise vulnerable populations in order to provide educational and employment opportunities to members of such populations;

(5) construct and deploy broadband facilities that improve public safety broadband communications services; and

(6) undertake such other projects and activities as the Assistant Secretary finds to be consistent with the purposes for which the program is established.

(h) The Assistant Secretary, in awarding grants under this section, shall, to the extent practical—

(1) award not less than 1 grant in each State;

(2) consider whether an application to deploy infrastructure in an area—

(A) will, if approved, increase the affordability of, and subscribership to, service to the greatest population of users in the area;

(B) will, if approved, provide the greatest broadband speed possible to the greatest population of users in the area;

(C) will, if approved, enhance service for health care delivery, education, or children to the greatest population of users in the area; and

(D) will, if approved, not result in unjust enrichment as a result of support for non-recurring costs through another Federal program for service in the area; and

(3) consider whether the applicant is a socially and economically disadvantaged small business concern as defined under section 8(a) of the Small Business Act (15 U.S.C. 637).

(i) The Assistant Secretary—

(1) shall require any entity receiving a grant pursuant to this section to report quarterly, in a format specified by the Assistant Secretary, on such entity's use of the assistance and progress fulfilling the objectives for which such funds were granted, and the Assistant Secretary shall make these reports available to the public;

(2) may establish additional reporting and information requirements for any recipient of any assistance made available pursuant to this section;

(3) shall establish appropriate mechanisms to ensure appropriate use and compliance with all terms of any use of funds made available pursuant to this section;

(4) may, in addition to other authority under applicable law, deobligate awards to grantees that demonstrate an insufficient level of performance, or wasteful or fraudulent spending, as defined in advance by the Assistant Secretary, and award these funds competitively to new or existing applicants consistent with this section; and

(5) shall create and maintain a fully searchable database, accessible on the Internet at no cost to the public, that contains at least a list of each entity that has applied for a grant under this section, a description of each application, the status of each such application, the name of each entity receiving funds made available pursuant to this section, the purpose for which such entity is receiving such funds, each quarterly report submitted by the entity pursuant to this section, and such other information sufficient to allow the public to understand and monitor grants awarded under the program.

(j) Concurrent with the issuance of the Request for Proposal for grant applications pursuant to this section, the Assistant Secretary shall, in coordination with the Commission, publish the non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under this section, including, at a minimum, adherence to the principles contained in the Commission's broadband policy statement (FCC 05-15, adopted August 5, 2005).

(k)(1) Not later than 1 year after the date of enactment of this section, the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a report containing a national broadband plan.

(2) The national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal. The plan shall also include—

(A) an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States;

(B) a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public;

(C) an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section; and

(D) a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.

(3) In developing the plan, the Commission shall have access to data provided to other Government agencies under the Broadband Data Improvement Act (47 U.S.C. 1301 note).

(l) The Assistant Secretary shall develop and maintain a comprehensive nationwide inventory map of existing broadband service capability and availability in the United States that depicts the geographic extent to which broadband service capability is deployed and available from a commercial provider or public provider throughout each State. Not later than 2 years after the date of the enactment of this Act, the Assistant Secretary shall make the broadband inventory map developed and maintained pursuant to this section accessible by the public on a World Wide Web site of the National Telecommunications and Information Administration in a form that is interactive and searchable.

(m) The Assistant Secretary shall have the authority to prescribe such rules as are necessary to carry out the purposes of this section.

TITLE VII—LIMITS ON EXECUTIVE COMPENSATION

SEC. 7000. TABLE OF CONTENTS.

The table of contents of this title is as follows:

SEC. 7001. EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE.

Section 111 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221) is amended to read as follows:

"SEC. 111. EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE.

"(a) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

"(1) SENIOR EXECUTIVE OFFICER.—The term 'senior executive officer' means an individual who is 1 of the top 5 most highly paid executives of a public company, whose compensation is required to be disclosed pursuant to the Securities Exchange Act of 1934, and any regulations issued thereunder, and non-public company counterparts.

"(2) GOLDEN PARACHUTE PAYMENT.—The term 'golden parachute payment' means any payment to a senior executive officer for departure from a company for any reason, except for payments for services performed or benefits accrued.

"(3) TARP RECIPIENT.—The term 'TARP recipient' means any entity that has received or will receive financial assistance under the financial assistance provided under the TARP.

"(4) COMMISSION.—The term 'Commission' means the Securities and Exchange Commission.

"(5) PERIOD IN WHICH OBLIGATION IS OUTSTANDING; RULE OF CONSTRUCTION.—For purposes of this section, the period in which any obligation arising from financial assistance provided under the TARP remains outstanding does not include any period during which the Federal Government only holds warrants to purchase common stock of the TARP recipient.

"(b) EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE.—

"(1) ESTABLISHMENT OF STANDARDS.—During the period in which any obligation arising from financial assistance provided under the TARP remains outstanding, each TARP recipient shall be subject to—

"(A) the standards established by the Secretary under this section; and

"(B) the provisions of section 162(m)(5) of the Internal Revenue Code of 1986, as applicable.

"(2) STANDARDS REQUIRED.—The Secretary shall require each TARP recipient to meet appropriate standards for executive compensation and corporate governance.

"(3) SPECIFIC REQUIREMENTS.—The standards established under paragraph (2) shall include the following:

"(A) Limits on compensation that exclude incentives for senior executive officers of the TARP recipient to take unnecessary and excessive risks that threaten the value of such recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.

"(B) A provision for the recovery by such TARP recipient of any bonus, retention award, or incentive compensation paid to a senior executive officer and any of the next 20 most highly-compensated employees of the TARP recipient based on statements of earnings, revenues, gains, or other criteria that are later found to be materially inaccurate.

"(C) A prohibition on such TARP recipient making any golden parachute payment to a senior executive officer or any of the next 5 most highly-compensated employees of the TARP recipient during the period in which any

obligation arising from financial assistance provided under the TARP remains outstanding.

"(D)(i) A prohibition on such TARP recipient paying or accruing any bonus, retention award, or incentive compensation during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding, except that any prohibition developed under this paragraph shall not apply to the payment of long-term restricted stock by such TARP recipient, provided that such long-term restricted stock—

"(I) does not fully vest during the period in which any obligation arising from financial assistance provided to that TARP recipient remains outstanding;

"(II) has a value in an amount that is not greater than ⅓ of the total amount of annual compensation of the employee receiving the stock; and

"(III) is subject to such other terms and conditions as the Secretary may determine is in the public interest.

"(ii) The prohibition required under clause (i) shall apply as follows:

"(I) For any financial institution that received financial assistance provided under the TARP equal to less than $25,000,000, the prohibition shall apply only to the most highly compensated employee of the financial institution.

"(II) For any financial institution that received financial assistance provided under the TARP equal to at least $25,000,000, but less than $250,000,000, the prohibition shall apply to at least the 5 most highly-compensated employees of the financial institution, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

"(III) For any financial institution that received financial assistance provided under the TARP equal to at least$250,000,000, but less than $500,000,000, the prohibition shall apply to the senior executive officers and at least the 10 next most highly-compensated employees, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

"(IV) For any financial institution that received financial assistance provided under the TARP equal to $500,000,000 or more, the prohibition shall apply to the senior executive officers and at least the 20 next most highly-compensated employees, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

"(iii) The prohibition required under clause (i) shall not be construed to prohibit any bonus payment required to be paid pursuant to a written employment contract executed on or before February 11, 2009, as such valid employment contracts are determined by the Secretary or the designee of the Secretary.

"(E) A prohibition on any compensation plan that would encourage manipulation of the reported earnings of such

TARP recipient to enhance the compensation of any of its employees.

"(F) A requirement for the establishment of a Board Compensation Committee that meets the requirements of subsection (c).

"(4) CERTIFICATION OF COMPLIANCE.—The chief executive officer and chief financial officer (or the equivalents thereof) of each TARP recipient shall provide a written certification of compliance by the TARP recipient with the requirements of this section—

"(A) in the case of a TARP recipient, the securities of which are publicly traded, to the Securities and Exchange Commission, together with annual filings required under the securities laws; and

"(B) in the case of a TARP recipient that is not a publicly traded company, to the Secretary.

"(c) BOARD COMPENSATION COMMITTEE.—

"(1) ESTABLISHMENT OF BOARD REQUIRED.—Each TARP recipient shall establish a Board Compensation Committee, comprised entirely of independent directors, for the purpose of reviewing employee compensation plans.

"(2) MEETINGS.—The Board Compensation Committee of each TARP recipient shall meet at least semiannually to discuss and evaluate employee compensation plans in light of an assessment of any risk posed to the TARP recipient from such plans.

"(3) COMPLIANCE BY NON-SEC REGISTRANTS.—In the case of any TARP recipient, the common or preferred stock of which is not registered pursuant to the Securities Exchange Act of 1934, and that has received $25,000,000 or less of TARP assistance, the duties of the Board Compensation Committee under this subsection shall be carried out by the board of directors of such TARP recipient.

"(d) LIMITATION ON LUXURY EXPENDITURES.—The board of directors of any TARP recipient shall have in place a company-wide policy regarding excessive or luxury expenditures, as identified by the Secretary, which may include excessive expenditures on—

"(1) entertainment or events;

"(2) office and facility renovations;

"(3) aviation or other transportation services; or

"(4) other activities or events that are not reasonable expenditures for staff development, reasonable performance incentives, or other similar measures conducted in the normal course of the business operations of the TARP recipient.

"(e) SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION.—

"(1) ANNUAL SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION.—Any proxy or consent or authorization for an annual or other meeting of the shareholders of any TARP recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding shall permit a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the Commission (which disclosure shall include the compensation discussion and analysis, the compensation tables, and any related material).

"(2) NONBINDING VOTE.—A shareholder vote described in paragraph (1) shall not be binding on the board of directors of a TARP recipient, and may not be construed as overruling

a decision by such board, nor to create or imply any additional fiduciary duty by such board, nor shall such vote be construed to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.

"(3) DEADLINE FOR RULEMAKING.—Not later than 1 year after the date of enactment of the American Recovery and Reinvestment Act of 2009, the Commission shall issue any final rules and regulations required by this subsection.

"(f) REVIEW OF PRIOR PAYMENTS TO EXECUTIVES.—

"(1) IN GENERAL.—The Secretary shall review bonuses, retention awards, and other compensation paid to the senior executive officers and the next 20 most highly-compensated employees of each entity receiving TARP assistance before the date of enactment of the American Recovery and Reinvestment Act of 2009, to determine whether any such payments were inconsistent with the purposes of this section or the TARP or were otherwise contrary to the public interest.

"(2) NEGOTIATIONS FOR REIMBURSEMENT.—If the Secretary makes a determination described in paragraph (1), the Secretary shall seek to negotiate with the TARP recipient and the subject employee for appropriate reimbursements to the Federal Government with respect to compensation or bonuses.

"(g) NO IMPEDIMENT TO WITHDRAWAL BY TARP RECIPIENTS.—Subject to consultation with the appropriate Federal banking agency (as that term is defined in section 3 of the Federal Deposit Insurance Act), if any, the Secretary shall permit a TARP recipient to repay any assistance previously provided under the TARP to such financial institution, without regard to whether the financial institution has replaced such funds from any other source or to any waiting period, and when such assistance is repaid, the Secretary shall liquidate warrants associated with such assistance at the current market price.

"(h) REGULATIONS.—The Secretary shall promulgate regulations to implement this section.".

SEC. 7002. APPLICABILITY WITH RESPECT TO LOAN MODIFICATIONS.

Section 109(a) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5219(a)) is amended—

(1) by striking "To the extent" and inserting the following:
"(1) IN GENERAL.—To the extent"; and

(2) by adding at the end the following:
"(2) WAIVER OF CERTAIN PROVISIONS IN CONNECTION WITH LOAN MODIFICATIONS.—The Secretary shall not be required to apply executive compensation restrictions under section 111, or to receive warrants or debt instruments under section 113, solely in connection with any loan modification under this section.".

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

Government Contracts Blog

Posted at 8:42 AM on July 6, 2009 by Sheppard Mullin

ARRA Risks -- Traps for the Unaware

While the promise of the $787 billion federal stimulus package is no doubt alluring to many companies, receiving Stimulus funds does not come without strings attached, posing risks for the unwary recipient.

For example:

- **Rules and Restrictions Apply to All Purchases Using Stimulus Funds**. While many commercial companies may not think that they are "government contractors," any company receiving **any** Stimulus Act funds -- including vendors and subcontractors ultimately providing goods or services for a Stimulus Act project -- are subject to the rules and restrictions inherent in the statute. Two of the stated hallmarks of the Stimulus Act are "oversight and accountability," and the statute extends these responsibilities to anyone receiving these federal funds, whether performing a federal contract underwritten with Stimulus funds or a State or local project that relies on stimulus funding. Moreover, despite the fact that the Act does not expressly apply to small purchases or to purchases of commercial products, regulatory authorities are thus far resisting any exceptions for small, common, or commercial purchases. What this means is that even though a company may simply provide a standard commercial product for a Stimulus-funded project, the strings are still attached. Like it or not, everyone who receives Stimulus money is considered a "government contractor."

- **Different Rules May Apply Depending on Whether the Stimulus Funds Are Distributed by the Federal Government or by a State or Local Government**. Unfortunately, the regulators on Capitol Hill have not seen fit to implement a single set of regulations governing the restrictions on Stimulus Act funds. Companies may find that they are subject to different sets of rules depending on the source through which the Stimulus funds are flowing.

- **Untrained Contracting Personnel.** The federal government is experiencing a shortage of trained contracting personnel, which means that many companies seeking Stimulus funds face administrative "slow downs" and personnel who may simply not know "what to do." This is further aggravated by the fact that many of the Stimulus funds are spent at the State or local level, where trained personnel who are familiar with the intricacies of federal law are -- quite simply -- not to be found. Unfortunately, this means that many companies are finding that the onus is on them to act as the "guide" as they navigate the difficult regulatory waters.

- **Quarterly Reporting Requirement**. Direct recipients of the Stimulus funds, such as prime contractors, are required to submit quarterly reports to the Government detailing a number of things – including the progress being made on the project, the amount of money spent to date, and (under certain circumstances) the salary amounts for the top five highest-paid employees. Perhaps one of the most difficult reporting requirements is that companies are also required to estimate the numbers of jobs created **or preserved** using the Stimulus funds. The guidance issued to date from the White House is vague and unclear as to how exactly these metrics should be measured, forcing companies to go through the time and effort of reaching reasoned estimates. Many companies are transferring the reporting requirements to all their suppliers and vendors to ensure that the reporting companies have the maximum amount of information available when ultimately reporting to the Government.

- **Buy American**. The Buy American requirements for construction projects under the Stimulus Act are incredibly complicated, even more so at the State or local level. Even companies that may be used to satisfying "country of origin" requirements under normal sales to the U.S. Government are finding that the Stimulus Act imposes different rules. The Buy American requirements have been addressed on our Blog here, here, and here.

- **Prevailing Wage Rates**. The Stimulus Act requires contractors performing certain labor functions to be paid based on a prevailing wage determination made by the U.S. Department of Labor. Normally, the prevailing wage requirements apply only to federal construction projects, but with the Stimulus Act, they reach much further.

- **Whistleblowers**. Federal law already presents a host of protections for people who blow the whistle on companieswho allegedly steal money from the U.S. Government. But the Stimulus Act includes several additional and onerous requirements, including the requirement that the whistleblower provisions flow down to subcontractors and that public notice be posted alerting employees of their whistleblower rights under the Act. The whistleblower protections under the Act are very broad and even extend to company audit personnel who may claim "reprisal" for routine investigations into potential fraud (even when investigating potential fraud is part of their regular responsibilities). This puts employers in an almost untenable position when it comes to disciplining audit personnel in the normal course of business.

- **Audit Rights**. Government audit rights under the Stimulus Act are extensive, especially at the State level, where a contractor may be subject to audit by the State, an agency Inspector General, the Government Accountability Office, and/or the Recovery Accountability and Transparency Board. The audit rights include the right to review documents, as well as the right to interview employees. We addressed this issue here and here.

- **Modifying the Regulations Moving Forward**. As if the risks are not substantial enough, complying with the regulatory requirements presents a bit of a moving target because the regulations are expected to change by summer's end. The public comment periods for the implementing regulations have closed, and it is expected that theGovernment will issue new, revised (and hopefully improved) regulations as soon as practicable. But exactly how those new regulations will differ from those currently in place is unknown.

While the Stimulus Act no doubt presents some attractive business prospects, we caution companies to enter the process with their eyes wide open, fully aware of the associated risks. Additional discussion of the Stimulus-related issues can be reviewed on our Blog at http://www.governmentcontractslawblog.com/articles/stimulus/.

Authored by:

David S. Gallacher

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U.S. Department of Labor

Secretary of Labor Hilda L. Solis

News Release

Printer-Friendly Version

EBSA News Release: [03/19/2009]
Contact Name: Gloria Della
Phone Number: (202) 693-8666
Release Number: 09-0301-NAT

Statement of Secretary of Labor Hilda L. Solis on COBRA subsidy under American Recovery and Reinvestment Act of 2009

WASHINGTON — Secretary of Labor Hilda L. Solis today issued the following statement regarding the Consolidated Omnibus Budget Reconciliation Act (COBRA) and the premium reduction under the American Recovery and Reinvestment Act (ARRA):

"America's workers and employers are the most productive in the world. With the labor and capital markets under financial stress, the Obama Administration is working to provide relief to American families. In February, the President signed into law the American Recovery and Reinvestment Act to create jobs, provide training opportunities for new jobs, extend unemployment benefits and help relieve the burden of health benefits.

"These programs are vitally important to the economic well-being of people who lost their jobs. Right now the federal government is beginning to implement the law to meet some of the basic needs of its citizens.

"The ARRA provides a 65 percent tax subsidy for the cost of health benefits, making them more affordable for the unemployed and their families. Millions of individuals, including those who previously declined employer-provided coverage under COBRA, will be eligible to receive a subsidy on their premiums for up to nine months.

"Today the Labor Department is publishing more information to help the public understand how the program works and how they can qualify for the premium subsidy for continuation of health coverage under private, state and federal programs. The model notices we are releasing enable employers to quickly spell out for former employees and their families how to take advantage of COBRA coverage and the subsidy.

"This administration is committed to putting Americans back to work so they can re-build the financial fabric of their lives. And the Labor Department is working quickly to make that happen."

Additional information is available at www.dol.gov/COBRA.

FAQs About COBRA Premium Reduction Under ARRA

General Information

Q1: I have heard that the stimulus package signed by the President included a temporary COBRA premium reduction. I would like more information.

The stimulus package, which was enacted as the American Recovery and Reinvestment Act of 2009 (ARRA) temporarily reduces the premium for COBRA coverage for eligible individuals. COBRA (the Consolidated Omnibus Budget Reconciliation Act of 1985) allows certain people to extend employer-provided group health coverage, if they would otherwise lose the coverage due to certain events such as divorce or loss of a job.

Individuals who are eligible for COBRA coverage because of their own or a family member's involuntarily termination from employment that occurred from September 1, 2008 through December 31, 2009 and who elect COBRA, may be eligible to pay a reduced premium. Eligible individuals pay only 35% of the full COBRA premiums under their plans for up to 9 months. This premium reduction is generally available for continuation coverage under the Federal COBRA provisions, as well as for group health insurance coverage under state continuation coverage laws.

If you were offered Federal COBRA continuation coverage as a result of an involuntary termination of employment that occurred at any time from September 1, 2008 through Feburary 16, 2009, and you declined to take COBRA at that time, or elected COBRA and later discontinued it, you may have another opportunity to elect COBRA coverage and pay a reduced premium.

Q2: What plans does the premium reduction apply to?

The COBRA premium reduction provisions apply to all group health plans sponsored by private-sector employers or employee organizations (unions) subject to the COBRA rules under the Employee Retirement Income Security Act of 1974 (ERISA). They also apply to plans sponsored by State or local governments subject to the continuation provisions under the Public Health Service Act, and plans in the Federal Employee Health Benefits Program (FEHBP). The premium reduction is also available for group health insurance that is required by State law to provide comparable continuation coverage (such as "mini-COBRA").

Q3: How can I tell if I am eligible to receive the COBRA premium reduction?

ARRA makes the premium reduction available for "assistance eligible individuals." An Assistance Eligible Individual is a COBRA qualified beneficiary who meets the following requirements:

- Is eligible for COBRA continuation coverage at any time during the period from September 1, 2008 through December 31, 2009;
- Elects COBRA coverage (when first offered or during the additional election period provided by ARRA); and
- The COBRA election opportunity relates to an involuntary termination of employment that occurred at some time from September 1, 2008 through December 31, 2009.

However, if you are eligible for other group health coverage (such as through a new employer's plan or a spouse's plan) or Medicare you not eligible for the premium reduction.

Moreover, electing the premium reduction disqualifies you for the Health Coverage Tax Credit, which could be more valuable to you than the premium reduction. Additionally, certain high-income individual may have to repay the amount of the premium reduction through an increase in their income taxes. See FAQ #9 below for more information.

Note: If the employee's termination of employment was for gross misconduct, the employee and any

dependents generally would not qualify for COBRA or the premium reduction.

Q4: In order to be an Assistance Eligible Individual, must the individual actually have coverage under the group health plan at the time of the involuntary termination of employment?

In general, yes. The individual must have coverage at the time of the involuntary termination of employment. This qualifying event must occur at any time from September 1, 2008 through December 31, 2009 and the individual must be eligible for COBRA coverage at any time during that period. Of course, newborns and children who were adopted or placed for adoption after the qualifying event are also considered qualified beneficiaries and so would have the same rights as someone who had coverage at the time of the qualifying event.

Q5: If I am eligible for the premium reduction, how long will it last?

Your premium reduction lasts for up to 9 months. It will end earlier if:

1. You become eligible for Medicare or another group health plan (such as a plan sponsored by a new employer or a spouse's employer)**, or
2. You reach the end of your maximum COBRA coverage period.

If you continue your COBRA coverage after the premium reduction period, you may have to pay the full amount of the premium. Failure to do so may result in your loss of COBRA coverage. Contact your plan administrator for more information.

** Individuals paying reduced COBRA premiums must notify their plans if they become eligible for coverage under another group health plan or Medicare. Failure to do so can result in a tax penalty.

Q6: Who is eligible for a new, second election opportunity for COBRA coverage?

Qualified beneficiaries whose qualifying event was an involuntary termination of employment during the period from September 1, 2008 through February 16, 2009 who did not elect COBRA when it was first offered OR who did elect COBRA but are no longer enrolled (for example, those who dropped COBRA coverage because they were unable to continue paying the premium) have a new, second election opportunity. Individuals eligible for the extended COBRA election period must receive a notice informing them of this opportunity. This notice must be provided by April 18, 2009 and individuals have 60 days after the notice is provided to elect COBRA. However, this special election period does not extend the period of COBRA continuation coverage beyond the original maximum period (generally 18 months from the employee's involuntary termination). COBRA coverage elected in this special election period begins with the first period of coverage beginning on or after February 17, 2009.

Under ARRA, this special election period opportunity is not required to be provided with respect to State continuation coverage that is provided pursuant to State insurance law. A State can take action, however, to provide an additional election period in its continuation coverage program for individuals involuntarily terminated from September 1, 2008 through February 16, 2009 in order for them to request premium assistance based upon involuntary termination occurring during that period. For more information on rights and responsibilities regarding election periods under State law, contact your State insurance commissioner's office or CMS at www.cms.hhs.gov/COBRAContinuationofCov.

Q7: Does ARRA change any State program requirements or time periods for election of continuation coverage?

No. ARRA does not change any requirement of a State continuation coverage program. ARRA only allows Assistance Eligible Individuals who elect continuation coverage under State insurance law to receive a premium reduction for up to 9 months. It also allows Assistance Eligible Individuals to switch to other coverage offered to active employees if permitted by the plan provided that the new coverage is no more expensive than the prior coverage.

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Premiums

Q8: How do I apply for the premium reduction?

If you were covered by an employment-based health plan on the last day of the employee's employment, the plan should send you a notice of your eligibility to elect COBRA and to receive the premium reduction. The notice should include any forms necessary for enrollment. You may also want to contact your plan directly to ask about taking advantage of the premium reduction.

Q9: Are there income limits for the premium reduction?

If the amount you earn for the year is more than $125,000 (or $250,000 for married couples filing a joint federal income tax return), you may have to repay all or part of the premium reduction through an increase in your income tax liability for the year. If you think that your income may exceed the amounts above, you may wish to consider waiving your right to the premium reduction. For more information, consult your tax preparer or visit the IRS webpage on ARRA at www.irs.gov/.

Q10: How does the 65% premium subsidy get paid to me?

You will not receive a payment. Assistance Eligible Individuals are responsible for paying only 35% of the COBRA premium for the period of coverage. The remaining 65% of the premium is reimbursed directly to the employer, plan administrator, or insurance company through a payroll tax credit.

Q11: Does the 35% I am required to pay include any administrative fees plans are permitted to charge or do I need to pay that fee separately?

If you are an Assistance Eligible Individual, you will only need to pay the amount that is 35% of what you would otherwise pay for your COBRA coverage, which already includes any administration fee.

Q12: Who can claim the payroll tax credit?

The payroll tax credit may be claimed by: (1) a multiemployer group health plan, (2) an employer maintaining a group health plan that is subject to Federal COBRA continuation coverage requirements or that is self-insured, or (3) an insurer providing coverage under a plan not included in (1) or (2). Only

this person is eligible to offset its payroll taxes by the amount of the subsidy. The tax credit is claimed on the January 2009 revision of the IRS Form 941, Employer's Quarterly Federal Tax Return. If the credit amount is greater than the taxes due, the Secretary of the Treasury will directly reimburse the person claiming the tax credit for the excess in the same manner as if it were an overpayment of such taxes. For more information on the credit and tax provisions in the ARRA, visit the IRS website at http://www.irs.gov/newsroom/article/0,,id=204505,00.html

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Notices

Q13: Does ARRA impose any new notice requirements?

Yes, plans and issuers are required to notify qualified beneficiaries regarding the premium reduction and other information about their rights under ARRA as follows:

- A general notice to all qualified beneficiaries, whether they are currently enrolled in COBRA coverage or not, who have a qualifying event during the period from September 1, 2008 through December 31, 2009. This notice may be provided separately or with the COBRA election notice following a COBRA qualifying event.
- A notice of the extended COBRA election period to any Assistance Eligible Individual (or any individual who would be an Assistance Eligible Individual if a COBRA continuation coverage election were in effect); who had a qualifying event at any time from September 1, 2008 through February 16, 2009; AND who either did not elect COBRA continuation coverage or who elected but subsequently discontinued COBRA. This notice must be provided within 60 days following February 17, 2009.

Unless specifically modified by ARRA, the existing COBRA notice manner and timing requirements continue to apply.

Under the State programs, the issuer of the group health plan must provide the notice to qualified beneficiaries with the information on how to apply for the premium reduction. These notices must be provided within the time required by State law.

Q14: What information must the notices include?

The notices must include the following information:

- The forms necessary for establishing eligibility for the premium reduction;
- Contact information for the plan administrator or other person maintaining relevant information in connection with the premium reduction;
- A description of the second election period (if applicable to the individual);
- A description of the requirement that the Assistance Eligible Individual notify the plan when he/she becomes eligible for coverage under another group health plan or Medicare and the penalty for failing to do so;
- A description of the right to receive the premium reduction and the conditions for entitlement; and
- If offered by the employer, a description of the option to enroll in a different coverage option available under the plan.

Q15: Will there be model notices?

Yes. The Department of Labor has developed model notices that are available at www.dol.gov/COBRA/.

Individual Questions for Dislocated Workers and Their Families

Q16: I was laid off from my job in December. Is that an involuntary termination of employment?

Being told not to come back to work until further notice is a termination of employment for purposes of COBRA and the ARRA premium reduction provisions.

Q17: My health coverage was terminated when my employer shut down and laid off all its workers. Can I get the premium reduction to pay for new health coverage?

The premium reduction is available to help qualified individuals pay for COBRA continuation health coverage. If there is no longer a health plan, there is often no COBRA coverage available, unless another related or successor employer sponsors a group health plan responsible for providing continuation coverage to you.

If you believe a related or successor employer may be responsible for providing you with COBRA coverage, you can contact the employer directly or EBSA toll free at 1.866.444.3272 to speak to a Benefits Advisor for assistance.

Q18: I am an assistance eligible individual who has been enrolled in COBRA coverage since December 2008. Will I receive a refund of 65% of all the premiums that I have already paid?

No. The premium reduction provisions apply only to premiums for coverage periods beginning on or after February 17, 2009. If you were eligible for the reduction but paid in full for periods of COBRA coverage beginning on or after February 17, 2009, you should contact the plan administrator or employer sponsoring the plan to discuss a credit against future payments (or refund in certain circumstances). See FAQ #23 below for more information.

Q19: I am currently enrolled in COBRA continuation coverage, but would like to switch to a different coverage option offered by my former employer. Can I do this?

Group health plans are permitted, but not required, to allow qualified beneficiaries to enroll in coverage that is different than the coverage they had at the time of the qualifying event. ARRA provides that changing coverage will not cause an individual to be ineligible for the COBRA premium reduction, provided that:

- The premium for the different coverage is the same or lower than the coverage the individual had at the time of the qualifying event;
- The different coverage is also offered to active employees; and
- The different coverage is not limited to only dental coverage, vision coverage, counseling coverage, a flexible spending account, or an on-site medical clinic.

If the plan permits individuals to change coverage options, the plan must provide the individuals with a notice of their opportunity to change. Individuals have 90 days to elect to change their coverage after

the notice is provided.

Q20: Only part of my family elected COBRA coverage but all of us were eligible. Can I enroll the others and take advantage of the premium reduction?

Each COBRA qualified beneficiary may independently elect COBRA coverage. Moreover, even if a family member did not elect COBRA coverage when first eligible, if the individual would be an Assistance Eligible Individual (except for his or her failure to elect COBRA coverage when first eligible or except because he or she discontinued COBRA coverage before February 17, 2009), that individual gets a second opportunity to enroll and qualify for the premium reduction. See FAQs #3 and #6 above for more information.

Q21: I received my COBRA election notice. Can I change my coverage option from the one I had previously?

In general, COBRA coverage is the same coverage that the individual had at the time of the qualifying event. However, under ARRA, an employer may offer Assistance Eligible Individuals the option of choosing other coverage that is also offered to active employees and that does not have higher premiums than the coverage the individual had at the time of the qualifying event. See FAQ #19 for more information.

Q22: I was offered COBRA in connection with a qualifying event that was a layoff on or after September 1, 2008, but I believe that I am also eligible for the Health Care Tax Credit under the Trade Adjustment Act. Which program can I receive benefits from?

Electing the premium reduction disqualifies you for the Health Coverage Tax Credit. If you are eligible for the Health Coverage Tax Credit, which could be more valuable than the premium reduction, you will have received a notification from the IRS.

If you have questions about these provisions, you may call the Health Coverage Tax Credit Customer Contact Center toll-free at 1-866-628-4282. TTD/TTY callers may call toll-free at 1-866-626-4282. More information about the Trade Act is also available at www.doleta.gov/tradeact.

Q23: If an Assistance Eligible Individual pays the full COBRA premium and is later determined to be eligible for the premium reduction, what should the plan do with the overpayment?

The plan (or other person to whom such payment is payable) can apply the overpayment as a credit toward subsequent premium payments as long as it is reasonable to believe that the credit can be used within 180 days of the overpayment. Otherwise, the overpayment must be reimbursed to the individual within 60 days of receipt.

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Appeals

Q24: What can I do if my former employer's group health plan denies my application for the premium reduction?

If the plan determines that you are not eligible for the premium reduction, you can request an expedited review of the denial. The Department of Labor will handle appeals related to private sector employer plans subject to ERISA's COBRA provisions. The Department of Health and Human Services will handle appeals for Federal, State, and local governmental employees, as well as appeals related to group health insurance coverage provided pursuant to state continuation coverage laws. The Departments are required to make a determination regarding your appeal within 15 business days after receiving your completed application for review. [Note: Appeals to the Department of Labor must be submitted on a U.S. Department of Labor application form. The form will soon be available at www.dol.gov/COBRA and can be completed online or mailed or faxed as indicated in the instructions.] If you believe you have been inappropriately denied eligibility for the premium reduction, you may wish to speak with an Employee Benefits Security Administration Benefits Advisor at 1.866.444.3272 before filing this form.

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More Information

Q25: How can I get more information on my eligibility for COBRA or the premium reduction?

Guidance and other information is available on the Department of Labor web site at www.dol.gov/COBRA. You can also call 1-866-444-3272 to speak to an Employee Benefits Security Administration Benefits Advisor.

Information about ARRA's premium reduction provisions is also available from the IRS (visit http://www.irs.gov/) and the Department of Health and Human Services (visit www.cms.hhs.gov/COBRAContinuationofCov), which, along with the Department of Labor, share responsibility for COBRA and the new requirements added by ARRA.

Model General Notice (full version)

Model COBRA Continuation Coverage Election Notice
(For use by group health plans for qualified beneficiaries who have not yet received an election notice and with qualifying events occurring during the period that begins with September 1, 2008 and ends with December 31, 2009.)

[*Enter date of notice*]

Dear: [*Identify the qualified beneficiary(ies), by name or status*]

This notice contains important information about your right to continue your health care coverage in the [*enter name of group health plan*] (the Plan). Please read the information contained in this notice very carefully.

The American Recovery and Reinvestment Act of 2009 (ARRA) reduces the COBRA premium in some cases. You are receiving this election notice because you experienced a loss of coverage that occurred during the period that begins with September 1, 2008 and ends with December 31, 2009 and you may be eligible for the temporary premium reduction for up to nine months. To help determine whether you can get the ARRA premium reduction, you should read this notice and the attached documents carefully. In particular, reference the "Summary of the COBRA Premium Reduction Provisions under ARRA" with details regarding eligibility, restrictions, and obligations and the "Application for Treatment as an Assistance Eligible Individual." **If you believe you meet the criteria for the premium reduction, complete the "Application for Treatment as an Assistance Eligible Individual" and return it with your completed Election Form.**

To elect COBRA continuation coverage, follow the instructions on the following pages to complete the enclosed Election Form and submit it to us.

If you do not elect COBRA continuation coverage, your coverage under the Plan will end on [*enter date*] due to [*check appropriate box(es)*]:

End of employment
Involuntary Voluntary
Divorce or legal separation
Death of employee
Entitlement to Medicare
Reduction in hours of employment
Loss of dependent child status

Each person ("qualified beneficiary") in the category(ies) checked below is entitled to elect COBRA continuation coverage, which will continue group health care coverage under the Plan for up to ___ months [*enter* 18 *or* 36, *as appropriate and check appropriate box or boxes; names may be added*]:

Employee or former employee
Spouse or former spouse
Dependent child(ren) covered under the Plan on the day before the event that caused the loss of coverage
Child who is losing coverage under the Plan because he or she is no longer a dependent under the Plan

If elected, COBRA continuation coverage will begin on [*enter date*] and can last until [*enter date*]. [*Add, if appropriate:* You may elect any of the following coverage options in which you are already enrolled for COBRA continuation coverage: [*list available coverage options*].]

[*If the plan permits Assistance Eligible Individuals to elect to enroll in coverage that is different than coverage in which the individual was enrolled at the time the qualifying event occurred, insert:* "To change the coverage option(s) for your COBRA continuation coverage to something different than what you had on the last day of employment, complete the "Form for Switching COBRA Continuation Coverage Benefit Options" and return it to us. Available coverage options are: [*insert list of available coverage options]*." *The different coverage must cost the same or less than the coverage the individual had at the time of the qualifying event; be offered to active employees; and cannot be limited to only dental coverage, vision coverage, counseling coverage, a flexible spending arrangement (FSA), including a health reimbursement arrangement that qualifies as an FSA, or an on-site medical clinic*.]

COBRA continuation coverage will cost: [*enter amount each qualified beneficiary will be required to pay for each option per month of coverage and any other permitted coverage periods*]. If you qualify as an "Assistance Eligible Individual" this cost will be [*include the amount that the Assistance Eligible Individual is required to pay for each option*] for up to nine months. You do not have to send any payment with the Election Form. Important additional information about payment for COBRA continuation coverage is included in the pages following the Election Form.

If you have any questions about this notice or your rights to COBRA continuation coverage, you should contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

COBRA Continuation Coverage Election Form

Instructions: To elect COBRA continuation coverage, complete this Election Form and return it to us. Under federal law, you have 60 days after the date of this notice to decide whether you want to elect COBRA continuation coverage under the Plan.

Send completed Election Form to: [*Enter Name and Address*]

This Election Form must be completed and returned by mail [*or describe other means of submission and due date*]. If mailed, it must be post-marked no later than [*enter date*].

If you do not submit a completed Election Form by the due date shown above, you will lose your right to elect COBRA continuation coverage. If you reject COBRA continuation coverage before the due date, you may change your mind as long as you furnish a completed Election Form before the due date. However, if you change your mind after first rejecting COBRA continuation coverage, your COBRA continuation coverage will begin on the date you furnish the completed Election Form.

Read the important information about your rights included in the pages after the Election Form.

I (We) elect COBRA continuation coverage in the [*enter name of plan*] (the Plan) as indicated below:

Name Date of Birth Relationship to Employee SSN (or other identifier)

a. _____

[*Add if appropriate:* Coverage option(s): _____]

b. _____

[*Add if appropriate:* Coverage option(s): _____]

c. _____

[*Add if appropriate:* Coverage option(s): _____]

_____ _____
Signature Date

_____ _____
Print Name Relationship to individual(s) listed above

_____

_____

_____ _____
Print Address Telephone number

[*Only use this model form if the plan permits Assistance Eligible Individuals to elect to enroll in coverage that is different than coverage in which the individual was enrolled at the time the qualifying event occurred.*]

Form for Switching COBRA Continuation Coverage Benefit Options

Instructions: To change the benefit option(s) for your COBRA continuation coverage to something different than what you had on the last day of employment, complete this form and return it to us. Under federal law, you have 90 days after the date of this notice to decide whether you want to switch benefit options.

Send completed form to: [*Enter Name and Address*]

This form must be completed and returned by mail [*or describe other means of submission and due date*]. If mailed, it must be post-marked no later than [*enter date*].

THIS IS NOT YOUR ELECTION NOTICE
YOU MUST SEPARATELY COMPLETE AND RETURN THE ELECTION NOTICE TO SECURE YOUR COBRA CONTINUATION COVERAGE.

I (We) would like to change the COBRA continuation coverage option(s) in the [*enter name of plan*] (the Plan) as indicated below:

Name Date of Birth Relationship to Employee SSN (or other identifier)

a. _____

Old Coverage Option: _____

New Coverage Option: _____

b. _____

Old Coverage Option: _____

New Coverage Option: _____

c. _____

Old Coverage Option: _____

New Coverage Option: _____

_____ _____
Signature Date

_____ _____
Print Name Relationship to individual(s) listed above

_____

_____

_____ _____
Print Address Telephone number

Important Information About Your COBRA Continuation Coverage Rights

What is continuation coverage?

Federal law requires that most group health plans (including this Plan) give employees and their families the opportunity to continue their health care coverage when there is a "qualifying event" that would result in a loss of coverage under an employer's plan. Depending on the type of qualifying event, "qualified beneficiaries" can include the employee (or retired employee) covered under the group health plan, the covered employee's spouse, and the dependent children of the covered employee.

Continuation coverage is the same coverage that the Plan gives to other participants or beneficiaries under the Plan who are not receiving continuation coverage. Each qualified beneficiary who elects continuation coverage will have the same rights under the Plan as other participants or beneficiaries covered under the Plan, including [*add if applicable:* open enrollment and] special enrollment rights.

How long will continuation coverage last?

In the case of a loss of coverage due to end of employment or reduction in hours of employment, coverage generally may be continued only for up to a total of 18 months. In the case of losses of coverage due to an employee's death, divorce or legal separation, the employee's becoming entitled to Medicare benefits or a dependent child ceasing to be a dependent under the terms of the plan, coverage may be continued for up to a total of 36 months. When the qualifying event is the end of employment or reduction of the employee's hours of employment, and the employee became entitled to Medicare benefits less than 18 months before the qualifying event, COBRA continuation coverage for qualified beneficiaries other than the employee lasts until 36 months after the date of Medicare entitlement. This notice shows the maximum period of continuation coverage available to the qualified beneficiaries.

Continuation coverage will be terminated before the end of the maximum period if:

- any required premium is not paid in full on time,
- a qualified beneficiary first becomes covered, after electing continuation coverage, under another group health plan that does not impose any preexisting condition exclusion for a preexisting condition of the qualified beneficiary,
- a qualified beneficiary first becomes entitled to Medicare benefits (under Part A, Part B, or both) after electing continuation coverage, or
- the employer ceases to provide any group health plan for its employees.

Continuation coverage may also be terminated for any reason the Plan would terminate coverage of a participant or beneficiary not receiving continuation coverage (such as fraud).

[*If the maximum period shown on page 1 of this notice is less than 36 months, add the following three paragraphs:*]

How can you extend the length of COBRA continuation coverage?

If you elect continuation coverage, an extension of the maximum period of coverage may be available if a qualified beneficiary is disabled or a second qualifying event occurs. You must notify [*enter name of party responsible for COBRA administration*] of a disability or a second qualifying event in order to extend the period of continuation coverage. Failure to provide notice of a disability or second qualifying event may affect the right to extend the period of continuation coverage.

Disability

An 11-month extension of coverage may be available if any of the qualified beneficiaries is determined under the Social Security Act (SSA) to be disabled. The disability has to have started at some time on or before the 60th day of COBRA continuation coverage and must last at least until the end of the 18-month period of continuation coverage. [*Describe Plan provisions for requiring notice of disability determination, including time frames and procedures*.] Each qualified beneficiary who has elected continuation coverage will be entitled to the 11-month disability extension if one of them qualifies. If the qualified beneficiary is determined to no longer be disabled under the SSA, you must notify the Plan of that fact within 30 days after that determination.

Second Qualifying Event

An 18-month extension of coverage will be available to spouses and dependent children who elect continuation coverage if a second qualifying event occurs during the first 18 months of continuation coverage. The maximum amount of continuation coverage available when a second qualifying event occurs is 36 months. Such second qualifying events may include the death of a covered employee, divorce or legal separation from the covered employee, the covered employee's becoming entitled to Medicare benefits (under Part A, Part B, or both), or a dependent child's ceasing to be eligible for coverage as a dependent under the Plan. These events can be a second qualifying event only if they would have caused the qualified beneficiary to lose coverage under the Plan if the first qualifying event had not occurred. You must notify the Plan within 60 days after a second qualifying event occurs if you want to extend your continuation coverage.

How can you elect COBRA continuation coverage?

To elect continuation coverage, you must complete the Election Form and furnish it according to the directions on the form. Each qualified beneficiary has a separate right to elect continuation coverage. For example, the employee's spouse may elect continuation coverage even if the employee does not. Continuation coverage may be elected for only one, several, or for all dependent children who are qualified beneficiaries. A parent may elect to continue coverage on behalf of any dependent children. The employee or the employee's spouse can elect continuation coverage on behalf of all of the qualified beneficiaries.

In considering whether to elect continuation coverage, you should take into account that a failure to continue your group health coverage will affect your future rights under federal law. First, you can lose the right to avoid having preexisting condition exclusions applied to you by other group health plans if you have a 63-day gap in health coverage, and election of continuation coverage may help prevent such a gap. Second, you will lose the guaranteed right to purchase individual health

coverage that does not impose a preexisting condition exclusion if you do not elect continuation coverage for the maximum time available to you. Finally, you should take into account that you have special enrollment rights under federal law. You have the right to request special enrollment in another group health plan for which you are otherwise eligible (such as a plan sponsored by your spouse's employer) within 30 days after your group health coverage ends because of the qualifying event listed above. You will also have the same special enrollment right at the end of continuation coverage if you get continuation coverage for the maximum time available to you.

How much does COBRA continuation coverage cost?

Generally, each qualified beneficiary may be required to pay the entire cost of continuation coverage. The amount a qualified beneficiary may be required to pay may not exceed 102 percent (or, in the case of an extension of continuation coverage due to a disability, 150 percent) of the cost to the group health plan (including both employer and employee contributions) for coverage of a similarly situated plan participant or beneficiary who is not receiving continuation coverage. The required payment for each continuation coverage period for each option is described in this notice.

The American Recovery and Reinvestment Act of 2009 (ARRA) reduces the COBRA premium in some cases. The premium reduction is available to certain individuals who experience a qualifying event that is an involuntary termination of employment during the period beginning with September 1, 2008 and ending with December 31, 2009. If you qualify for the premium reduction, you need only pay 35 percent of the COBRA premium otherwise due to the plan. This premium reduction is available for up to nine months. If your COBRA continuation coverage lasts for more than nine months, you will have to pay the full amount to continue your COBRA continuation coverage. See the attached "Summary of the COBRA Premium Reduction Provisions under ARRA" for more details, restrictions, and obligations as well as the form necessary to establish eligibility.

[*If employees might be eligible for trade adjustment assistance, the following information must be added*: The Trade Act of 2002 created a tax credit for certain individuals who become eligible for trade adjustment assistance and for certain retired employees who are receiving pension payments from the Pension Benefit Guaranty Corporation (PBGC). Under the tax provisions, eligible individuals can either take a tax credit or get advance payment of 65% of premiums paid for qualified health insurance, including continuation coverage. ARRA made several amendments to these provisions, including an increase in the amount of the credit to 80% of premiums for coverage before January 1, 2011 and temporary extensions of the maximum period of COBRA continuation coverage for PBGC recipients (covered employees who have a nonforfeitable right to a benefit any portion of which is to be paid by the PBGC) and TAA-eligible individuals.

If you have questions about these provisions, you may call the Health Coverage Tax Credit Customer Contact Center toll-free at 1-866-628-4282. TTD/TTY callers may call toll-free at 1-866-626-4282. More information about the Trade Act is also available at www.doleta.gov/tradeact.]

When and how must payment for COBRA continuation coverage be made?

First payment for continuation coverage

If you elect continuation coverage, you do not have to send any payment with the Election Form. However, you must make your first payment for continuation coverage not later than 45 days after the date of your election. (This is the date the Election Notice is post-marked, if mailed.) If you do not make your first payment for continuation coverage in full not later than 45 days after the date of your election, you will lose all continuation coverage rights under the Plan. You are responsible for making sure that the amount of your first payment is correct. You may contact [*enter appropriate contact information, e.g., the Plan Administrator or other party responsible for COBRA administration under the Plan*] to confirm the correct amount of your first payment or to discuss payment issues related to the ARRA premium reduction.

Periodic payments for continuation coverage

After you make your first payment for continuation coverage, you will be required to make periodic payments for each subsequent coverage period. The amount due for each coverage period for each qualified beneficiary is shown in this notice. The periodic payments can be made on a monthly basis. Under the Plan, each of these periodic payments for continuation coverage is due on the [*enter due day for each monthly payment*] for that coverage period. [*If Plan offers other payment schedules, enter with appropriate dates:* You may instead make payments for continuation coverage for the following coverage periods, due on the following dates:]. If you make a periodic payment on or before the first day of the coverage period to which it applies, your coverage under the Plan will continue for that coverage period without any break. The Plan [*select one:* will *or* will not] send periodic notices of payments due for these coverage periods.

Grace periods for periodic payments

Although periodic payments are due on the dates shown above, you will be given a grace period of 30 days after the first day of the coverage period [*or enter longer period permitted by Plan*] to make each periodic payment. Your continuation coverage will be provided for each coverage period as long as payment for that coverage period is made before the end of the grace period for that payment. [*If Plan suspends coverage during grace period for nonpayment, enter and modify as necessary:* However, if you pay a periodic payment later than the first day of the coverage period to which it applies, but before the end of the grace period for the coverage period, your coverage under the Plan will be suspended as of the first day of the coverage period and then retroactively reinstated (going back to the first day of the coverage period) when the periodic payment is received. This means that any claim you submit for benefits while your coverage is suspended may be denied and may have to be resubmitted once your coverage is reinstated.]

If you fail to make a periodic payment before the end of the grace period for that coverage period, you will lose all rights to continuation coverage under the Plan.

Your first payment and all periodic payments for continuation coverage should be sent to:

[*enter appropriate payment address*]

For more information

This notice does not fully describe continuation coverage or other rights under the Plan. More information about continuation coverage and your rights under the Plan is available in your summary plan description or from the Plan Administrator.

If you have any questions concerning the information in this notice, your rights to coverage, or if you want a copy of your summary plan description, you should contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

Private sector employees seeking more information about rights under ERISA, including COBRA, the Health Insurance Portability and Accountability Act (HIPAA), and other laws affecting group health plans, can contact the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) at 1-866-444-3272 or visit the EBSA website at www.dol.gov/ebsa. State and local government employees should contact HHS-CMS at www.cms.hhs.gov/COBRAContinuationofCov/ or NewCobraRights@cms.hhs.gov.

Keep Your Plan Informed of Address Changes

In order to protect your and your family's rights, you should keep the Plan Administrator informed of any changes in your address and the addresses of family members. You should also keep a copy, for your records, of any notices you send to the Plan Administrator.

Summary of the COBRA Premium Reduction Provisions under ARRA

President Obama signed the American Recovery and Reinvestment Act (ARRA) on February 17, 2009. The law gives "Assistance Eligible Individuals" the right to pay reduced COBRA premiums for periods of coverage beginning on or after February 17, 2009 and can last up to 9 months.

To be considered an "Assistance Eligible Individual" and get reduced premiums you:

MUST be eligible for continuation coverage at any time during the period from September 1, 2008 through December 31, 2009 and elect the coverage;
MUST have a continuation coverage election opportunity related to an involuntary termination of employment that occurred at some time from September 1, 2008 through December 31, 2009;
MUST NOT be eligible for Medicare; AND
MUST NOT be eligible for coverage under any other group health plan, such as a plan sponsored by a successor employer or a spouse's employer.*

Individuals who experienced a qualifying event as the result of an involuntary termination of employment at any time from September 1, 2008 through February 16, 2009 and were offered, but did not elect, continuation coverage OR who elected continuation coverage and subsequently discontinued it may have the right to an additional 60-day election period.

♦ IMPORTANT ♦

- If, after you elect COBRA and while you are paying the reduced premium, you become eligible for other group health plan coverage or Medicare you MUST notify the plan in writing. If you do not, you may be subject to a tax penalty.
- Electing the premium reduction disqualifies you for the Health Coverage Tax Credit. If you are eligible for the Health Coverage Tax Credit, which could be more valuable than the premium reduction, you will have received a notification from the IRS.
- The amount of the premium reduction is recaptured for certain high income individuals. If the amount you earn for the year is more than $125,000 (or $250,000 for married couples filing a joint federal income tax return) all or part of the premium reduction may be recaptured by an increase in your income tax liability for the year. If you think that your income may exceed the amounts above, you may wish to consider waiving your right to the premium reduction. For more information, consult your tax preparer or visit the IRS webpage on ARRA at www.irs.gov.

For general information regarding your plan's COBRA coverage you can contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

For specific information related to your plan's administration of the ARRA Premium Reduction or to notify the plan of your ineligibility to continue paying reduced premiums, contact [*enter name of party responsible for ARRA Premium Reduction administration for the Plan, with telephone number and address*].

If you are denied treatment as an "Assistance Eligible Individual" you may have the right to have the denial reviewed. For more information regarding reviews or for general information about the ARRA Premium Reduction go to:

www.dol.gov/COBRA or call 1-866-444-EBSA (3272)

* Generally, this does not include coverage for only dental, vision, counseling, or referral services; coverage under a health flexible spending arrangement; or treatment that is furnished in an on-site medical facility maintained by the employer.

To apply for ARRA Premium Reduction, complete this form and return it to us along with your Election Form.

You may also send this form in separately. If you choose to do so, send the completed "Request for Treatment as an Assistance Eligible Individual" to: [*Enter Name and Address*]

You may also want to read the important information about your rights included in the "Summary of the COBRA Premium Reduction Provisions Under ARRA."

[*Insert Plan Name*] | **REQUEST FOR TREATMENT AS AN ASSISTANCE ELIGIBLE INDIVIDUAL** | [*Insert Plan Mailing Address*]

PERSONAL INFORMATION

Name and mailing address of employee (list any dependents on the back of this form)	Telephone number E-mail address (optional)

To qualify, you must be able to check 'Yes' for all statements.*

1. The loss of employment was involuntary.	Yes• No
2. The loss of employment occurred at some point on or after September 1, 2008 and on or before December 31, 2009.	Yes• No
3. I elected (or am electing) COBRA continuation coverage.*	Yes• No
4. I am NOT eligible for other group health plan coverage (or I was not eligible for other group health plan coverage during the period for which I am claiming a reduced premium).	Yes• No
5. I am NOT eligible for Medicare (or I was not eligible for Medicare during the period for which I am claiming a reduced premium).	Yes• No

***If you checked NO for statement 3, you may still be eligible. See below for more information.**

ADDITIONAL ELECTION PERIOD

If your COBRA continuation coverage relates to an involuntary loss of employment from September 1, 2008 through February 16, 2009 and you were eligible for, but did not elect, COBRA continuation coverage **OR** you elected but subsequently discontinued COBRA, you may have the right to an additional 60-day election period. You should receive a new election notice with an Election Form which you MUST complete and return. If you believe you should have received this additional notice but have not, contact [*enter name of party responsible for COBRA administration for the Plan, with telephone number and address*].

I make an election to exercise my right to the ARRA Premium Reduction. To the best of my knowledge and belief all of the answers I have provided on this form are true and correct.

Signature ➔ _____ Date ➔ _____

Type or print name ➔ _____ Relationship to employee ➔ _____

FOR EMPLOYER OR PLAN USE ONLY

This application is: Approved• Denied Approved for some/denied for others (explain in #4 below)

Specify reason below and then return a copy of this form to the applicant.

REASON FOR DENIAL OF TREATMENT AS AN ASSISTANCE ELIGIBLE INDIVIDUAL

1. Loss of employment was voluntary.	
2. The involuntary loss did not occur between September 1, 2008 and December 31, 2009.	
3. Individual did not elect COBRA coverage.*	
4. Other (please explain)	

***If you checked number 3, was individual eligible for, and given, the Additional Election Period described above?**

Signature of employer, plan administrator, or other party responsible for COBRA administration for the Plan

➔ _____ Date ➔ _____

Type or print name ➔ _____

Telephone number ➔ _____ E-mail address ➔ _____

DEPENDENT INFORMATION (Parent or guardian should sign for minor children.)

Name Date of Birth Relationship to Employee SSN (or other identifier)

a. _____

1. I elected (or am electing) COBRA continuation coverage.	Yes• No
2. I am NOT eligible for other group health plan coverage.	Yes• No
3. I am NOT eligible for Medicare.	Yes• No

I make an election to exercise my right to the ARRA Premium Reduction. To the best of my knowledge and belief all of the answers I have provided on this form are true and correct.

Signature ➔ _____ Date ➔ _____

Type or print name ➔ _____ Relationship to employee ➔ _____

Name Date of Birth Relationship to Employee SSN (or other identifier)

b. _____

1. I elected (or am electing) COBRA continuation coverage.	Yes• No
2. I am NOT eligible for other group health plan coverage.	Yes• No
3. I am NOT eligible for Medicare.	Yes• No

I make an election to exercise my right to the ARRA Premium Reduction. To the best of my knowledge and belief all of the answers I have provided on this form are true and correct.

Signature ➔ _____ Date ➔ _____

Type or print name ➔ _____ Relationship to employee ➔ _____

Name Date of Birth Relationship to Employee SSN (or other identifier)

c. _____

1. I elected (or am electing) COBRA continuation coverage.	Yes• No
2. I am NOT eligible for other group health plan coverage.	Yes• No
3. I am NOT eligible for Medicare.	Yes• No

I make an election to exercise my right to the ARRA Premium Reduction. To the best of my knowledge and belief all of the answers I have provided on this form are true and correct.

Signature ➔ _____ Date ➔ _____

Type or print name ➔ _____ Relationship to employee ➔ _____

This form is designed for plans to distribute to COBRA qualified beneficiaries who are paying reduced premiums pursuant to ARRA so they can notify the plan if they become eligible for other group health plan coverage or Medicare.

Use this form to notify your plan that you are eligible for other group health plan coverage or Medicare and therefore not eligible for reduced premiums under ARRA.

Plan Name	**Participant Notification**	Plan Mailing Address

PERSONAL INFORMATION

Name and mailing address	Telephone number
	E-mail address (optional)

PREMIUM REDUCTION INELIGIBILITY INFORMATION – Check one

I am eligible for coverage under another group health plan. If any dependents are also eligible, include their names below. Insert date you became eligible_____	.
I am eligible for Medicare. Insert date you became eligible_____	.

IMPORTANT

If you fail to notify your plan of becoming eligible for other group health plan coverage or Medicare AND continue to pay reduced COBRA premiums you could be subject to a fine of 110% of the amount of the premium reduction.

Eligibility is determined regardless of whether you take or decline the other coverage.

However, eligibility for coverage does not include any time spent in a waiting period.

To the best of my knowledge and belief all of the answers I have provided on this Form are true and correct.

Signature ➢_____ Date ➢_____

Type or print name ➢_____

If you are eligible for coverage under another group health plan and that plan covers dependents you must also list their names here:

_____ _____

_____ _____

Aviso general modelo (versión completa)

Aviso Modelo de Elección de Cobertura de Continuación Según COBRA
(Para uso de planes de salud grupales para beneficiarios calificados que aún no hayan recibido un aviso de elección y con hechos calificadores que se produzcan durante el período del 1 de septiembre de 2008 al 31 de diciembre de 2009)

[*Ingresar fecha de notificación*]

Estimado: [*Identificar a los beneficiarios calificados por nombre o condición*]

Este aviso contiene información importante sobre su derecho a continuar su cobertura de atención médica en el [*ingresar el nombre del plan de salud grupal*] (el Plan). Lea atentamente la información que contiene este aviso.

La Ley de Recuperación y Reinversión Estadounidense (ARRA) de 2009 reduce la prima de COBRA en algunos casos. Usted recibe este aviso de elección porque sufrió una pérdida de cobertura que se produjo durante el período del 1 de septiembre de 2008 al 31 de diciembre de 2009 y puede ser elegible para recibir una reducción temporal de la prima por un período de hasta nueve meses. Para ayudar a determinar si puede obtener una reducción de la prima según la ley ARRA, debe leer atentamente este aviso y los documentos adjuntos. Específicamente, consulte el "Resumen de las disposiciones sobre reducción de la prima de COBRA conforme a la ley ARRA" para obtener detalles sobre elegibilidad, restricciones y obligaciones y la "Solicitud de tratamiento en calidad de persona elegible para recibir asistencia". **Si considera que cumple con los requisitos para la reducción de la prima, complete la "Solicitud de Tratamiento en calidad de Persona Elegible para recibir Asistencia" y envíela con el Formulario de Elección completo.**

Para optar por la cobertura de continuación según COBRA siga las instrucciones que aparecen en las siguientes páginas para completar el Formulario de Elección adjunto y envíelo.

Si no opta por la cobertura de continuación según COBRA, su cobertura conforme al Plan finalizará el [*ingresar fecha*] debido a lo siguiente [*marcar las casillas que correspondan*]:

Finalización del contrato laboral
Involuntaria Voluntaria
Divorcio o separación legal
Fallecimiento del empleado
Derecho a Medicare
Reducción del horario de trabajo
Pérdida de condición de hijo dependiente

Cada persona ("beneficiario calificado") en las categorías marcadas a continuación tiene derecho a elegir la cobertura de continuación según COBRA, que continuará la cobertura de atención médica grupal conforme al Plan por un período de hasta ___ meses [*ingresar* 18 *ó* 36*, según corresponda, y marcar las casillas correspondientes; se pueden agregar nombres*]:

Empleado o ex empleado
Cónyuge o ex cónyuge
Hijos dependientes cubiertos conforme al Plan el día anterior al evento que haya causado la pérdida de la cobertura
Hijo que pierde la cobertura conforme al Plan porque ya no es un dependiente conforme al Plan

Si se opta por la cobertura de continuación según COBRA, ésta comenzará el día [*ingresar fecha*] y podrá continuar hasta el día [*ingresar fecha*].
[*Agregar, si corresponde:* Podrá elegir cualquiera de las siguientes opciones de cobertura en la cual ya esté inscrito para la cobertura de continuación según COBRA: [*enumerar opciones de cobertura disponibles*].]

[*Si el plan permite que las Personas Elegibles para recibir Asistencia opten por inscribirse en una cobertura diferente de la cobertura en la cual estaba inscrita la persona en el momento del evento calificador, insertar:* "Para cambiar las opciones de la cobertura de continuación según COBRA por otras diferentes de las que tenía el último día de su empleo, complete el "Formulario para Sambiar las Opciones del Beneficio de Cobertura de Continuación Según COBRA", y envíelo. Las opciones de cobertura disponibles son: [*insertar la lista de opciones de cobertura disponibles*].] *La cobertura diferente debe tener el mismo costo o un costo menor que la cobertura que tenía la persona en el momento de ocurrir el evento calificador; debe ofrecerse a empleados activos, y no puede limitarse únicamente a la cobertura dental, de la visión, de asesoramiento, cuenta de gastos flexibles (FSA), incluido un acuerdo de reembolso de salud que califique como una FSA, ni a una clínica médica en el lugar.*]

La cobertura de continuación según COBRA tendrá un costo equivalente a: [*ingresar la cantidad total que deberá pagar cada beneficiario calificado para cada opción por mes de cobertura y cualquier otro período de cobertura permitido*]. Si califica como "Persona Elegible para recibir Asistencia", este costo será de [*incluir la cantidad total que debe pagar la Persona Elegible para recibir Asistencia para cada opción*] por un período de hasta nueve meses. No es necesario que envíe ningún pago con el Formulario de Elección. En las páginas posteriores al Formulario de Elección, se incluye información adicional importante sobre el pago de la cobertura de continuación según COBRA.

Si tiene dudas sobre este aviso, o sobre sus derechos respecto de la cobertura de continuación según COBRA, comuníquese con [*ingresar el nombre de la persona a cargo de la administración de COBRA para el Plan, el número de teléfono y la dirección*].

Formulario de Elección de Cobertura de Continuación Según COBRA

Instrucciones: Para elegir la cobertura de continuación según COBRA, complete este Formulario de Elección y envíelo. Conforme a la ley federal, usted tiene 60 días después de la fecha del presente aviso para decidir si desea optar por la cobertura de continuación según COBRA bajo el Plan.

Envíe el Formulario de Elección completo a: [*Ingresar nombre y dirección*]

Este Formulario de Elección se debe completar y enviar por correo [*o detallar otros medios de envío y fecha de vencimiento*]. Si se envía por correo, la fecha del sello postal debe ser anterior al [*ingresar fecha*].

Si no envía un Formulario de Elección completo antes de la fecha de vencimiento que aparece más arriba, perderá su derecho de optar por la cobertura de continuación según COBRA. Si rechaza la cobertura de continuación según COBRA antes de la fecha de vencimiento, podrá cambiar de opinión siempre que entregue un Formulario de Elección completo antes de la fecha de vencimiento. Sin embargo, si cambia de opinión después de su primer rechazo de la cobertura de continuación según COBRA, la cobertura de continuación según COBRA comenzará en la fecha en que usted entregue el Formulario de Elección completo.

Lea la información importante acerca de sus derechos que se incluye en las páginas posteriores al Formulario de Elección.

Yo (Nosotros) elijo la cobertura de continuación según COBRA en el [*ingresar el nombre del plan*] (el Plan) según se indica a continuación:

Nombre	Fecha de Nacimiento	Relación con el Empleado	Número de Seguro Social (u otro identificador)

a. _____

[*Agregar, si corresponde:* Opciones de cobertura: _____]

b. _____

[*Agregar, si corresponde:* Opciones de cobertura: _____]

c. _____

[*Agregar, si corresponde:* Opciones de cobertura: _____]

_____ _____
Firma Fecha

_____ _____
Nombre en letra de imprenta Relación con las personas mencionadas más arriba

_____

_____

_____ _____
Dirección en letra de imprenta Número de teléfono

[*Solamente usar este modelo de formulario si el plan permite que las Personas Elegibles para recibir Asistencia opten por inscribirse en una cobertura diferente de la cobertura en la cual estaba inscrita la persona en el momento del evento calificador*.]

Formulario para Cambio de Opciones de Beneficios de la Cobertura de Continuación Según COBRA

Instrucciones: Para cambiar las opciones de beneficios para la cobertura de continuación según COBRA, por otras diferentes de las que tenía el último día de su empleo, complete este formulario y envíelo. Conforme a la ley federal, usted tiene 90 días después de la fecha del presente aviso para decidir si desea cambiar las opciones de beneficios.

Envíe el formulario completo a: [*Ingresar nombre y dirección*]

Este formulario se debe completar y enviar por correo [*o detallar otros medios de envío y fecha de vencimiento*]. Si se envía por correo, la fecha del sello postal debe ser anterior al [*ingresar fecha*].

ÉSTE NO ES SU AVISO DE ELECCIÓN
DEBE COMPLETAR Y ENVIAR POR SEPARADO EL AVISO DE ELECCIÓN PARA GARANTIZAR LA COBERTURA DE CONTINUACIÓN SEGÚN COBRA.

Yo (Nosotros) quisiera cambiar las opciones de la cobertura de continuación según COBRA en el [*ingresar el nombre del plan*] (el Plan) según se indica a continuación:

Nombre Fecha de Nacimiento Relación con el Empleado Número de Seguro Social (u otro identificador)

a. _____

Opción de cobertura anterior: _____

Opción de cobertura nueva: _____

b. _____

Opción de cobertura anterior: _____

Opción de cobertura nueva: _____

c. _____

Opción de cobertura anterior: _____

Opción de cobertura nueva: _____

_____ _____
Firma Fecha

_____ _____
Nombre en letra de imprenta Relación con las personas mencionadas más arriba

_____

_____

_____ _____
Dirección en letra de imprenta Número de teléfono

Información Importante Acerca de sus Derechos de Cobertura de Continuación Según COBRA

¿Qué es la cobertura de continuación?

La ley federal exige que la mayoría de los planes de salud grupales (incluido este Plan) brinde a los empleados y a sus familias la oportunidad de continuar su cobertura de atención médica cuando existe un "evento calificador" que daría como resultado la pérdida de la cobertura bajo el plan de un empleador. Según el tipo de evento calificador, "beneficiarios calificados" puede incluir al empleado (o empleado retirado) cubierto bajo el plan de salud grupal, el cónyuge del empleado cubierto, y los hijos dependientes del empleado cubierto.

La cobertura de continuación es la misma cobertura que da el Plan a otros participantes o beneficiarios bajo el Plan que no reciben cobertura de continuación. Cada beneficiario calificado que opte por la cobertura de continuación tendrá los mismos derechos conforme al Plan que otros participantes o beneficiarios cubiertos bajo el Plan, incluso [*agregar si corresponde:* inscripción abierta y] derechos especiales de inscripción.

¿Cuánto durará la cobertura de continuación?

En caso de pérdida de cobertura debido a la finalización del empleo o reducción del horario de trabajo, la cobertura generalmente sólo se puede continuar por un período de hasta 18 meses en total. En caso de pérdidas de cobertura por fallecimiento del empleado, divorcio o separación legal, porque el empleado adquiere derecho a los beneficios de Medicare o un hijo dependiente deja de ser dependiente conforme a los términos del plan, la cobertura puede continuar por un período de hasta 36 meses en total. Cuando el evento calificador es la finalización del empleo o la reducción del horario de trabajo del empleado, y el empleado adquiere derecho a los beneficios de Medicare 18 meses o menos antes del evento calificador, la cobertura de continuación según COBRA para beneficiarios calificados que no sea el empleado durará hasta 36 meses posteriores a la fecha en que comience a tener derecho a Medicare. Esta notificación muestra el período máximo de cobertura de continuación disponible para los beneficiarios calificados.

La cobertura de continuación finalizará antes de concluir el período máximo en los siguientes casos:

- Si no se paga la totalidad de la prima requerida en forma puntual.
- Si un beneficiario calificado primero queda cubierto, después de optar por la cobertura de continuación, bajo otro plan de salud grupal que no establece ninguna exclusión de condición preexistente para una condición preexistente del beneficiario calificado.
- Si un beneficiario calificado primero adquiere derecho a los beneficios de Medicare (Parte A, Parte B, o ambas) después de elegir la cobertura de continuación.
- Si el empleador deja de brindar un plan de salud grupal a sus empleados.

La cobertura de continuación también puede finalizar por cualquier motivo por el cual el Plan finalizaría la cobertura de un participante o beneficiario que no recibe cobertura de continuación (por ejemplo, fraude).

[*Si el período máximo que aparece en la página 1 de este aviso es menor de 36 meses, agregar los siguientes tres párrafos:]*

¿Cómo se puede extender la duración de la cobertura de continuación según COBRA?

Si opta por la cobertura de continuación, es posible que pueda disponer de una extensión del período máximo de cobertura, si un beneficiario calificado se queda incapacitado, o si se produce un segundo evento calificador. Deberá notificar a [*ingresar el nombre de la persona a cargo de la administración de COBRA*] sobre la incapacidad o segundo evento calificador a fin de extender el período de la cobertura de continuación. Si no brinda notificación de la incapacidad o segundo evento calificador, podría afectar su derecho de extender el período de la cobertura de continuación.

Incapacidad

Puede haber disponible una extensión de 11 meses de cobertura si se determina, conforme a la Ley de Seguro Social (SSA), que alguno de los beneficiarios calificados esta incapacitado. La incapacidad deberá haber comenzado en algún momento antes del 60 día de la cobertura de continuación según COBRA, y debe durar al menos hasta finalizar el período de 18 meses de cobertura de continuación. [*Describir las disposiciones del Plan para exigir notificación de determinación de incapacidad, incluso plazos y procedimientos*.] Cada beneficiario calificado que haya elegido la cobertura de continuación tendrá derecho a la extensión por incapacidad de 11 meses si uno de ellos califica. Si, conforme a la SSA, se determina que el beneficiario calificado ya no está incapacitado, debe notificar al Plan sobre este hecho, dentro de los 30 días posteriores a esa determinación.

Segundo Evento Calificador

Habrá disponible una extensión de la cobertura de 18 meses para los cónyuges e hijos dependientes que opten por la cobertura de continuación si se produce un segundo evento calificador durante los primeros 18 meses de la cobertura de continuación. La cantidad máxima de cobertura de continuación disponible cuando se produce un segundo evento calificador es de 36 meses. Los segundos eventos calificadores pueden incluir el fallecimiento de un empleado cubierto, el divorcio o separación legal del empleado cubierto, que el empleado cubierto adquiera derecho a los beneficios de Medicare (bajo Parte A, Parte B, o ambas), o que un hijo dependiente deje de estar calificado para la cobertura en calidad de dependiente conforme al Plan. Estos casos pueden ser un segundo evento calificador solamente si causan que el beneficiario calificado pierda la cobertura conforme al Plan si no hubiera ocurrido el primer evento calificador. Usted deberá notificar al Plan dentro de los 60 días posteriores al segundo evento calificador, si desea extender su cobertura de continuación.

¿Cómo puede optar por la cobertura de continuación según COBRA?

Para optar por la cobertura de continuación, deberá completar el Formulario de Elección y entregarlo en conformidad con las indicaciones que aparecen en el formulario. Cada beneficiario calificado tiene un derecho individual de elegir la continuación de la cobertura. Por ejemplo, el cónyuge del empleado puede optar por la cobertura de continuación incluso si el empleado no lo hace. Se puede optar por la cobertura de continuación para uno, varios o todos los hijos dependientes que sean beneficiarios calificados. Uno de los padres puede elegir la cobertura de continuación en nombre de cualquier hijo dependiente. El empleado o el cónyuge del empleado pueden elegir la cobertura de continuación en nombre de todos los beneficiarios calificados.

Cuando considere si desea la cobertura de continuación, deberá tener en cuenta que si usted no continúa con su cobertura de salud grupal, esto afectará sus derechos futuros conforme a la ley federal. Primero, puede perder el derecho a evitar que otros planes de salud grupales apliquen a su caso las exclusiones de condición preexistente si tiene un intervalo de 63 días en la cobertura de salud, y la elección de continuar la cobertura puede ayudarlo a evitar ese intervalo. Segundo, perderá el derecho garantizado de comprar cobertura de salud individual que no imponga una exclusión de condición preexistente si no opta por la cobertura de continuación por el tiempo máximo disponible en su caso. Por último, debe tener en cuenta que tiene derechos especiales de inscripción conforme a la ley federal. Usted tiene derecho a solicitar inscripción especial en otro plan de salud grupal para el cual usted estuviera calificado de otro modo (por ejemplo, un plan patrocinado por el empleador de su cónyuge) dentro de los 30 días posteriores a la finalización de su cobertura de salud grupal, debido al evento calificador mencionado anteriormente. También tiene el mismo derecho de inscripción especial al finalizar la cobertura de continuación si obtiene cobertura de continuación por el tiempo máximo disponible en su caso.

¿Cuál es el costo de la cobertura de continuación según COBRA?

Por lo general, cada beneficiario calificado debe pagar el costo total de la cobertura de continuación. La cantidad total que deba pagar un beneficiario calificado no puede exceder el 102% (o, en caso de una extensión de la cobertura de continuación por incapacidad, el 150%) del costo del plan de salud grupal (incluidos los aportes del empleador y del empleado) para la cobertura de un participante o beneficiario de un plan de situación similar que no reciba cobertura de continuación. El pago exigido para cada período de cobertura de continuación para cada opción está descrito en este aviso.

La Ley de Recuperación y Reinversión Estadounidense (ARRA) de 2009 reduce la prima de COBRA en algunos casos. La reducción de la prima está disponible para ciertas personas que sufren un evento calificador que sea una desvinculación laboral involuntaria durante el período del 1 de septiembre de 2008 hasta el 31 de diciembre de 2009. Si califica para la reducción de la prima, solamente deberá pagar el 35% de la prima de COBRA adeudada al plan. Esta reducción de prima está disponible por un período de hasta nueve meses. Si la cobertura de continuación según COBRA dura más de nueve meses, deberá pagar la cantidad total para conservar la cobertura de continuación según COBRA. Consulte el "Resumen de las Disposiciones sobre Reducción de la Prima de COBRA conforme a la ley ARRA" adjunto para obtener más detalles, restricciones y obligaciones y el formulario necesario para establecer la elegibilidad.

[*Si es posible que los empleados estén calificados para recibir asistencia de ajuste comercial, se debe agregar la siguiente información:* La Ley de Comercio de 2002 creó un crédito de impuesto para ciertas personas calificadas para la asistencia de ajuste comercial y para ciertos empleados retirados que reciban pagos de pensiones de la Corporación de Beneficios Garantizados de Pensión (PBGC). Según las disposiciones de impuestos, las personas elegibles pueden tomar un crédito de impuesto o bien obtener el pago anticipado del 65% de las primas pagadas por el seguro médico calificado, incluida la cobertura de continuación. La ley ARRA realizó varias modificaciones a estas disposiciones, incluso un aumento en la cantidad del crédito al 80% de las primas para cobertura antes de 1 de enero de 2011 y extensiones temporales del período máximo de la cobertura de continuación según COBRA para quienes reciban la pensión PBGC (empleados cubiertos con

derecho no caducable a un beneficio, cualquier parte del cual deba ser pagada por la PBGC) y personas calificadas para la ayuda de reajuste comercial (TAA).

Si tiene dudas sobre estas disposiciones, puede llamar al Centro de Atención al Cliente Sobre Créditos de Impuestos de cobertura de salud al número de teléfono gratuito 1-866-628-4282. Las personas con problemas auditivos o de habla pueden llamar gratis al 1-866-626-4282. Encuentre información adicional sobre la Ley de Comercio en www.doleta.gov/tradeact.]

¿Cuándo y cómo se debe realizar el pago de la cobertura de continuación según COBRA?

Primer pago para la cobertura de continuación

Si opta por la cobertura de continuación, no es necesario que envíe ningún pago con el Formulario de Elección. Sin embargo, debe realizar el primer pago para la cobertura de continuación antes de los 45 días posteriores a la fecha de su elección. (Fecha del sello postal del Aviso de Elección, si se envió por correo). Si no realiza el primer pago total para la cobertura de continuación antes de los 45 días posteriores a la fecha de su elección, perderá todos los derechos a continuar la cobertura conforme al Plan. Usted es responsable de asegurarse de que la cantidad total del primer pago sea correcto. Puede comunicarse con [*ingresar la información de contacto correspondiente, por ej., Administrador del Plan u otra persona a cargo de la administración de COBRA conforme a Plan*] para confirmar la cantidad correcta del primer pago o para discutir temas referidos a pagos en relación con la reducción de prima según la ley ARRA.

Pagos periódicos para la cobertura de continuación

Después de realizar el primer pago para la cobertura de continuación, deberá realizar pagos periódicos para cada período subsiguiente de cobertura. La cantidad total a pagar para cada período de cobertura para cada beneficiario calificado se detalla en este aviso. Los pagos periódicos se pueden realizar en forma mensual. Conforme al Plan, cada pago periódico para la cobertura de continuación vence el [*ingresar día de vencimiento de cada pago mensual*] para ese período de cobertura. [*Si el Plan ofrece otros cronogramas de pagos, ingresar las fechas correspondientes:* Usted podrá realizar pagos para la cobertura de continuación para los períodos siguientes de cobertura, con vencimiento en las siguientes fechas:]. Si realiza un pago periódico el primer día del período de cobertura o antes al cual se aplica, su cobertura conforme al Plan continuará para ese período de cobertura sin ningún intervalo. El Plan [*seleccionar uno:* enviará *o* no enviará] notificaciones periódicas de pagos adeudados para estos períodos de cobertura.

Períodos de gracia para pagos periódicos

Aunque los pagos periódicos venzan en las fechas anteriormente detalladas, usted recibirá un período de gracia de 30 días después del primer día del período de cobertura [*o ingresar un período mayor si lo permite el Plan*] para realizar cada pago periódico. Su cobertura de continuación se brindará para cada período de cobertura mientras se realice el pago de ese período de cobertura antes de finalizar el período de gracia para ese pago. [*Si el Plan suspende la cobertura durante el período de gracia por falta de pago, ingresar y modificar según corresponda:* No obstante, si realiza un pago periódico después del primer día del período de cobertura al cual se aplica, pero antes de finalizar el período de gracia para el período de cobertura, su cobertura bajo el Plan se suspenderá a partir del primer día del período de cobertura y luego se restablecerá en forma retroactiva (volviendo al primer día del período de cobertura) cuando se reciba el pago periódico. Esto significa que cualquier reclamo que presente por beneficios mientras se encuentra suspendida su cobertura podrá rechazarse y deberá volver a presentarlo una vez restablecida la cobertura.]

Si no realiza un pago periódico antes de finalizar el período de gracia para ese período de cobertura, perderá todos los derechos a la cobertura de continuación conforme al Plan.

El primer pago, y todos los pagos periódicos para continuar la cobertura, deben enviarse a:

[*ingresar la dirección de pago correspondiente*]

Para obtener más información

Este aviso no describe totalmente la cobertura de continuación u otros derechos conforme al Plan. Hay más información sobre la cobertura de continuación y sus derechos conforme al Plan disponible en el resumen descriptivo del plan o si la solicita al Administrador del Plan.

Si tiene preguntas o dudas sobre la información contenida en este aviso o sobre sus derechos de cobertura, o si desea una copia del resumen descriptivo del plan, comuníquese con [*ingresar el nombre de la persona a cargo de la administración de COBRA para el Plan, el número de teléfono y la dirección*].

Los empleados del sector privado que deseen obtener más información sobre derechos conforme a la Ley de Seguridad de Ingresos de Retiro de Trabajadores (ERISA), incluidas COBRA, la Ley de Portabilidad y Responsabilidad del Seguro Médico (HIPAA), y otras leyes que afectan a planes de salud grupales, pueden ponerse en contacto con la Administración de Seguridad de Beneficios para Empleados del Departamento de Trabajo de los Estados Unidos (EBSA) al 1-866-444-3272 o visitar el sitio web de EBSA en www.dol.gov/ebsa. Los empleados del gobierno estatal y local deben ponerse en contacto con HHS-CMS en www.cms.hhs.gov/COBRAContinuationofCov/ o en NewCobraRights@cms.hhs.gov.

Informe a su Plan sobre cualquier cambio de domicilio

Para proteger sus derechos y los de su familia, debe mantener informado al Administrador del Plan sobre cualquier cambio de su domicilio o del domicilio de sus familiares. También deberá conservar una copia para sus registros de todas las notificaciones que le envíe al Administrador del Plan.

Resumen de las Disposiciones sobre Reducción de la Prima de COBRA conforme a la ley ARRA

El Presidente Obama firmó la Ley de Recuperación y Reinversión Estadounidense (ARRA) el 17 de febrero de 2009. La ley brinda a las "personas calificadas para recibir asistencia" el derecho de pagar primas reducidas de COBRA para períodos de cobertura que comiencen el 17 de febrero de 2009 o después, y puede durar hasta 9 meses.

Para ser considerado una "Persona Elegible para recibir Asistencia" y obtener reducción de las primas usted:

DEBE ser elegible para la cobertura de continuación en cualquier momento desde el 1 de septiembre de 2008 hasta el 31 de diciembre de 2009 y optar por la cobertura.
DEBE la tener oportunidad de elegir la cobertura de continuación relacionada con una desvinculación laboral involuntaria ocurrida en algún momento entre el 1 de septiembre de 2008 y el 31 de diciembre de 2009.
NO DEBE ser elegible para Medicare.
NO DEBE ser elegible para una cobertura bajo ningún otro plan de salud grupal, como un plan patrocinado por un posterior empleador o empleador del cónyuge.*

Las personas que sufren un evento calificador como resultado de una desvinculación laboral involuntaria en cualquier momento entre el 1 de septiembre de 2008 y el 16 de febrero de 2009 y se les ofreció la cobertura de continuación, pero no optaron por ella, U optaron por la cobertura de continuación y luego la discontinuaron, podrán tener derecho a un período de elección adicional de 60 días.

♦ IMPORTANTE ♦

- Si, después de optar por COBRA y mientras paga la prima reducida, pasa a ser elegible para otra cobertura de plan de salud grupal o Medicare, DEBE notificar al plan por escrito. Si no lo hace, puede estar sujeto a una sanción de impuestos.
- Elegir la reducción de la prima lo descalifica para el Crédito de Impuesto de Cobertura de Salud. Si usted es elegible para el Crédito de Impuesto de Cobertura de Salud, que podría ser más valioso que la reducción de la prima, recibirá una notificación del Servicio de Impuestos Internos (IRS).
- La cantidad de la reducción de la prima se recaptura para ciertas personas de altos ingresos. Si la cantidad que usted gana anualmente es mayor a $125,000 (o $250,000 para matrimonios que presentan una declaración de impuesto sobre la renta conjunta) toda o parte de la reducción de la prima puede ser recapturada por un aumento en su deuda de impuestos sobre la renta para el año. Si piensa que sus ingresos pueden exceder las cantidades anteriores, deberá considerar renunciar a su derecho de reducción de prima. Para obtener más información, consulte a su preparador de declaración o visite el sitio web del Servicio de Impuestos Internos para obtener información sobre ARRA en www.irs.gov.

Para información general sobre la cobertura COBRA de su plan puede comunicarse con [*ingresar el nombre de la persona a cargo de la administración de COBRA para el Plan, el número de teléfono y la dirección*].

Para información específica relacionada con la administración de de la Reducción de Prima según la ley ARRA de su plan, o para notificar al plan sobre su condición de no elegible para continuar pagando primas reducidas, comuníquese con [*ingresar nombre de la persona a cargo de la administración de Reducción de Primas según la ley ARRA para el Plan, el número de teléfono y la dirección*].

Si se le niega considerarlo como "Persona Elegible para recibir Asistencia" es posible que tenga derecho a hacer revisar la negación. Para obtener más información sobre revisiones, o para información general sobre la Reducción de la Prima según la ley ARRA, ingrese en:

www.dol.gov/COBRA o llame al 1-866-444-EBSA (3272)

* Por lo general, esto no incluye cobertura sólo para servicios dentales, de la visión, de asesoramiento o de derivación; cobertura bajo una cuenta de gastos flexibles para la salud o tratamiento recibido en un centro médico en el lugar a través del empleador.

Para solicitar la Reducción de Prima según ley ARRA, complete este formulario y envíelo junto con el Formulario de Elección.

También puede enviar este formulario por separado. Si decide hacerlo, envíe la "Solicitud de Tratamiento en calidad de Persona Elegible para recibir Asistencia" completa a: [*Ingresar nombre y dirección*]

También deberá leer la información importante sobre sus derechos incluida en el "Resumen de las Disposiciones sobre Reducción de la Prima COBRA conforme a la ley ARRA".

[*Insertar nombre del Plan*]

SOLICITUD DE TRATAMIENTO EN CALIDAD DE PERSONA ELEGIBLE PARA RECIBIR ASISTENCIA

[*Insertar dirección postal del Plan*]

DATOS PERSONALES

Nombre y dirección postal del empleado (enumere todos los dependientes en el reverso de este formulario)	Número de teléfono Dirección de correo electrónico (opcional)

Para calificar, debe marcar "Sí" en todos los enunciados*.

1. La desvinculación laboral fue involuntaria.	Sí • No
2. La desvinculación laboral se produjo en algún momento el 1 de septiembre de 2008 o después, o el 31 de diciembre de 2009 o antes.	Sí • No
3. Opté (u opto) por la cobertura de continuación según COBRA*.	Sí • No
4. NO soy elegible para otra cobertura de plan de salud grupal (o no era elegible para otra cobertura de plan de salud grupal durante el período para el cual solicito una prima reducida).	Sí • No
5. NO soy elegible para Medicare (o no era elegible para Medicare durante el período para el cual solicito la prima reducida).	Sí • No

***Si marcó NO en el enunciado 3, aun es posible que sea elegible. Consulte a continuación para obtener más información.**

PERÍODO DE ELECCIÓN ADICIONAL

Si su cobertura de continuación según COBRA se relaciona con una desvinculación laboral involuntaria ocurrida entre el 1 de septiembre de 2008 y el 16 de febrero de 2009 y usted era elegible pero no optó por la cobertura de continuación según COBRA **U** optó por ella pero luego la discontinuó, podría tener derecho a un período de elección adicional de 60 días. Recibirá un aviso de nueva elección con un formulario de elección que DEBE completar y enviar. Si cree que debería haber recibido este aviso adicional pero no fue así, comuníquese con [*ingresar el nombre de la persona a cargo de la administración de COBRA para el Plan, el número de teléfono y la dirección*].

Elijo ejercer mi derecho a la reducción de prima según ley ARRA. A mi leal saber y entender, todas las respuestas que suministré en este formulario son verdaderas y correctas.

Firma → _____ Fecha → _____

Nombre en letra de imprenta → _____ Relación con el empleado → _____

PARA USO DEL EMPLEADOR O DEL PLAN ÚNICAMENTE

Esta solicitud es: Aprobada• Rechazada Aprobada para algunos/rechazada para otros (explicar en el punto nro. 4 a continuación)

Especificar el motivo a continuación y enviar una copia de este formulario a solicitante.

MOTIVO DE RECHAZO DE TRATAMIENTO EN CALIDAD DE PERSONA ELEGIBLE PARA RECIBIR ASISTENCIA

1. La desvinculación laboral fue voluntaria.
2. La desvinculación laboral involuntaria no se produjo entre el 1 de septiembre de 2008 y el 31 de diciembre de 2009.
3. La persona no optó por la cobertura según COBRA*.
4. Otro (explicar)

***Si marcó el enunciado número 3, ¿era elegible la persona, y recibió el período de elección adicional descrito anteriormente?**

Firma del empleador, administrador del plan u otra persona a cargo de la administración de COBRA para el Plan

→ _____ Fecha → _____

Nombre en letra de imprenta → _____

Número de teléfono → _____ Dirección de correo electrónico → _____

INFORMACIÓN DEL DEPENDIENTE (En caso de hijos menores de edad deberá firmar el padre o tutor)

Nombre | Fecha de nacimiento | Relación con el empleado | Número de Seguro Social (u otro identificador)

a. _____

1. Opté (u opto) por la cobertura de continuación según COBRA.	Sí • No
2. NO soy elegible para otra cobertura de plan de salud grupal.	Sí • No
3. NO soy elegible para Medicare.	Sí • No

Elijo ejercer mi derecho a la Reducción de Prima según ley ARRA. A mi leal saber y entender, todas las respuestas que suministré en este formulario son verdaderas y correctas.

Firma ➔ _____ Fecha ➔ _____

Nombre en letra de imprenta ➔ _____ Relación con el empleado ➔ _____

Nombre | Fecha de nacimiento | Relación con el empleado | Número de Seguro Social (u otro identificador)

b. _____

1. Opté (u opto) por la cobertura de continuación según COBRA.	Sí • No
2. NO soy elegible para otra cobertura de plan de salud grupal.	Sí • No
3. NO soy elegible para Medicare.	Sí • No

Elijo ejercer mi derecho a la Reducción de Prima según ley ARRA. A mi leal saber y entender, todas las respuestas que suministré en este formulario son verdaderas y correctas.

Firma ➔ _____ Fecha ➔ _____

Nombre en letra de imprenta ➔ _____ Relación con el empleado ➔ _____

Nombre | Fecha de nacimiento | Relación con el empleado | Número de Seguro Social (u otro identificador)

c. _____

1. Opté (u opto) por la cobertura de continuación según COBRA.	Sí • No
2. NO soy elegible para otra cobertura de plan de salud grupal.	Sí • No
3. NO soy elegible para Medicare.	Sí • No

Elijo ejercer mi derecho a la Reducción de Prima según ley ARRA. A mi leal saber y entender, todas las respuestas que suministré en este formulario son verdaderas y correctas.

Firma ➔ _____ Fecha ➔ _____

Nombre en letra de imprenta ➔ _____ Relación con el empleado ➔ _____

Este formulario está diseñado para que los planes lo distribuyan a los beneficiarios calificados para la cobertura según COBRA que pagan primas reducidas conforme a la ley ARRA, para que puedan notificar al plan si pasan a ser elegibles para otra cobertura de plan de salud grupal o para Medicare.

Use este formulario para notificar a su plan que usted es elegible para otra cobertura de plan de salud grupal o para Medicare y que por lo tanto no es elegible para las primas reducidas según la ley ARRA.

Nombre del Plan | **Aviso del participante** | Dirección postal del Plan

DATOS PERSONALES

Nombre y dirección postal

Número de teléfono

Dirección de correo electrónico (opcional)

INFORMACIÓN DE NO ELEGIBILIDAD PARA LA REDUCCIÓN DE PRIMA - Marque una opción

Soy elegible para la cobertura bajo otro plan de salud grupal. Si cualquiera de los dependientes también es elegible, incluya sus nombres a continuación. Indique la fecha en que pasó a ser elegible _____	•
Soy elegible para Medicare. Indique la fecha en que pasó a ser elegible _____	•

IMPORTANTE

Si no notifica a su plan que pasó a ser elegible para otra cobertura de plan de salud grupal o para Medicare Y continúa pagando primas reducidas según COBRA, podría estar sujeto a una multa del 110% de la cantidad total de la reducción de la prima.

La elegibilidad se determina independientemente de si acepta o rechaza la otra cobertura.

Sin embargo, la elegibilidad para la cobertura no incluye ningún plazo transcurrido en un período de espera.

A mi leal saber y entender, todas las respuestas que suministré en este formulario son verdaderas y correctas.

Firma ➔ _____ Fecha ➔ _____

Nombre en letra de imprenta ➔ _____

Si es elegible para la cobertura conforme a otro plan de salud grupal y ese plan cubre a dependientes, debe también indicar sus nombres aquí:

_____ _____

_____ _____

Subpart 9.5—Organizational and Consultant Conflicts of Interest

9.500 Scope of subpart.

This subpart—

(a) Prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest;

(b) Provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations; and

(c) Implements section 8141 of the 1989 Department of Defense Appropriation Act, Pub. L. 100-463, 102 Stat. 2270-47 (1988).

9.501 Definition.

"Marketing consultant," as used in this subpart, means any independent contractor who furnishes advice, information, direction, or assistance to an offeror or any other contractor in support of the preparation or submission of an offer for a Government contract by that offeror. An independent contractor is not a marketing consultant when rendering—

(1) Services excluded in Subpart 37.2;

(2) Routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);

(3) Routine legal, actuarial, auditing, and accounting services; and

(4) Training services.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving—

(1) Management support services;

(2) Consultant or other professional services;

(3) Contractor performance of or assistance in technical evaluations; or

(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

(c) An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required.

(d) Acquisitions subject to unique agency organizational conflict of interest statutes are excluded from the requirements of this subpart.

9.503 Waiver.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to—

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.506).

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.506).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 9.503. The waiver request and decision shall be included in the contract file.

9.505 General rules.

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage. In addition to the other situations described in this subpart, an unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses—

(1) Proprietary information that was obtained from a Government official without proper authorization; or

(2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not—

(1) Be awarded a contract to supply the system or any of its major components; or

(2) Be a subcontractor or consultant to a supplier of the system or any of its major components.

(b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore this contractor should not be in a position to make decisions favoring its own products or capabilities.

9.505-2 Preparing specifications or work statements.

(a)(1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. This rule shall not apply to—

(i) Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

(ii) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

(2) If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

(3) In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair; hence no prohibition should be imposed.

(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless—

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in paragraph (b)(1) of this section.

(3) For the reasons given in 9.505-2(a)(3), no prohibitions are imposed on development and design contractors.

9.505-3 Providing evaluation services.

Contracts for the evaluation of offers for products or services shall not be awarded to a contractor that will evaluate its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests.

9.505-4 Obtaining access to proprietary information.

(a) When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—

(1) Furnished voluntarily without limitations on its use; or

(2) Available to the Government or contractor from other sources without restriction.

(b) A contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.

(c) Contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

9.506 Procedures.

(a) If information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers first should seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

(b) If the contracting officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the contracting officer shall, before issuing the solicitation, submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft solicitation provision (see 9.507-1); and

(3) If appropriate, a proposed contract clause (see 9.507-2).

(c) The approving official shall—

(1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendations in writing.

(d) The contracting officer shall—
(1) Include the approved provision(s) and any approved clause(s) in the solicitation or the contract, or both;
(2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and
(3) Before awarding the contract, resolve the conflict or the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity.
(e) If, during the effective period of any restriction (see 9.507), a contracting office transfers acquisition responsibility for the item or system involved, it shall notify the successor contracting office of the restriction, and send a copy of the contract under which the restriction was imposed.

9.507 Solicitation provisions and contract clause.

9.507-1 Solicitation provisions.
As indicated in the general rules in 9.505, significant potential organizational conflicts of interest are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations shall contain a provision that—
(a) Invites offerors' attention to this subpart;
(b) States the nature of the potential conflict as seen by the contracting officer;
(c) States the nature of the proposed restraint upon future contractor activities; and
(d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation.

9.507-2 Contract clause.
(a) If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint. The contracting officer shall include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so (see 9.506(d) of this subsection).
(b) The restraint imposed by a clause shall be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias. This period varies. It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction. In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.

9.508 Examples.
The examples in paragraphs (a) through (i) following illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to help the contracting officer apply the general rules in 9.505 to individual contract situations.
(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (*i.e.*, turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (*e.g.*, fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.
(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.
(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.
(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.
(e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.
(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.
(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.
(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to—
(1) Enter into agreements with these firms to protect any proprietary information they provide; and
(2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.
(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

Washington State Department of Transportation

ADMINISTRATIVE MANUAL

Organizational Conflicts of Interest Manual

M 3043.01

July 10, 2009

Environmental and Engineering Programs
Design, Construction, and Consultant Services

Americans with Disabilities Act (ADA) Information

Materials can be provided in alternative formats for persons with disabilities by contacting the ADA Compliance Officer via telephone at 360-705-7097 or by e-mail to Shawn Murinko at murinks@wsdot.wa.gov.

Title VI Notice to Public

It is the Washington State Department of Transportation's (WSDOT) policy to assure that no person shall, on the grounds of race, color, national origin and sex, as provided by Title VI of the Civil Rights Act of 1964, be excluded from participation in, be denied the benefits of, or be otherwise discriminated against under any of its federally funded programs and activities. Any person who believes his/her Title VI protection has been violated, may file a complaint with WSDOT's Office of Equal Opportunity (OEO). For Title VI complaint forms and advise, please contact OEO's Title VI Coordinator at 360-705-7098.

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Foreword

The *Organizational Conflicts of Interest Manual* M 3043 is for use by Washington State Department of Transportation project engineers, project managers, Consultant Services Office, consultants, sub-consultants, contractors, subcontractors, and design–builders. It supplements the department's Secretary's Executive Order *Organizational Conflicts of Interest* E 1059.00 by providing procedures and methods for implementing that Secretary's Executive Order.

The integrated nature of the design-build project delivery method creates the potential for Organizational Conflicts of Interest. Similarly, recent developments in the design-bid-build contracting method, such as (1) WSDOT's use of contractors for CVEP, CRA, value engineering studies, and constructability reviews, and (2) firms with the ability to provide both design and construction services, has created the need to establish a policy governing Organizational Conflicts of Interest. Disclosure, evaluation, and management of these conflicts and of the appearance of conflicts is in the interests of the public, WSDOT, and the consulting and construction communities.

/s/ Jeff Carpenter

Jeff Carpenter, P.E.
State Construction Engineer

/s/ Pasco Bakotich

Pasco Bakotich III, P.E.
State Design Engineer

/s/ Marilyn S. Bowman

Marilyn Bowman
Consultant Services Director

Contents

I. Applicability

These guidelines apply to all contracts for professional services related to WSDOT projects, design-bid-build (DBB) contracts, design-build (DB) contracts, including Requests for Qualifications (RFQ) and Instructions to Proposers (ITP), unless specifically stated otherwise. The guidelines apply to the individual entities that make up a joint venture in the same manner as they apply to the joint venture. Parent and subsidiary entities shall be considered as the same entity for purposes of these guidelines.

The guidelines also apply to entities resulting from acquisitions and mergers. An entity with an actual or potential conflict of interest carries that actual or potential conflict of interest with them to the newly formed entity after an acquisition or merger.

The guidelines also apply to employees of consultants who move from one firm to another. A consultant employee with an actual or potential conflict of interest carries that actual or potential conflict of interest with them to the new employer after changing firms.

II. Responsibilities

The responsibility to avoid or neutralize Organizational Conflicts of Interest (OCOI), ultimately rests with the person or firm potentially conflicted.

Nevertheless, WSDOT retains the sole discretion to determine on a case-by-case basis whether an OCOI exists and whether actions may be appropriate to avoid or neutralize any actual or potential conflict or the appearance of any such conflict. It is understood that any determination by WSDOT regarding the existence of an actual or potential OCOI or whether the OCOI may be avoided or neutralized is based solely on the facts made available at the time the determination is made. Unknown facts or a change in the facts over time can necessitate a re-evaluation of the original conclusion. Risks associated with a successful legal challenge to an OCOI are the sole responsibility of the person or firm potentially conflicted. WSDOT reserves the right to reassess and revise any determination made regarding an OCOI at any time.

WSDOT recognizes that its concern with OCOI must be balanced against the need to promote competition in the DBB or DB procurement process. With that, these guidelines neither purport to address every situation that may arise in the context of a project nor to mandate a particular decision or determination by WSDOT when faced with facts similar to those described herein.

III. Guidelines for Evaluating OCOI

WSDOT follows the pertinent state and federal laws regarding OCOI. Nothing contained in this manual is intended to limit, modify, or otherwise alter the applicability or effect of relevant (federal and state) law, rules, and regulations. All such laws, rules, and regulations shall apply in their normal manner irrespective of these guidelines.

WSDOT evaluates the following on a case-by-case basis

1. Whether or not an OCOI exists
2. Whether or not the OCOI can be avoided or neutralized
3. The appropriate steps to avoid or neutralize OCOI

In evaluating the above, WSDOT uses the following in making such determinations.

Washington State has adopted ethical standards set forth in RCW 42.52 that specifically address ethics in public service. These laws apply to all state employees, former state employees, and state officers. For purposes of addressing OCOI, these standards shall be construed to apply to all employees of Consultants and/or Sub-Consultants that perform work on WSDOT projects. For reference, without limitation, specific attention is drawn to the following statutes: RCWs 42.52.020, 42.52.030, 42.52.040, 42.52.050, 42.52.080, and 42.52.900.

RCW 18.43 addresses prohibited conduct and acts related to the practice of engineering. Conflicts of interest are referenced under RCW 18.43.105(6). Similarly, the Board of Registration tasked with the oversight of engineers and land surveyors pursuant to RCW 18.43 has promulgated a set of rules of professional conduct and practice that addresses conflicts of interest in WAC 196-27A-020-2(i).

The Federal Highway Administration (FHWA) addresses OCOI in relation to federally funded highway projects in general at 23 CFR §1.33, DB projects under 23 CFR §636.116 and §636.117 , and the NEPA process as it relates to DB at 23 CFR §636.109(b) 6 & 7. WSDOT adopts these rules for use on all WSDOT DB contracts, whether federally funded or not.

The following situations are considered to result in OCOI that cannot be avoided or neutralized. These restrictions apply only to the circumstances described.

1. For DB projects, firms that act as the General Engineering Consultant (GEC), Major Consultant, or key staff employed by the GEC or Major Consultant, will not be allowed to join a DB team which submits on a contract that is part of the project for which the person or firm acted in the capacity of a GEC, Major Consultant, or key staff employed by the GEC or Major Consultant.

2. For DB projects, a Consultant (person or firm) and/or Sub-consultant (person or firm) that assists WSDOT in preparing a RFQ, ITP, or selection criteria shall not participate in any capacity on a DB team related to the same contract.

3. For DB projects, Consultants and/or Sub-consultants (persons) will not be allowed to do the actual scoring of a Statement of Qualifications (SOQ) or Proposal. Consultants and/or Sub-consultants (persons) may be allowed to act as discipline-specific advisory experts to identify the strengths and weakness of a SOQ or Proposal.

4. For DB projects, if the NEPA process has not been completed prior to issuing the RFP, a Consultant and/or Sub-consultant that has responsibility to prepare the NEPA Document shall not participate in any capacity on a DB team for the same project. A Sub-consultant to the preparer of a NEPA Document may be allowed to participate on a DB team provided (a) the department releases the Sub-consultant from further responsibility on the NEPA Document not later than issuing the RFQ, and (b) there is no other basis for an OCOI with said Sub-consultant.

5. For DBB projects, firms that act as WSDOT's GEC or as WSDOT's Major Consultant shall not participate as a Constructor, or as a Consultant or Sub-consultant on a Constructor's team, on a construction contract developed under its supervision.

IV. Procedures

A. General

Consultants, Sub-consultants, and Constructors are encouraged to investigate and manage any potential OCOI well in advance of forming teams or considering participating with a Submitter/Proposer on a contract. A firm or individual considering whether to enter into a contract as a Consultant or Sub-consultant on a WSDOT project should consider contacting WSDOT as to whether its proposed scope of work may create an OCOI if the firm or individual chooses to elect in the future to participate with a proposer on a contract related to the firm's or individual's work product.

WSDOT will apply the following procedures in accordance with the law and on a project specific basis.

B. Design-Builders: Prior to Forming Teams

1. Prior to submitting an SOQ or Proposal on a DB contract, each Submitter/Proposer shall conduct an internal review of its current affiliations and shall require its team members to identify potential, real, or perceived OCOI relative to the anticipated procurement. Potential Submitter/Proposers are notified that prior and existing contractual obligations relative to the proposed procurement may present an OCOI and these may require avoidance or neutralization.

2. If a potential, real, or perceived OCOI is identified or if there is any question regarding an OCOI, the potential Submitter/Proposer shall submit an Exhibit A Organizational Conflict of Interest *Disclosure and Avoidance/Neutralization Plan*, along with other pertinent information, to the WSDOT project manager.

3. The project manager will evaluate Exhibit A using the factors in part III of this manual, propose changes as appropriate, and forward a recommended draft response to the State Construction Engineer for review. See Exhibit B for an example written response.

4. The State Construction Engineer, in consultation with the Consultant Services Director, will review the recommended draft response letter and send comments or concurrence to the project manager.

   a. WSDOT, in its sole discretion, will make a determination relative to potential OCOI and the entity's ability to avoid or neutralize such a conflict.

   b. If the State Construction Engineer determines that an actual or potential OCOI exists and cannot be avoided or neutralized, the project manager will respond in writing, and the individual or firm determined to have the OCOI shall not be allowed to participate as a team member for that particular contract. Failure to abide by WSDOT's determination in this matter may result in a SOQ or proposal being declared nonresponsive.

   c. If the State Construction Engineer determines that the actual or potential OCOI can be avoided or neutralized, the project manager shall send a letter indicating concurrence or that corrections and resubmittal of the Disclosure and Avoidance/Neutralization Plan is required.

5. The State Construction Engineer's determination, reflected in the response sent from the project manager, may be appealed to the Assistant Secretary for Engineering and Regional Operations whose decision shall be final subject to further review only as provided for by state law.

C. Design-Builders: Documents Submitted with RFQ and RFP

1. Each Submitter/Proposer on a design-build RFQ and/or RFP shall be required to include Exhibit D-3, Organizational Conflicts of Interest Certification, with their SOQ and Proposal.

2. It is expected that most, if not all, potential or real OCOI's will have been identified and reviewed by the department prior to submission of the SOQ or Proposal. Nevertheless, if a potential, real, or perceived OCOI is identified or if there is any question regarding an OCOI, the potential Submitter/Proposer shall submit an Exhibit A *Organizational Conflict*

of Interest Disclosure and Avoidance/Neutralization Plan, along with other pertinent information, as attachments to Exhibit D-3. If previously submitted and approved Exhibit A plans are still applicable, they should be included, along with the department response, as an attachment to Exhibits D-3. These will be evaluated as described in the RFQ or ITP.

3. The department will evaluate the Exhibit A plans pursuant to the process described above in Sections IV B3, B4, and B5. Scoring of the OCOI Exhibits D-3 and Exhibit A will be in accordance with the RFQ or ITP.

D. Design-Bid-Builders

1. In regards to DBB contracts, WSDOT will address OCOI issues in compliance with pertinent state and federal law.

V. Contract Provisions/Forms

A. General

All Professional Service Agreements, and design-build requests for qualifications and proposals shall include a reference to and require compliance with the Secretary's Executive Order E 1059.00 and this manual.

B. Professional Services Agreements

The provision contained in Exhibit C to this manual shall be included in all Professional Service Agreements entered into between WSDOT and its Consultants.

C. Design-Build Request for Qualifications and Proposals

The form contained in Exhibit A and Exhibits D-3 shall be included in all Requests for Qualifications and Instructions to Proposers on DB projects.

The provisions contained in Exhibits D-1 and D-2 shall be included in all Requests for Qualifications and Instructions to Proposers on DB projects.

The provision contained in Exhibit E-1 along with the forms in Exhibits E-2 and E-3 shall be included in WSDOT's evaluation manuals for all DB projects.

VI. Definitions

For purposes of this manual, the following terms have the meaning as shown:

A. Consultant – An entity that provides professional services to WSDOT or a Constructor.

B. Constructor – A construction contractor, subcontractor, design-builder, or construction manager.

C. General Engineering Consultant (GEC) – An engineering firm under contract to WSDOT to help manage the overall development of a project.

D. Low-Level Document – As used in 23 CFR §636, low-level documents shall be interpreted to mean documents that are defined as program- or project-related documents that provide a basic understanding of a specific aspect of the program or project. "Low-Level" documents generally include engineering or technical work completed prior to completion of 30 percent design, and may include designs and reports created to assist in obtaining permits.

E. Major Consultant – An engineering firm that, as a consultant or sub-consultant to WSDOT, has a scope of work that includes any of the following:

1. Manage the development of the PS&E for a design-bid-build construction contract;
2. Manage the development of an RFQ or RFP for a design-build contract; or
3. Assist WSDOT in the management of the overall development of a project.

F. NEPA Document: Any one of the following: Environmental Assessment (EA), Environmental Impact Statement (EIS), Finding of No Significant Impact (FONSI), Record of Decision (ROD), or Categorical Exclusion (CE).

G. Organizational Conflict of Interest (OCOI) means that because of other activities or relationships with other persons or entities, a person or entity:

1. Is unable or potentially unable to render impartial assistance or advice to WSDOT;
2. Is or might be otherwise impaired in its objectivity in performing the contract work; or
3. Has an unfair competitive advantage.

H. Sub-consultant – An entity that provides professional services to a Consultant or to a sub-consultant at any tier.

I. Submitter/Proposer – A submitter on an RFQ for a DB contract, or a proposer on an RFP for a DB contract.

VII. Who to Contact

For more information contact the Headquarters Construction Office at 360-705-7820, Web site http://www.wsdot.wa.gov/biz/construction/

Exhibit A Organizational Conflict of Interest Disclosure and Avoidance/Neutralization Plan

(To be inserted in all Design-Build RFQs and ITPs; for use by consultant or constructor: submit to WSDOT Project Manager)

Organizational Conflict of Interest
Disclosure and Avoidance/Neutralization Plan

This disclosure statement outlines potential organizational conflicts of interest, either real or apparent, which as a result of activities or relationships with other persons or entities, such person or entity:

1. Is unable or potentially unable to render impartial assistance or advice to WSDOT; or
2. Is or might be otherwise impaired in its objectivity in performing the contract work; or
3. Has an unfair competitive advantage.

SECTION I of this disclosure statement describes the potential Organizational Conflict of Interest, as defined in Secretary's Executive Order E-1059.00. SECTION II of this disclosure statement describes the management plan for avoiding or neutralizing the potential Organizational Conflicts of Interest as described in SECTION I of this disclosure statement. I acknowledge that the Washington State Department of Transportation (WSDOT) may require revisions to the management plan described in SECTION II of this disclosure statement prior to approving it, and that WSDOT has the right, in its sole discretion, to limit or prohibit my involvement in the Project as a result of the potential conflicts of interest described in SECTION I of this disclosure statement.

SECTION Ia – Name of Person or Firm Potentially Conflicted

_____

SECTION Ib – Current Project Name and Scope of Work

_____

_____

SECTION Ic – Future Project Name and Description of Potential Conflict Of Interest

_____

SECTION II - Plan for Managing Potential Conflicts Of Interest

_____

_____

Signed _____ Date _____

Printed Name and Title _____

Exhibit B — Sample of Written Response to Disclosure and Avoidance/Neutralization Plan

(Sample written response from WSDOT Project Manager regarding OCOI)

Washington State Department of Transportation
Paula J. Hammond, P.E.
Secretary of Transportation

Transportation Building
310 Maple Park Avenue S.E.
P.O. Box 47300
Olympia, WA 98504-7300
360-705-7000
TTY: 1-800-833-6388
www.wsdot.wa.gov

John Doe, President

Dear Mr. Doe:

We have reviewed your Organizational Conflicts of Interest Disclosure and Avoidance/Neutralization Plan ("Disclosure") regarding your firm, ABC Engineering, its involvement in preparation of the right of way drawings as a subconsultant to WSDOT's GEC on the I-999 Corridor project, and your desire to be allowed to team with a design-builder as the lead designer on the A Project that is part of the I-999 Program.

Based on the attached *Disclosure and Avoidance/Neutralization Plan*, WSDOT has determined that the identified conflicts, in our opinion, do not preclude your firm from joining a team to Propose on the A Project. WSDOT's determination is based on the following conditions:

1. This determination is based on the scope of work you have described in your disclosure statement.
2. This determination may be invalidated if you performed or perform expanded or additional scope on the I-999 Corridor project not identified in the Disclosure.
3. You are expected to implement the *Avoidance/Neutralization Plan* identified in your disclosure with the following recommended revisions:
   a.
   b.
4. This determination does not apply to future behaviors of your firm or employees, which may necessitate a rescission of this letter if organizational conflicts of interest occur in the future.
5. Your firm and its employees are ultimately responsible to ensure that organizational conflicts of interest, as defined in WSDOT Secretary's Executive Order E 1059.00 and the Project RFQ are avoided or neutralized. Failure to do so may result in your firm and its team's proposal being considered non-responsive for the A Project. Risks, if any, associated with a successful legal challenge regarding the OCOI remain solely the responsibility of ABC Engineering.
6. WSDOT reserves the right to reassess and revise any determination made herein at any time.

Sincerely,

_____
John Q. Manager
Project Manager
I-999 Corridor Program

Exhibit C — OCOI Acknowledgement for Consultant Contracts

(For WSDOT to insert in Professional Service Agreements)

Organizational Conflicts of Interest

Consultant acknowledges that WSDOT has a policy on Organizational Conflicts of Interest that is implemented by Secretary's Executive Order E 1059.00 and the *Organizational Conflicts of Interest Manual* M 3043. Consultant agrees to abide by WSDOT's policies as described therein on this contract and any project or contract related to this contract. This provision shall be required to be implemented in all sub-consultant agreements, at all tiers.

Exhibit D-1 OCOI Disclosure Requirements for DB RFQ and RFP

(For WSDOT to insert in (design-build RFQ) or (design-build ITP)

Organizational Conflicts of Interest

Organizational conflict of interest means that because of other activities or relationships with other persons or entities, a person or entity:

1. Is unable or potentially unable to render impartial assistance or advice to WSDOT; or
2. Is or might be otherwise impaired in its objectivity in performing the contract work; or
3. Has an unfair competitive advantage.

The integrated nature of the design-build project delivery method creates the potential for Organizational Conflicts of Interest. Disclosure, evaluation, neutralization, and management of these conflicts and of the appearance of conflicts, is in the interests of the public, WSDOT, and the consulting and construction communities.

WSDOT will take steps to ensure that individuals involved in the preparation of the procurement package, evaluation of (SOQs) (Proposals), and Design-Builder selection are not influenced by organizational conflicts of interest, and that no (Submitter) (Proposer) is given an unfair competitive advantage over another.

Attention is directed to the requirement for disclosure of organizational conflicts of interest set forth in 23 CFR Section 636.116(a)(2), WSDOT Secretary's Executive Order E-1059.00, and WSDOT *Organizational Conflicts of Interest Manual* M 3043.

(Submitters) (Proposers) are required to disclose all relevant facts concerning any past, present or currently planned interests, activities, or relationships which may present an organizational conflict of interest. Submitters shall state how their interests, activities, or relationships, or those of the chief executives, directors, key project personnel, or any proposed Consultant, Sub-Consultant at any tier, Contractor, or Subcontractor at any tier may result, or could be viewed as, an organizational conflicts of interest prior to or in the (SOQ) (Proposal), in accordance with Secretary's Executive Order E-1059.00 and WSDOT *Organizational Conflicts of Interest Manual* (M 3043). Submit the *Organizational Conflict of Interest Certification* and Organizational Conflict of Interest *Disclosure and Avoidance/Neutralization Plans* (forms contained in Appendix ****) as described elsewhere in this (RFQ)(ITP).

If an Organizational Conflict of Interest is determined to exist, WSDOT may, at its sole discretion: offer the (Submitter) (Proposer) the opportunity to avoid or neutralize the Organizational Conflict of Interest; disqualify the (Submitter)(Proposer) from further participation in the procurement; cancel this procurement; or, if award has already occurred, declare the Proposer not responsible and award the contract to the next responsible Proposer, or cancel the Contract. If the (Submitter) (Proposer) was aware of an Organizational Conflict of Interest prior to award of a Contract and did not disclose the conflict to WSDOT, WSDOT may terminate the Contract for default.

Exhibit D-2 DB Identification of Conflicted Firms

(For WSDOT to include in RFQs, and ITPs.)

WSDOT Consultant/Technical Support

WSDOT has retained the consulting firms of _____

_____

_____

_____

to provide guidance in preparing and evaluating the RFQ, and/or the RFP, and/or to provide advice on related financial, contractual, and technical matters. Each of these firms is prohibited from joining any Submitter's or Proposer's team or otherwise assisting any Submitter or Proposer in connection with the procurement process.

Exhibit D-3 Design Builder OCOI Certification

(To be inserted in all Design Build RFQs and ITPs; for use by Submitter or Proposer)

Organizational Conflict of Interest Certification
To be signed by authorized signatory of (Submitter) (Proposer)

(Name of Submitter_____)

My signature below certifies that, prior to submitting this (SOQ) (Proposal), I have conducted an internal review of (Submitter's) (Proposer's) current affiliations and have required (Submitter's) (Proposer's) team members to identify potential, real, or perceived Organizational Conflicts of Interest relative to the anticipated procurement, in accordance with the Secretary's Executive Order E-1059.00 and WSDOT *Organizational Conflict of Interest Manual* M-3043.

I further certify that "*Organizational Conflict of Interest Disclosure and Avoidance/Neutralization Plan*" forms are attached, as listed below, for all real or potential organizational conflicts of interest as defined in WSDOT Organization Conflict of Interest Manual M-3043 for all (Submitter) (Proposer) team members.

Signed _____ Date_____

Printed Name and Title_____

List Attachments by name of person or firm potentially conflicted:

_____
_____
_____
_____
_____
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_____
_____
_____
_____
_____
_____

Exhibit E-1 DB Evaluation, Confidentiality, and Non-Disclosure Process

(For WSDOT use in the WSDOT Plan for Evaluating SOQs and Proposals)

Confidentiality and Non-disclosure Agreement and No-Conflicts of Interest Affidavit

A Confidentiality and Non-Disclosure Agreement and No-Conflicts of Interest Affidavit (see Appendices E-2 and E3) will be executed by Chairpersons, Advisors, and Overseers (the "Evaluation Team") (see the Evaluation Committee Organizational Chart) prior to commencement of the Proposal evaluation process, or during the Proposal Evaluation kick-off meeting, and provide them to the Project Engineer. The Agreements and Affidavits will be retained as part of the Proposal evaluation record. Any person who fails to execute the required Confidentiality and Non-Disclosure Agreement and No- Conflicts of Interest Affidavit will not participate in the Proposal evaluation. As part of the Proposal Evaluation kick-off meeting, prior to the start of the evaluation, the Project Engineer will inform the Evaluation Team of the importance of confidentiality safeguards and verify that a Confidentiality and Non-Disclosure Agreement and No-Conflicts of Interest Affidavit has been collected from each Evaluation Team member. The Overseers will review all Confidentiality and Non-Disclosure Agreements and No-Conflicts of Interest Affidavits. Indications of real, apparent, or possible conflicts of interest will be resolved by the Executive Team. If the conflict cannot be resolved, the individual involved will be removed from the Proposal evaluation process. After the kick-off meeting, all individuals involved in the Proposal evaluation process will be responsible for maintaining confidentiality.

Exhibit E-2 DB Evaluation Team Member OCOI Affidavit

(For WSDOT use in WSDOT Plan for Evaluating SOQs and Proposals)

Design-Build Project No-Conflicts of Interest Affidavit for Design-Builder Evaluations

I, _____, in agreeing to participate as a member of a team reviewing the (SOQs) (Proposals) for the design and construction of the _____ (the "Project"), make the following representations:

1. I have reviewed a copy of Secretary's Executive Order E1059.00 and the Organizational Conflicts Manual M3042. Except as set forth in the Attachment to this No Conflicts of Interest Affidavit, I have no real or potential Organizational Conflict of Interest as defined and described therein.
2. Except as set forth in the Attachment to this No-Conflicts of Interest Affidavit, neither I nor any member of my immediate family has a financial interest in any entity pursuing this Project;
3. Except as set forth in the Attachment to this No-Conflicts of Interest Affidavit, no business or organization with which I am associated has a financial interest in any entity pursuing this Project;
4. Except as set forth in the Attachment to this No-Conflicts of Interest Affidavit, no member of my immediate family or other person, business, or organization with which I am associated is negotiating or has an arrangement concerning prospective employment relating to any entity pursuing this Project; and
5. I will not solicit or accept, directly or indirectly, any gift, favor, gratuity, entertainment, food, lodging, loan, or other item from any firm that has submitted an (SOQ) (Proposal) in response to the Request for Proposal if it tends to influence me in the discharge of my duties.

Signed _____

Date _____

Printed Name and Title _____

Exhibit E-3 DB Evaluation Team Member OCOI Disclosure

(For WSDOT use in the WSDOT Plan for Evaluating SOQs and Proposals)

Attachment to the No-Conflicts of Interest Affidavit Design-Builder Evaluations

This disclosure statement outlines potential conflicts of interest, either real or apparent, as a result of a direct or indirect financial interest on my part or that of any member of my immediate family, or of my employer, partners, or joint venturers, in any firm under consideration for the design-build contract associated with ***INSERT PROJECT NAME*** (the "Project"). SECTION I of this disclosure statement describes the potential conflicts of interest. SECTION II of this disclosure statement describes the management plan for dealing with the potential conflicts of interest as described in SECTION I of this disclosure statement. I acknowledge that the Washington State Department of Transportation (WSDOT) may require revisions to the management plan described in SECTION II of this disclosure statement prior to approving it, and that WSDOT has the right, in its sole discretion, to limit or prohibit my involvement in the Project as a result of the potential conflicts of interest described in SECTION I of this disclosure statement.

SECTION I - Description of Potential Conflicts of Interest
(attach additional pages as necessary)

_____
_____
_____

SECTION II - Plan for Managing Potential Conflicts of Interest
(attach additional pages as necessary)

_____
_____
_____

Signed _____ Date _____
Printed Name and Title _____

Approved by Washington State Department of Transportation
Signed _____ Date _____
Printed Name and Title _____

To see full regulation: 73 F.R. 67064

Federal Acquisition Regulation; Contractor Business Ethics Compliance Program and Disclosure Requirements

Wednesday, November 12, 2008 Effective December 12, 2008

***67064** ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. This final rule implements Pub. L. 110-252, Title VI, Chapter 1.

Applicability: The Contractor's Internal Control System shall be established within 90 days after contract award, unless the Contracting Officer establishes a longer time period (See FAR 52.203-13(c)). The Internal Control System is not required for small businesses or for commercial item contracts.

***

A. Background

This case is in response to a request to the Office of Federal Procurement Policy from the Department of Justice, dated May 23, 2007, and the Close the Contractor Fraud Loophole Act, Public Law 110-252, Title VI, Chapter 1. This final rule amends the Federal Acquisition Regulation to require Government contractors to--

. Establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of *any* Government contract or subcontract; and

. Timely disclose to the agency Office of the Inspector General, with a copy to the contracting officer, whenever, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, the contractor has credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or a violation of the civil False Claims Act *(31 U.S.C. 3729*-3733).

. The rule also provides as cause for suspension or debarment, knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of--

A. Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

B. Violation of the civil False Claims Act; or

C. Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001, Definitions.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at *72 FR 64019,* November 14, 2007, entitled "Contractor Compliance Program and Integrity Reporting." The public comment period closed on January 14, 2008. (This was a follow-on case to the final rule under FAC 2005-22, FAR case 2006-007 that was published in the **Federal Register** at *72 FR 65868,* November 23, 2007, effective December 24, 2007.) A second proposed rule was published in the **Federal Register** at *73 FR 28407,* May 16, 2008, entitled "Contractor Compliance Program and Integrity Reporting." The public comment period on the second proposed rule closed on July 15, 2008.

On June 30, 2008, the Close the Contractor Fraud Loophole Act (Pub. L. 110-252, Title VI, Chapter 1) was enacted as part of the Supplemental Appropriations Act, 2008. This Act requires revision to the FAR within 180 days of enactment, pursuant to 2007-006, "or any follow-on FAR case to include provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial

items." The statute also defines a covered contract to mean "any contract in an amount greater than $ 5,000,000 and more than 120 days in duration."

***

PART 3--IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

48 CFR 3.1001

3. Revise section 3.1001 to read as follows:

48 CFR 3.1001

3.1001 Definitions.

As used in this subpart--

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

48 CFR 3.1003

4. Amend section 3.1003 by revising the section heading and paragraph (a); redesignating paragraph (b) as paragraph (c), and adding a new paragraph (b) to read as follows:

48 CFR 3.1003

3.1003 Requirements.

(a) Contractor requirements. (1) Although the policy at 3.1002 applies as guidance to all Government contractors, the contractual requirements set forth in the clauses at 52.203-13, Contractor Code of Business Ethics and Conduct, and 52.203-14, Display of Hotline Poster(s), are mandatory if the contracts meet the conditions specified in the clause prescriptions at 3.1004.

(2) Whether or not the clause at 52.203-13 is applicable, a contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension and/or debarment until 3 years after final payment on a contract (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

(3) The Payment clauses at FAR 52.212-4(i)(5), 52.232-25(d), 52.232-26(c), and 52.232-27(l) require that, if the contractor becomes aware that the Government has overpaid on a contract financing or invoice payment, the contractor shall remit the overpayment amount to the Government. A contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose credible evidence of a significant overpayment, other than overpayments resulting from contract financing payments as defined in 32.001 (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

(b) Notification of possible contractor violation. If the contracting officer is notified of possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C.; or a violation of the civil False Claims Act, the contracting officer shall--

(1) Coordinate the matter with the agency Office of the Inspector General; or

(2) Take action in accordance with agency procedures.

* * * * *

48 CFR 3.1004

5. Amend section 3.1004 by removing the introductory text and revising the introductory text of paragraph (b)(1) to read as follows:

48 CFR 3.1004

3.1004 Contract clauses.

* * * * *
(b)(1) Unless the contract is for the acquisition of a commercial item or will be performed entirely outside the United States, insert the clause at FAR ***67091** 52.203-14, Display of Hotline Poster(s), if--

* * * * *

PART 9--CONTRACTOR QUALIFICATIONS

48 CFR 9.104-1

6. Amend section 9.104-1 by revising paragraph (d) to read as follows:

48 CFR 9.104-1

9.104-1 General standards.

* * * * *
(d) Have a satisfactory record of integrity and business ethics (for example, see Subpart 42.15).

* * * * *

48 CFR 9.406-2

7. Amend section 9.406-2 by revising the introductory text of paragraph (b)(1) and adding paragraph (b)(1)(vi) to read as follows:

48 CFR 9.406-2

9.406-2 Causes for debarment.

(b)(1) A contractor, based upon a preponderance of the evidence, for any of the following--

* * * * *
(vi) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of--

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

* * * * *

48 CFR 9.407-2

8. Revise section 9.407-2 by redesignating paragraph (a)(8) as paragraph (a)(9) and adding a new paragraph (a)(8); to read as follows:

48 CFR 9.407-2

9.407-2 Causes for suspension.

(a) * * *

(8) Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of--

(i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(ii) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(iii) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001; or

* * * * *

PART 42--CONTRACT ADMINISTRATION AND AUDIT SERVICES

48 CFR 42.1501

9. Amend section 42.1501 by revising the last sentence to read as follows:

48 CFR 42.1501

42.1501 General.

* * * It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; the contractor's record of integrity and business ethics, and generally, the contractor's business-like concern for the interest of the customer.

PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

48 CFR 52.203-13

10. Amend section 52.203-13 by--

a. Revising the date of clause;

b. Revising paragraph (a);

c. Revising paragraphs (b)(1)(i), (b)(1)(ii), (b)(2) and adding paragraph (b)(3); and

d. Revising paragraphs (c) and (d).

The revised text reads as follows:

48 CFR 52.203-13

52.203-13 Contractor Code of Business Ethics and Conduct.

* * * * *

Contractor Code of Business Ethics and Conduct

(Dec 2008)

(a) Definitions. As used in this clause--

Agent means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

Full cooperation--(1) Means disclosure to the Government of the

information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require--

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from--

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

(b) * * *

(1) * * *

(i) Have a written code of business ethics and conduct;

(ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) The Contractor shall--

(i) Exercise due diligence to prevent and detect criminal conduct; and

(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(3)(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed--

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or

agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

(iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.

(c) Business ethics awareness and compliance program and internal control ***67092** system. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial item as defined at FAR 2.101. The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

(i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

(2) An internal control system.

(i) The Contractor's internal control system shall--

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including--

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(E) Disciplinary action for improper conduct or for failing to take

reasonable steps to prevent or detect improper conduct.

(F) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontractor thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.

(2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) Subcontracts. (1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of $5,000,000 and a performance period of more than 120 days.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

Office of Inspector General
For the General Services Administration

GSA OIG Contractor Reporting

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. This final rule implements Pub. L. 110–252, Title VI, Chapter 1.

Effective Date: December 12, 2008.

Under the rule, a contractor must timely disclose to the relevant agency's Office of Inspector General, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act.

Source: 73 Fed. Reg. 67064, 67064, 67090 (Nov. 12, 2008).

Make a Report

The above link will take you to our electronic form. Once you have submitted your report on that form, we will automatically send you a copy of the information you submitted as confirmation for your records.

Office of Inspector General
For the General Services Administration

GSA OIG Contractor Reporting Form

This form is provided as a convenience to allow contractors to comply with the reporting requirements in the December 12, 2008, FAR amendment, . Specifically, contractors may use this form to satisfy the requirement that they notify, in writing, the agency (GSA) Office of the Inspector General, whenever the contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of the civil False Claims Act or a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations in connection with the award, performance, or closeout of a contract or any related subcontract. The individual completing this form must be an authorized representative empowered to speak for the company. When you submit this electronic form an email will automatically be generated to send you a tracking number and a copy of what you have submitted. The information you are providing is not deemed to be submitted until you have received that confirmation email. If you wish to provide information that does not fall within these guidelines, please visit the .

Instructions:

Fill in the form at right.

GSA Office of Inspector General
Attn: FAR Contractor Reporting
Office of Audits (JA)
1800 F Street NW, Room 5318
Washington, DC 20405

Your Company Information

Your First Name:
Your Last Name:
Your Title:
Your Business Email:
Confirm Your Business Email:
Company Name:
Business Address1:
Business Address2:
Business City:
Business State / Province:
Business Zip or Postal Code:
Business Country:
Business Phone Number:
Business Fax Number:

Relationship

My company is the: Prime
I am reporting on: My Company

Contract Information

Contract No:
DUNS or TINS:
GSA Contracting Officer Name:

8/11/2009 GSA Office of Inspector General

GSA Component / Region: Administrator / 1 - Boston, MA

If other, please specify:

Description of Services/Supplies/System:

Incident

Estimated Amount of Loss:

Loss Description:

Initial Incident Date: 01 / 01 /

Is the incident ongoing? Yes No

Date contractor learned of potential violation: 01 / 01 /

Comments

Please provide a complete description of the facts and circumstances surrounding the reported activities, including the evidence forming the basis of this report, the names of the individuals involved, dates, location, how the matter was discovered, potential witnesses and their involvement and any corrective action taken by the company.

Does this report contain confidential or proprietary information? Yes No

Please list any other government entities you are notifying about this incident:

Attachments

Choose File No file chosen

Add File

NAME:

Validation

Please enter the number from the image into the adjacent field:

Clear Submit

oig.gsa.gov/integrityreport.htm 2/3

TITLE 31--MONEY AND FINANCE

CHAPTER 37--CLAIMS

SUBCHAPTER III--CLAIMS AGAINST THE UNITED STATES GOVERNMENT

* * * * * * *

Sec. 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS. [Struck out->]**[** --Any person who **]**[<-Struck out] --

(1) **IN GENERAL- *SUBJECT TO PARAGRAPH (2), ANY PERSON WHO*--**

(A) **knowingly presents, or causes to be presented,** [Struck out->]**[** to an officer or employee of the United States Government or a member of the Armed Forces of the United States **]**[<-Struck out] **a false or fraudulent claim for payment or approval;**

[Struck out->]**[** (2) **]**[<-Struck out] ***(B)*** **knowingly makes, uses, or causes to be made or used, a false record or statement *material* to** [Struck out->]**[** get **]**[<-Struck out] **a false or fraudulent claim** [Struck out->]**[** paid or approved by the Government **]**[<-Struck out] ;

[Struck out->]**[** (3) **]**[<-Struck out] ***(C)*** **conspires to** [Struck out->]**[** defraud the Government by getting a false or fraudulent claim allowed or paid **]**[<-Struck out**]** ***commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)*;**

[Struck out->]**[** (4) **]**[<-Struck out] ***(D)*** **has possession, custody, or control of property or money used, or to be used, by the Government and** [Struck out->]**[** , intending to defraud the Government or willfully to conceal the property, **]**[<-Struck out] ***knowingly*** **delivers, or causes to be delivered, less** [Struck out->]**[** property than the amount for which the person receives a certificate or receipt **]**[<-Struck out] ***than all of that money or property*;**

[Struck out->]**[** (5) **]**[<-Struck out] ***(E)*** **is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;**

[Struck out->]**[** (6) **]**[<-Struck out] ***(F)*** **knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or**

[Struck out->]**[** (7) **]**[<-Struck out] ***(G)*** **knowingly makes, uses, or causes to be made or used, a false record or statement *material* to** [Struck out->]**[** conceal, avoid, or decrease **]**[<-Struck out] **an obligation to pay or transmit money or property to the Government, *or knowingly conceals or knowingly and***

improperly avoids or decreases an obligation to pay or transmit money or property to the Government,
is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, *as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410),* plus 3 times the amount of damages which the Government sustains because of the act of that person. [Struck out->][except that if the court finds that][<-Struck out]
[Struck out->][(A)][<-Struck out] ***(2)* REDUCED DAMAGES.--*IF THE COURT FINDS THAT*--**
***(A)* the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;**
(B) such person fully cooperated with any Government investigation of such violation; and
(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation [Struck out->][;][<-Struck out] **, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of** [Struck out->][the][<-Struck out] ***that* person.**
***(3)* COSTS OF CIVIL ACTIONS- A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.**

(b) [Struck out->][KNOWING AND KNOWINGLY DEFINED][<-Struck out] **.**
DEFINITIONS- For purposes of this section [Struck out->][,][<-Struck out] **--**

***(1)* the terms `knowing' and `knowingly'--**
***(A)* mean that a person, with respect to information--**
[Struck out->][(1)][<-Struck out] ***(i)* has actual knowledge of the information;**
[Struck out->][(2)][<-Struck out] ***(ii)* acts in deliberate ignorance of the truth or falsity of the information; or**
[Struck out->][(3)][<-Struck out] ***(iii)* acts in reckless disregard of the truth or falsity of the information; and**
***(B) require* no proof of specific intent to defraud** [Struck out->][is required][<-Struck out] .
[Struck out->][(c)][<-Struck out] ***(2)*** [Struck out->][CLAIM DEFINED- For purposes of this section,][<-Struck out] ***the term* `claim'--**
(A) means [Struck out->][includes][<-Struck out] **any request or demand, whether under a contract or otherwise, for money or property *and whether or not the United States has title to the money or property, that*--**
(i) is presented to an officer, employee, or agent of the United States; or
(ii) [Struck out->][which][<-Struck out] **is made to a contractor, grantee, or other recipient if the *money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the* United States Government--**
***(I)* provides *or has provided* any portion of the money or property** [Struck out->][which is][<-Struck out] **requested or demanded, or**
(II) [Struck out->][if the Government][<-Struck out] **will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded, *and***
(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as income subsidy with no restrictions on that individual's use of the money or property; and
(3) the term `obligation' means a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, statutory, fee-based, or similar relationship, and the retention of overpayment; and
(4) the term `material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

[Struck out->][(d)][<-Struck out] ***(c)* EXEMPTION FROM DISCLOSURE- Any information furnished pursuant to** [Struck out->][subparagraphs (A) through (C) of subsection (a)][<-Struck out] **subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.**

[Struck out->][(e)][<-Struck out] ***(d)* EXCLUSION- This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.**

A NEW SECTION (c) IS CREATED

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.''.

SECTION (h) is expanded

(h) Relief From Retaliatory Actions.--
``(1) In general.--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor,

or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

``(2) Relief.--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.''

NEW DEFINITION OF "OFFICIAL USE"

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

Senate Report 111-010 - FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009 (EXCERPTS)

Sec. 4. Clarifications to the False Claims Act to reflect the original intent of the law

In response to the economic crisis, the Federal Government has obligated and expended more than $1 trillion in an effort to stabilize our banking system and rebuild our economy. These

funds are often dispensed through contracts with non-governmental entities, going to general contractors and subcontractors working for the Government. Protecting these funds from fraud and abuse must be among our highest priorities as we move forward with these necessary actions.

One of the most successful tools for combating waste and abuse in Government spending has been the False Claims Act (FCA), which is an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse. The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect the Federal assistance and relief funds expended in response to our current economic crisis.

This section amends the FCA to clarify and correct erroneous interpretations of the law that were decided in *Allison Engine Co.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), and *United States ex. rel. Totten* v. *Bombardier Corp*, 380 F.3d 488 (D.C. Cir. 2004). 2

[Footnote] In *Allison Engine*, the Supreme Court held that Section 3729(a)(2) of the FCA requires the Government to prove that `a defendant must intend that the Government itself pay the claim,' for there to be a violation. 128 S. Ct. at 2128. As a result, even when a subcontractor in a large Government contract knowingly submits a false claim to general contractor and gets paid with Government funds, there can be no liability unless the subcontractor intended to defraud the Federal Government, not just their general contractor. This is contrary to Congress's original intent in passing the law and creates a new element in a FCA claim and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute. Similarly, in Totten, the Court of Appeals for the District of Columbia Circuit held that liability under the FCA can only attach if the claim is `presented to an officer or employee of the Government before liability can attach.' 380 F. 3d at 490. Known as the `presentment clause,' the D.C. Circuit interpreted this clause to limit recovery for frauds committed by a Government contractor when the funds are expended by a Government grantee, such as Amtrak. The Totten decision, like the Allison Engine decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.

[*Footnote 2:* The provisions in Section 4 were drawn, in significant part, from the Committee's previous work on S. 2041, the False Claims Act Corrections Act of 2008, in the 110th Congress. S. 2041 was favorably reported from Committee and a detailed Committee report was filed on S. 2041 outlining the conflicting interpretations and providing significant background on why the Committee chose to make the amendments contained in the bill. The Committee feels that the report to S. 2041, S. Rpt. 110-507, should be read as a complement to this report due to a number of similar changes contained in S. 386.]

As the bill makes a number of changes to the liability provisions compared to the current statute, this report will outline the new clarifications to the law by topic.

A. Fraud against government contractors and grantees

Following the decision in *Totten* a number of courts have held that the FCA does not reach false claims that are (1) presented to Government grantees and contractors, and (2) paid with Government grant or contract funds. 3

[Footnote] These cases are representative of the types of frauds the FCA was intended to reach when it was amended in 1986. This section of the bill clarifies that liability under section 3729(a) attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the Federal Government; with an agent acting on the Government's behalf; or with a third party contractor, grantee, or other recipient of such money or property. The bill explicitly excludes from liability requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or has received as an income subsidy, such as Social Security benefits.

[*Footnote 3:* 380 F.3d 488 (D.C. Cir. 2005); see, e.g. *United States, ex rel., Atkins* v. *McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), aff'd on other grounds, 470 F.3d 1350 (11th Cir. 2006); *United States, ex rel., Rafizadeh* v. *Continental Common, Inc.*, 2006 WL 980676 (E.D. La. April 10, 2006); *United States* v. *City of Houston*, 2006 WL 2382327 (S.D. Tex. Aug. 16, 2006); *United States, ex rel., Rutz* v. *Village of River Forest,* 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007); *United States, ex rel., Arnold* v. *CMC Engineering*, 2007 WL 442237 (W.D. Pa. Feb. 7, 2007).]

As some defendants have argued that *Totten* and *Atkins* restrict FCA liability from attaching to Medicaid claims, the bill clarifies the position taken by the Committee in 1986 that the FCA reaches all false claims submitted to State administered Medicaid programs. By removing the offending language from section 3729(a)(1), which requires a false claim be presented to `an officer or employee of the Government, or to a member of the Armed Forces,' the bill clarifies that direct presentment is not required for liability to attach. This is consistent with the intent of Congress in amending the definition of `claim' in the 1986 amendments to include `any request or demand * * * for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.' 31 U.S.C. Sec. 3729(c) (2000). 4

[Footnote]

[*Footnote 4:* See also S. Rpt. No. 99-345, at 5282-5301 (providing section-by-section analysis explaining that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government).]

This section differs also addresses the Supreme Court's decision in *Allison Engine*, 128 S. Ct. 2123 (2008). In *Allison Engine*, the Court held that the FCA contained an intent requirement in sections 3729(a)(2) and (a)(3) that had not previously been required to prove for FCA liability to attach. The *Allison Engine* decision created a significant question about the scope and applicability of the FCA to certain false claims, effectively limiting FCA coverage for some Government programs and funds. As a result, defendants across the country have cited *Allison Engine* in seeking dismissal of certain FCA cases claiming that the FCA no longer applies to Government programs traditionally covered. Further, one court has even gone as far as dismissing a case *sua sponte*. 5

[Footnote]

[*Footnote 5:* See *United States* v. *Russell T. Hawley, et al.*, No. C06-4087-MWB (N.D. Iowa).]

To correct the *Allison Engine* decision, S. 386 contains three specific changes to existing section 3729(a)(2) and (a)(3). In section 3729(a)(2) the words `to get' were removed striking the language the Supreme Court found created an intent requirement for false claims liability under that section. In place of this language, the Committee inserted the words `material to' a false or fraudulent claim. Further, the language `paid or approved by the Government' was removed to address both the decision in *Allison Engine*, and to prevent a new `presentment' requirement from being read into the section. Finally, the new term `material' is defined later in the section to mean `having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property.' This definition is consistent with the Supreme Court definition, as well as other courts interpreting the term as applied to the FCA. 6

[Footnote]

[*Footnote 6:* See *Neder* v. *United States*, 527 U.S. 1, 16 (1999); *United States* v. *Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008); *United States* v. *Rogan*, 517 F.3d 449, 452 (7th Cir. 2008); *United States ex rel. Bahrani* v. *Conagra, Inc.*, 465 F.3d 1189, 1204 (10th Cir. 2006); *United States ex rel. A+ Homecare, Inc.* v. *Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 446 (6th Cir. 2005); *United States ex rel. Harrison* v. *Westinghouse Savannah River Co.*, 352 F.3d 908, 913, 916-917 (4th

Cir. 2003); *United States ex rel. Cantekin* v. *University of Pittsburgh*, 192 F.3d 402, 415-416 (3d Cir. 1999).]

The other change responding to *Allison Engine* is in current section 3729(a)(3). While this section includes further modifications discussed below, the words `defraud the Government by getting a false or fraudulent claim allowed or paid' were removed to specifically address the intent requirement read into the section by the Court in *Allison Engine*. As a result, the provision now just extends FCA liability to those who conspire to commit a violation of any substantive section of 3729(a).

B. Fraud against funds administered by the United States

The Committee included provisions in the bill to address a recent decision involving funds administered by the U.S. Government during the reconstruction of Iraq. In *United States ex rel. DRC, Inc.* v. *Custer Battles, LLC*, a district court set aside a jury award finding that Iraqi funds administered by the U.S. Government on behalf of the Iraqi people were not U.S. Government funds within the scope of the FCA. 376 F. Supp. 2d 617 (E.D. Va. 2006). The Committee believes this result is inconsistent with the spirit and intent of the FCA.

When the U.S. Government elects to invest its resources in administering funds belonging to another entity, or providing property to another entity, it does so because use of such investments for their designated purposes will further the interest of the United States. 7

[Footnote] False claims made against Government-administered funds harm the ultimate goals and U.S. interests and reflect negatively on the United States. The FCA should extend to these administered funds to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government. Accordingly, this bill includes a clarification to the definition of the term `claim' in new Section 3729(b)(2)(A) and attaches FCA liability to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration.

[*Footnote 7:* See, e.g., *United States ex rel. Haynes* v. *CMC Electronics, Inc.*, 297 F.Supp.2d 734 (D.N.J. 2003) (discussing sales of equipment to foreign governments under the Arms Export Control Act).]

C. Conspiracy

As noted above, the current FCA contains a provision that subjects those who knowingly conspire to defraud the Government by getting a false or fraudulent claim allowed or paid. Some courts have interpreted this provision narrowly. 8

[Footnote] The current FCA conspiracy provision does not explicitly impose liability on those who conspire to violate other provisions of the FCA, such as delivery of less Government property than that promised or making false statements to conceal an obligation to pay money to the Government. *See* 31 U.S.C. Sec. 3729(a)(4-6) (2000). Because of the confusion and uncertainty surrounding the application of the conspiracy provision, the bill amends current section 3729(a)(3) to clarify that conspiracy liability can arise whenever a person conspires to violate any of the provisions in Section 3729 imposing FCA liability.

[*Footnote 8:* See, e.g., *United States ex rel. Huangyan Import & Export Corp.* v. *Nature's Farm Products, Inc.*, 370 F. Supp. 2d 993 (N.D. Cal. 2005) (holding that section 3729(a)(3) does not extend to conspiracies to violate section 3729(a)(7)).]

D. Wrongful possession, custody or control of government property

Section 3729(a)(4) of the FCA has remained unchanged since enactment of the FCA in 1863. This provision establishes FCA liability upon an individual that has `possession, custody, or control of property or money used, or to be used, by the Government, and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate of receipt.' 31 U.S.C. Sec. 3729(a)(4)(2000). This section allows the Government to recover losses that are incurred because of conversion of Government assets. However, because this section has remained unchanged from the original act that was drafted in 1863, the archaic language has made recoveries under a conversion theory contingent upon the individual receiving an actual receipt for the property. The new section, renumbered as Section 3729(a)(1)(D) in the bill, updates this provision by retaining the core conversion principle while redrafting it in a more straightforward manner and removing the receipt requirement. Where knowing conversion of Government property occurs, it should make no difference whether the person receives a valid receipt from the Government.

E. `Reverse' false claims

Section 3729(a)(7) of the FCA currently imposes liability on any person who `knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.' 31 U.S.C. Sec. 3729(a)(7)(2000). This provision is commonly referred to as creating `reverse' false claims liability because it is designed to cover Government money or property that is knowingly retained by a person even though they have no right to it. This provision is similar to the liability established under 3729(a)(2) for making `false records or statements to get false or fraudulent claims paid or approved.' 31 U.S.C. 3729(a)(2)(2000). However, the provision does not capture conduct described in 3729(a)(1), which imposes liability for actions to conceal, avoid, or decrease an obligation directly to the Government. This legislation closes this loophole and incorporates an analogous provision to 3729(a)(1) for `reverse' false claims liability.

Further, this legislation addresses current confusion among courts that have developed conflicting definitions of the term `obligation' in Section 3729(a)(7). 9

[Footnote] The term `obligation' is now defined under new Section 3729(b)(3) and includes fixed and contingent duties owed to the Government--including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on imported goods. 10

[Footnote] It is also noteworthy to restate that while the new definition of `obligation' expressly includes contingent, non-fixed obligations, the Committee supports the position of the Department of Justice that current section 3729(a)(7) `speaks of an `obligation,' not a `fixed obligation.' 11

[Footnote] By including contingent obligations such as, `implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship,' this new section reflects the Committee's view, held since the passage of the 1986 Amendments, 12

[Footnote] that an `obligation' arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined 13

[Footnote] to the instance where there is a relationship between the Government and a person that `results in a duty to pay the Government money, whether or not the amount owed is yet fixed.' 14

[Footnote]

[*Footnote 9:* See, e.g., *United States ex rel. Prawer & Co.* v. *Verrill & Dana,* 946 F. Supp. 87, 93-95 (D. Me. 1996) (discussing the definition of `obligation' at length); *Am. Textile Mfr's Inst., Inc.* v. *The Limited, Inc.*, 190 F.3d 729, 736 (6th Cir. 1999) (discussing definition of `obligation').]

[*Footnote 10:* The new definition of the term `obligation' in S. 386 does not include specific reference to `customs duties for mismarking country of origin,' which was a singular type of obligation referred to in S. 2041. The Committee originally included this language in S. 2041 in response to the decision in *American Textile Manufacturers Institute, Inc.* v. *The Limited, Inc.* where the Sixth Circuit Court of Appeals narrowly defined the term `obligation' to apply reverse false claims to only fixed obligations and dismissing a claim for false statements made by importers to avoid paying customs duties. See 190 F.3d 729 (6th Cir. 1999). After subsequent discussion with the Department of Justice, the Committee decided to remove the `customs duties' language in S. 386, as the Committee believes that customs duties clearly fall within the new definition of the term `obligation' absent an express reference and any such specific language would be unnecessary.]

[*Footnote 11:* Brief for United States at 23, *United States* v. *Bourseau* No. 06-56741, 06-56743 (9th Cir. July 14, 2008).]

[*Footnote 12:* See S. Rpt. No. 99-345 at 5283.]

[*Footnote 13:* See, e.g., *Am. Textile Mfrs. Inst.* v. *The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999); *United States* v. *Q Int'l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997).]

[*Footnote 14:* Brief for United States at 24, *United States* v. *Bourseau* No. 06-56741, 06-56743 (9th Cir. July 14, 2008) (citing *United States ex rel. Bahrani* v. *Conagra, Inc.*, 465 F.3d 1189, 1201 (10th Cir. 2006), mot. for reh'g pending, (10th Cir. 2007)); United States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1237-38 (11th Cir. 1999) (en banc).]

The Committee also notes that the reverse false claims provision and amendments to that provision do not include any new language that would incorporate or should otherwise be construed to include a presentment requirement. This is consistent with various court decisions that have held that the current reverse false claims provision does not contain a presentment requirement. 15

[Footnote]

[*Footnote 15:* See, e.g., *United States ex rel. Bahrani*, 465 F.3d 1189, 1208 (10th Cir. 2006); *United States ex rel. Koch* v. *Koch Indus.*, 57 F.Supp.2d 1122, 1144 (N.D. Okla. 1999).]

The new definition of `obligation' includes an express statement that an obligation under the FCA includes `the retention of an overpayment.' The Department of Justice supported the inclusion of this provision and provided technical advice that the proper place to include overpayments was in the definition of obligation. 16

[Footnote] This new definition will be useful to prevent Government contractors and others who receive money from the Government incrementally based upon cost estimates from retaining any Government money that is overpaid during the estimate process. Thus, the violation of the FCA for receiving an overpayment may occur once an overpayment is knowingly and improperly retained, without notice to the Government about the overpayment. The Committee also recognizes that there are various statutory and regulatory schemes in Federal contracting that allow for the reconciliation of cost reports that may permit an unknowing, unintentional retention of an overpayment. The Committee does not intend this language to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation, provided the receipt of the overpayment is not based upon any willful act of a recipient to increase the payments from the Government when the recipient is not entitled to such Government money or property. Moreover, any action or scheme created to intentionally defraud the Government by receiving overpayments, even if within the statutory or regulatory window for reconciliation, is not intended to be protected by this provision. Accordingly, any knowing and improper retention of an overpayment beyond or following the final submission of payment as required by statute or regulation--including relevant statutory or regulatory periods designated to reconcile cost reports, but excluding administrative and judicial appeals--would be actionable under this provision.

[*Footnote 16:* Letter from Brian Benczkowski, Principal Deputy Assistant Attorney General, United States Department of Justice, to Senator Patrick Leahy, Chairman, Senate Committee on the Judiciary Appendix 3 (Feb. 21, 2008).]

S. 386 also includes the term `statutory' to the definition of `obligation'. This term was included to ensure that duties created by a statutory authority that may not be an express or implied contract or other relation are included as these statutory relationships confer a duty upon the recipient of Government funds regardless of the existence of a contract.

8.404 Use of Federal Supply Schedules.

(a) *General.** * * Therefore, when establishing a BPA (as authorized by 13.303–2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsize the requirement; but see paragraph (e) of this section for orders (including orders issued under BPAs) funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

(e) Publicizing contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5):

(1) Notices of proposed MAS orders (including orders issued under BPAs) that are for ''informational purposes only'' exceeding $25,000 shall follow the procedures in 5.704 for posting orders.

(2) Award notices for MAS orders (including orders issued under BPAs) shall follow the procedures in 5.705.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 5. Amend section 13.105 by adding paragraph (d) to read as follows:

13.105 Synopsis and posting requirements.

* * * * *

(d) When publicizing contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5):

(1) Notices of proposed contract actions shall follow the procedures in 5.704 for posting orders.

(2) Award notices shall follow the procedures in 5.705.

PART 16—TYPES OF CONTRACTS

■ 6. Amend section 16.505 by revising paragraph (a)(1); and adding paragraph (a)(10) to read as follows:

16.505 Ordering.

(a) * * *

(1) In general, the contracting officer does not synopsize orders under indefinite-delivery contracts; but see 16.505(a)(10) for orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

(10) Publicize orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) as follows:

(i) Notices of proposed orders shall follow the procedures in 5.704 for posting orders.

(ii) Award notices for orders shall follow the procedures in 5.705.

* * * * *

[FR Doc. E9–7019 Filed 3–30–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4 and 52

[FAC 2005–32; FAR Case 2009–009; Item IV; Docket 2009–0011, Sequence 1]

RIN 9000–AL21

Federal Acquisition Regulation; FAR Case 2009–009, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Reporting Requirements

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 1512 of Division A of the American Recovery and Reinvestment Act of 2009, which requires contractors to report on their use of Recovery Act funds.

DATES: *Effective Date*: March 31, 2009

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clause if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–009, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–009'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–009. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–009'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, *Attn*: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–009, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. Please cite FAC 2005–32, FAR case 2009–009. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009 (the ''Recovery Act''), including a number of provisions to be implemented in Federal Government contracts. This interim rule implements section 1512, which is also known as the ''Jobs Accountability Act.'' Subsection (c) of section 1512 requires contractors that receive awards (or modifications to existing awards) funded, in whole or in part, by the Recovery Act to report quarterly on the use of the funds.

This FAR case adds a new subpart 4.15, and a new clause, 52.204–11. Contracting officers must include the new clause in solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. Commercial item contracts and Commercially Available Off-The-Shelf (COTS) item contracts are covered, as well as actions under the simplified acquisition threshold.

Contracting officers who obligate Recovery Act funds on existing contracts or orders must modify those contracts to add the new clause.

Contracting officers shall ensure that the contractor complies with the reporting requirements of the new clause. Contracting officers are not responsible for validating report content, only that a report was submitted as required. The online reporting tool will allow the contracting officer to monitor this as a matter of contract performance.

Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter. Contractors will report the information, using the online reporting tool available at *http://www.FederalReporting.gov*, using instructions at that Web site. The online reporting tool is being developed for use by the July 10th timeframe. The data elements to be reported are outlined in the clause 52.204–11, in paragraph (d).

The Government intends to pre-populate as many data elements as possible to reduce the burden on contractors and first-tier subcontractors by using information available in other Government systems. For instance, the Government is considering pre-populating congressional districts based on nine-digit zip codes, funding agency, North American Industry Classification System (NAICS) code, and parent DUNS.

While Section 1512(c)(4) requires reporting on all Federal Financial Accountability and Transparency Act (FFATA) data elements, including the compensation information, it limits the reporting to first-tier subcontractors that meet the applicability requirements. The FAR clause requires this compensation disclosure for prime contractors, because to exclude prime contractors while requiring disclosure for first-tier subcontractors would be unsupportable given the transparency goals of both FFATA and the Recovery Act.

B. Determinations

The Councils provide the following determinations with respect to the rule's applicability to contracts and subcontracts in amounts not greater than the simplified acquisition threshold, commercial items, and commercially available off-the-shelf (COTS) items.

1. *Applicability to contracts at or below the simplified acquisition threshold.* Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them. Therefore, given section 1512 of the Recovery Act which requires that prime contractors report information on their use of Recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

2. *Applicability to Commercial Item contracts.* Section 8003 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given section 1512, of the Recovery Act, which requires that prime contractors report information on their use of recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply the rule to commercial items, as defined at 2.101, both at the prime and subcontract levels.

3. *Applicability to Commercially Available Off-The-Shelf (COTS) item contracts.* Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of commercially available off-the-shelf (COTS) items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply. The same applies for subcontracts for COTS items.

Therefore, given section 1512, of the Recovery Act which requires that prime contractors report information on their use of recovery funds, and the initial implementing guidance for the Recovery Act issued on February 18, 2009 by the Director of the Office of Management and Budget (OMB) committing to an unprecedented level of transparency and accountability for taxpayer dollars, the Administrator, Office of the Federal Procurement Policy, has determined that it is in the best interest of the Federal Government to apply the rule to Commercially Available Off-The-Shelf (COTS) item contracts and subcontracts, as defined at FAR 2.101.

C. Request for Public Comments

The Councils ask for public comments on the interim rule, and the following additional issues:

1. The statute requires a description of the work (implemented at 52.204–11(d)(5)). Should the Government provide a list of broad categories of work under the Recovery Act from which the contractor would select and, if so, what should these be?

2. The definitions of ''jobs created'' and ''jobs retained'' are currently based on a conversion of part-time or temporary jobs into ''full-time equivalent'' (FTE) jobs. In order to do such a conversion, these part-time hours must be divided by the number of hours in a full-time schedule. This interim rule leaves the definition of full-time schedule to each individual company's discretion based on its existing practices. With respect to the methodology described in the interim rule for estimating jobs created or retained:

—Is the use of FTE and the description provided consistent with existing business practices and systems?

—Is a standardized methodology based on FTE necessary or do contractors have existing practices that adequately address other than full-time jobs to avoid inflating estimated numbers for jobs created and jobs retained? Should the Government allow contractors to use any method consistent with their existing practice as long as the contractor provides an explanation of the methodology, including a description of how part-time and temporary employees are addressed?

—If the Government were to standardize the number of hours in a ''full-time schedule,'' would this increase the burden of reporting on jobs created or retained?

3. If the Government were to require companies to separately invoice for all supplies or services funded by the Recovery Act, what challenges would this pose? Are there any benefits?

4. Is there information not customarily provided that would make it easier for companies to segregate their invoices to separately identify items funded by the Recovery Act?

5. Are there challenges to obtaining the information required from first-tier subcontractors? If so, how could the rule be changed to ease the submission of this information from both a prime contractor and subcontractor perspective?

6. Does the definition of ''Total compensation'' used in the clause provide sufficient clarity? If not, what specifically should be clarified?

7. Would it be useful to provide an Alternate clause that would allow agencies to identify meaningful distinct ''projects'' within the contract for the purpose of requiring the contractor to report employment impact and progress by ''project'' rather than for the contract as a whole? For example, if the contract called for work in distinct geographic areas, the report might provide more meaningful information if the contractor were to report employment impact and progress separately by geographic area. This would not require individual reports but rather separate sections within the quarterly report.

8. Currently, this rule requires contractors to report on invoiced amounts because the Government assumed that it would be extremely difficult for the contractor employee responsible for report submission, to report on ''receipt of funds.'' Would a contractor be able to separately identify when Recovery Act funds were received and be able to identify the payment to particular deliverables? How difficult would this be to track and report on a quarterly basis?

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

This interim rule may have a significant economic impact on a substantial number of small entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it requires contractors to report on their use of Recovery Act funds. An Initial Regulatory Flexibility Analysis has been prepared and the results of the analysis show that the direct cost of this rule on an average cost-per-contractor basis does not appear to rise to the level of being economically significant (*i.e.* $100,000,000); however, the Councils request comments on this finding.

Therefore, the Councils have prepared an Initial Regulatory Flexibility Analysis (IRFA) for public comment that is summarized as follows:

This Initial Regulatory Flexibility Analysis has been prepared consistent with 5 U.S.C. 603.

1. Reasons for the action.

This action implements section 1512 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which requires contractors to report quarterly on their use of Recovery Act funds.

2. Objectives of, and legal basis for, the rule.

The objective of the Recovery Act is to create jobs, restore economic growth, and strengthen America's middle class through measures that modernize the nation's infrastructure, enhance America's energy independence, expand educational opportunities, preserve and improve affordable health care, provide tax relief, protect those in greatest need, and provide for other purposes. This rule implements section 1512 of the Recovery Act which requires contractors, as a condition of receipt of funds, to report quarterly on their use of those funds. These reports will be made available to the public. The Recovery Act is designed to provide unprecedented transparency to the American taxpayer.

3. Description and estimate of the number of small entities to which the rule will apply.

The rule imposes a clause in any award document funded by the Recovery Act, requiring the contractor to publicly disclose information related to the use of funds and specific information about first-tier subcontract awards. This clause requires contractors to report on use of Recovery Act funds. The clause imposes a public reporting burden on prime contractors and, in a more limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and unique prime Federal contractors. The estimate for the number of active and unique prime federal contractors that will participate in awards funded by the Recovery Act is 20,013, of which 4,003 or 20 percent are estimated to be small businesses. It is also noted that this is 20 percent of prime contractors, which should not be confused with the 23 percent small business contracting goal which is based on dollars and that continues to apply to both Recovery Act spending and agencies' ongoing procurement spending.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is 60,039 or three times the number of prime contractors. Of these 60,039 Recovery Act first-tier subcontractors, it is estimated that 25 percent, or 15,010, will be small businesses.

Based on the above, the estimated total number of small businesses, prime and subcontractors, to which this rule will apply is 19,013 and the estimated total number of other than small businesses to which this rule will apply is 61,039.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The rule requires Federal prime contractors, both small and other than small businesses, to report quarterly on their use of funds received under the Recovery Act. The rule applies to all Federal contractors regardless of size or business ownership. Such a report would probably be prepared by a company contract administrator or contract manager or a company subcontract administrator. The information required in the report is primarily information that companies would maintain for their own business purposes including, but not limited to, contract or other award number, the dollar amount of invoices, the supplies or services delivered, a broad assessment of progress towards completion, the estimated number of new jobs created or retained resulting from the award, and first-tier subcontract information (or aggregate information if the subcontract is less than $25,000, or the subcontractor is an individual or had gross income in the previous tax year of less than $300,000). While most of the data elements impose only one-time burden collection, some will require quarterly updates.

There are three data elements required in the report that will likely require some additional effort: (1) Estimating the cumulative number of jobs created each calendar quarter, (2) estimating the cumulative number of jobs retained each calendar quarter, and (3) providing the name and total compensation of each of the five most highly compensated officers of the contractor for the calendar year in which the contract is awarded, which applies at both the prime and first-tier subcontract level. The rule also requires the prime contractor to report certain information, required by the Federal Funding Accountability and Transparency Act of 2006 (FFATA), about first-tier subcontracts (though all awards under $25,000 will be aggregated, eliminating the need to report transaction-level data). The prime contractor will have most of this information in the subcontract award document, such as the name of the subcontractor, award number, and date of award. However, the prime contractor will have to obtain four of the elements directly from the first-tier subcontractor: (1) The unique identifier (DUNS Number) ''for awards of $25,000 or more'' as well as for the

subcontractor's parent company, if the subcontractor has a parent company, (2) subcontractor's physical address, (3) subcontract primary performance location, and (4) the compensation information described earlier as required by FFATA and reflected in section 1512 of the Recovery Act.

With respect to the DUNS Number, we anticipate that most first-tier subcontractors have a DUNS Number as it is a requirement for receipt of any Government contract. However, a company that never received nor anticipated a Government contract might not have a DUNS number and will have to register for one with Dunn and Bradstreet. The registration process is not burdensome, can be done online or by phone, and requires only information any company would have on hand for business purposes. First-tier subcontractors are not required to register in the Central Contractor Registration (CCR) as a consequence of this rule.

With respect to compensation information, this requirement results from FFATA and will not apply if the public has access to information about compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. Otherwise, each prime contractor and first-tier subcontractors will have to disclose the compensation information if it received (1) 80 percent or more of annual gross revenues in Federal awards; and (2) $25M or more in annual gross revenue from Federal awards. Because this requirement of FFATA became law on December 26, 2007, we anticipate that those companies to which it applies are aware of the requirement and have been preparing to provide this information.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule includes the reporting requirements stipulated by FFATA in FAR Case 2008–039 FFATA flow-down and 2008–037 Financial Disclosure.

These cases are in process and as they are finalized, they will be amended to ensure that they do not duplicate, overlap, or conflict with the requirements of this interim rule.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

The rule requires Federal prime contractors to respond to all of the reporting requirements, eliminating some of the reporting burden on first-tier subcontractors despite the fact that they will have to provide some information to the prime contractor. Also, all of the reporting elements applied to first-tier subcontractors, a significant percentage of which will be small businesses, are one-time collection burdens. The Government believes that the rule will further minimize the reporting burden on Government contractors, including all small businesses, as well as other businesses, by using existing Federal acquisition/registration systems to pre-populate certain data elements.

The FAR Secretariat will be submitting a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 4 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–32, FAR case 2009–009), in all correspondence.

E. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the interim rule contains information collection requirements. Accordingly, the FAR Secretariat forwarded an emergency information collection request for approval of new information collection requirements to the Office of Management and Budget (OMB) under 44 U.S.C. Chapter 35, *et seq.* OMB approved the new information collection requirements as follows:

1. OMB Control No. 9000–0166—One Time Reporting Requirements for Prime Contractors.

2. OMB Control No. 9000–0167—One Time Reporting for First-tier Subcontractors.

3. OMB Control No. 9000–0168—One Time Reporting, Compensation Requirements.

4. OMB Control No. 9000–0169—Quarterly Reporting for Prime Contractors.

Comments on the interim rule as well as the collection will be considered in the revisions to both the rule and the collection.

Any award funded by the Recovery Act will contain the clause at 52.204–11. This clause requires contractors to report on use of Recovery Act funds. The clause imposes public reporting burden on prime contractors and, in a more limited way, on their first-tier subcontractors. According to the Federal Procurement Data System (FPDS), there are 129,331 active and unique prime Federal contractors as of February 2009. The estimate for the number of active and unique prime Federal contractors that will participate in awards funded by the Recovery Act is 20,013. This is based on using a factor of .16 of 129,331, derived by dividing 129,331 by $517B in procurement obligations for fiscal year 2008 or by dividing estimated Recovery Act dollars for contracts ($80B: Government's best estimate of Recovery Act dollars to be obligated by contracts is between $60 and $80 billion; using $80 billion for calculation purposes) by $517B. Of the estimated 20,013 Recovery Act prime contractors, it is estimated that 20 percent, or 4,003, will be small businesses. It should be noted that this is 20 percent of prime contractors; this should not be confused with the 23 percent small business contracting goal which is based on dollars and that continues to apply to both Recovery Act spending and agencies' ongoing procurement spending.

The number of first-tier subcontractors estimated to participate in Recovery Act awards is 60,039. This was derived by estimating three first-tier subcontractors for each prime contractor. Of these 60,039 Recovery Act first-tier subcontractors, it is estimated that 25 percent, or 15,010, will be small businesses.

Based on the above, the estimated total number of small businesses, prime and subcontractors, to which this rule will apply is 19,013 and the estimated total number of other than small businesses to which this rule will apply is 61,039.

Though Section 1512 requires that the reports be completed by the prime contractor for all data elements, for practical purposes, the prime contractor will have to obtain certain information from their first-tier subcontractors, hence the flow-down requirements of paragraph (d)(10) of the clause. Additionally, the information required on the prime contractor award varies from that required for the first-tier subcontract awards. For instance, the elements at paragraphs (d)(1) through (9) are collection burdens associated with the prime contract award while the elements in (d)(10)(i) through (ix) are associated with first-tier subcontracts.

Finally, the elements required by Section 1512 of the Recovery Act are a combination of those that will be updated in each quarterly report, such as jobs created and retained and progress towards completion of the overall purpose and expected outcomes or results of the contract and those that are one-time collection burdens, such as award number and date and all of the reporting requirements for first-tier subcontracts. Therefore, the following analysis separately estimates the burden associated with the one-time reporting elements and those that are updated quarterly. The parenthetical reference after the description of each reporting element refers to the FAR clause. The hours estimated per response include the time for reviewing instructions, searching existing data sources, gathering the data, and completing the collection of information. The estimated total annual burden associated with reporting requirements of FAR 52.204–11 is $31,725,468, based on the following:

One-Time Reporting Elements

1. *OMB Control No. 9000–0166—One Time Reporting Requirements for Prime Contractors.* One-time reporting elements for which the burden is imposed on the prime contractor include the following:

a. The award number for both its Government contract and first-tier subcontracts ((d)(1) and (d)(10)(viii));

b. Program or project title, if any, for its Government contract ((d)(4));

c. A description of the overall purpose and expected outcomes or results of the contract and first-tier subcontracts, including significant deliverables and, if appropriate, units of measure ((d)(5) and (d)(10)(vii));

d. Name of the first-tier subcontractor ((d)(10)(ii));

e. Amount of the first-tier subcontract award ((d)(10)(iii));

f. Date of the first-tier subcontract award ((d)(10)(iv));

g. Applicable North American Industry Classification System (NAICS) code ((d)(10)(v)); and

h. Funding agency ((d)(10)(vi)).

We estimate the total annual public cost burden for these elements to be $850,544 based on the following:

Respondents: 20,013.

Responses per respondent: 1.25 (reflects estimate that 25 percent of contractors will have more than one Recovery Act funded award on which to report).

Total annual responses: 25,016.

Preparation hours per response: .5.

Total response burden hours: 12,508.

Average hourly wages ($50.00+36.35 percent overhead): 68.00.

Estimated cost to the public: $850,544.

2. *OMB Control No. 9000–0168—One Time Reporting, Compensation Requirements.* A one-time reporting element for which the burden is imposed on certain prime contractors and first-tier subcontractors to publicly disclose the names and total compensation of each of the contractor's or first-tier subcontractor's five most highly compensated officers, for the calendar year in which the award was made ((d)(8) and (d)(10)(xi)) (see applicability requirements in the clause at (d)(8) and (d)(10)).

While Section 1512(c)(4) of the Recovery Act requires reporting on all FFATA data elements, including the compensation information, it limits the prime's reporting responsibility to first-tier subcontractors that meet the applicability requirements. The FAR clause requires this compensation disclosure for prime contractors as well because to exclude prime contractors while requiring disclosure for first-tier subcontractors would be unsupportable given the transparency goals of both FFATA and the Recovery Act.

There are likely to be some prime contractors that already provide public access to the compensation of senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 or section 6104 of the Internal Revenue Code of 1986. For purposes of this analysis, the Government estimates that 5 percent of prime contractors already provide such public access. There are also likely to be some first-tier subcontractors that do not meet either of the revenue thresholds for applicability. For purposes of this analysis, the Government estimates that 5 percent of first-tier subcontractors will not have to disclose compensation information because they do not meet the revenue thresholds.

We estimate the total annual public cost burden for these elements to be $19,392,444, based on the following:

Respondents: 76,049 (20,013 primes-5 percent=19,012+60,039 first-tier subcontractors-5 percent=57,037).

Responses per respondent: 1.25 (reflects estimate that 25 percent of all respondents will have more than one Recovery Act funded award on which to report).

Total annual responses: 95,061.

Preparation hours per response: 3.

Total response burden hours: 285,183.

Average hourly wages ($50.00+36.35 percent overhead): $68.00.

Estimated cost to the public: $19,392,444.

3. *OMB Control No. 9000–0167—One Time Reporting for First-tier Subcontractors.*

One-time reporting elements for which the burden is imposed only on the first-tier subcontractor include the following:

a. Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company ((d)(10)(i));

b. Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable((d)(10)(ix)); and

c. Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable ((d)(10)(x)).

The Government expects that most first-tier subcontractors will have a DUNS number. However, if a company has never received nor anticipated a Government contract, it would be required to register for a DUNS number which is not an onerous process and can be done online or by phone using information a company would have on hand for business purposes.

We estimate the total annual public cost burden for these elements to be $1,275,816, based on the following:

Respondents: 60,039.

Responses per respondent: 1.25 (reflects estimate that 25 percent of first-tier subcontractors will have more than one Recovery Act funded award on which to report).

Total annual responses: 75,049.

Preparation hours per response: .25.

Total response burden hours: 18,762.

Average hourly wages ($50.00+36.35 percent overhead):$68.00.

Estimated cost to the public: $1,275,816.

4. *OMB Control No. 9000–0169—Quarterly Reporting for Prime Contractors.* Elements updated quarterly for which the burden is imposed on the prime contractor include the following:

a. The amount of Recovery Act funds invoiced by the contractor, cumulative since the beginning of the contract ((d)(2));

b. A list of all significant services performed or supplies delivered, including construction, for which the contractor has invoiced ((d)(3));

c. An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract (*i.e.*, not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act ((d)(6));

d. A narrative description of the employment impact of the Recovery Act funded work ((d)(7)(i) through (ii)); and

e. For subcontracts valued at less than $25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under $300,000, the contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount ((d)(9)).

We estimate the total annual public cost burden for these elements to be $10,206,664, based on the following:

Respondents: 20,013.

Responses per respondent: 1.25 (reflects 4 reports multiplied by a factor of 1.25 to reflect Government's estimate that 25 percent of contractors will have more than one Recovery Act funded award on which to report).

Total annual responses: 100,065.

Preparation hours per response: 1.5.
Total response burden hours: 150,098.
Average hourly wages ($50.00+36.35 percent overhead): $68.00.
Estimated cost to the public: $10,206,664.

F. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than June 1, 2009 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite the applicable OMB Control No.: 9000–0166; 9000–0167; 9000–0168; or 9000–0169, and FAR Case 2009–009, American Recovery and Reinvestment Act—Reporting Requirements, in all correspondence.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite the applicable OMB Control No.: 9000–0166, 9000–0167; 9000–0168; or 9000–0169, and FAR Case 2009–009, American Recovery and Reinvestment Act—Reporting Requirements, in all correspondence.

The Paperwork Reduction Act applies to this interim rule.

G. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the American Recovery and Reinvestment Act of 2009 became effective on enactment on February 17, 2009, and agencies are ready to award contracts using funds appropriated by the Act. Without a FAR clause, agencies will be forced to develop their own clause, which would (1) significantly increase the costs for Government as well as contractors who may have to comply with varied clauses and reporting mechanisms, (2) increase the risk of non-compliance, and (3) degrade transparency and public understanding. Waiting for public comment prior to issuing a clause will require resource-intensive and costly post-award bilateral negotiations and may hinder recovery. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4 and 52

Government procurement.

Dated: March 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Add subpart 4.15 to read as follows:

Subpart 4.15–American Recovery and Reinvestment Act—Reporting Requirements

Sec.
4.1500 Scope of subpart.
4.1501 Procedures.
4.1502 Contract clause.

4.1500 Scope of subpart.

This subpart implements section 1512(c) of Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act), which requires, as a condition of receipt of funds, quarterly reporting on the use of funds. The subpart also implements the data elements of the Federal Funding Accountability and Transparency Act of 2006, as amended (Pub. L. 109–282). Contractors that receive awards (or modifications to existing awards) funded, in whole or in part by the Recovery Act, must report information including, but not limited to—

(a) The dollar amount of contractor invoices;

(b) The supplies delivered and services performed;

(c) An assessment of the completion status of the work;

(d) An estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds;

(e) Names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and

(f) Specific information on first-tier subcontractors.

4.1501 Procedures.

(a) In any contract action funded in whole or in part by the Recovery Act, the contracting officer shall indicate that the contract action is being made under the Recovery Act, and indicate which products or services are funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the contract instrument.

(b) To maximize transparency of Recovery Act funds that must be reported by the contractor, the contracting officer shall structure contract awards to allow for separately tracking Recovery Act funds. For example, the contracting officer may consider awarding dedicated separate contracts when using Recovery Act funds or establishing contract line item number (CLIN) structures to mitigate commingling of Recovery funds with other funds.

(c) Contracting officers shall ensure that the contractor complies with the reporting requirements of 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements. If the contractor fails to comply with the reporting requirements, the contracting officer shall exercise appropriate contractual remedies.

(d) The contracting officer shall make the contractor's failure to comply with the reporting requirements a part of the contractor's performance information under Subpart 42.15.

4.1502 Contract clause.

Insert the clause at 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements in all solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This includes, but is not limited to, Governmentwide Acquisition Contracts (GWACs), multi-agency contracts (MACs), Federal Supply Schedule (FSS) contracts, or agency indefinite-delivery/indefinite-quantity (ID/IQ) contracts that will be funded with Recovery Act funds. Contracting officers shall ensure that this clause is included in any existing contract or order that will be funded with Recovery Act funds. Contracting officers may not use Recovery Act funds on existing contracts and orders if the clause at 52.204–11 is not incorporated.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Add section 52.204–11 to read as follows:

52.204–11 American Recovery and Reinvestment Act—Reporting Requirements

As prescribed in 4.1502, insert the following clause:

American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009)

(a) *Definitions.* As used in this clause—

Contract, as defined in FAR 2.101, means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see FAR Part 16.

First-tier subcontract means a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act.

Jobs created means an estimate of those new positions created and filled, or previously existing unfilled positions that are filled, as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as ''full-time equivalent'' (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Jobs retained means an estimate of those previously existing filled positions that are retained as a result of funding by the American Recovery and Reinvestment Act of 2009 (Recovery Act). This definition covers only prime contractor positions established in the United States and outlying areas (see definition in FAR 2.101). The number shall be expressed as ''full-time equivalent'' (FTE), calculated cumulatively as all hours worked divided by the total number of hours in a full-time schedule, as defined by the contractor. For instance, two full-time employees and one part-time employee working half days would be reported as 2.5 FTE in each calendar quarter.

Total compensation means the cash and noncash dollar value earned by the executive during the contractor's past fiscal year of the following (for more information see 17 CFR 229.402(c)(2)):

(1) *Salary and bonus.*

(2) *Awards of stock, stock options, and stock appreciation rights.* Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

(3) *Earnings for services under non-equity incentive plans.* Does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.

(4) *Change in pension value.* This is the change in present value of defined benefit and actuarial pension plans.

(5) Above-market earnings on deferred compensation which is not tax-qualified.

(6). *Other compensation.* For example, severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property if the value for the executive exceeds $10,000.

(b) This contract requires the contractor to provide products and/or services that are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 1512(c) of the Recovery Act requires each contractor to report on its use of Recovery Act funds under this contract. These reports will be made available to the public.

(c) Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter.

(d) The Contractor shall report the following information, using the online reporting tool available at *http://www.FederalReporting.gov.*

(1) The Government contract and order number, as applicable.

(2) The amount of Recovery Act funds invoiced by the contractor for the reporting period. A cumulative amount from all the reports submitted for this action will be maintained by the government's on-line reporting tool.

(3) A list of all significant services performed or supplies delivered, including construction, for which the contractor invoiced in this calendar quarter.

(4) Program or project title, if any.

(5) A description of the overall purpose and expected outcomes or results of the contract, including significant deliverables and, if appropriate, associated units of measure.

(6) An assessment of the contractor's progress towards the completion of the overall purpose and expected outcomes or results of the contract (*i.e.*, not started, less than 50 percent completed, completed 50 percent or more, or fully completed). This covers the contract (or portion thereof) funded by the Recovery Act.

(7) A narrative description of the employment impact of work funded by the Recovery Act. This narrative should be cumulative for each calendar quarter and only address the impact on the contractor's workforce. At a minimum, the contractor shall provide—

(i) A brief description of the types of jobs created and jobs retained in the United States and outlying areas (see definition in FAR 2.101). This description may rely on job titles, broader labor categories, or the contractor's existing practice for describing jobs as long as the terms used are widely understood and describe the general nature of the work; and

(ii) An estimate of the number of jobs created and jobs retained by the prime contractor, in the United States and outlying areas. A job cannot be reported as both created and retained.

(8) Names and total compensation of each of the five most highly compensated officers of the Contractor for the calendar year in which the contract is awarded if—

(i) In the Contractor's preceding fiscal year, the Contractor received—

(A) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(B) $25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and

(ii) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(9) For subcontracts valued at less than $25,000 or any subcontracts awarded to an individual, or subcontracts awarded to a subcontractor that in the previous tax year had gross income under $300,000, the Contractor shall only report the aggregate number of such first tier subcontracts awarded in the quarter and their aggregate total dollar amount.

(10) For any first-tier subcontract funded in whole or in part under the Recovery Act, that is over $25,000 and not subject to reporting under paragraph 9, the contractor shall require the subcontractor to provide the information described in (i), (ix), (x), and (xi) below to the contractor for the purposes of the quarterly report. The contractor shall advise the subcontractor that the information will be made available to the public as required by section 1512 of the Recovery Act. The contractor shall provide detailed information on these first-tier subcontracts as follows:

(i) Unique identifier (DUNS Number) for the subcontractor receiving the award and for the subcontractor's parent company, if the subcontractor has a parent company.

(ii) Name of the subcontractor.

(iii) Amount of the subcontract award.
(iv) Date of the subcontract award.
(v) The applicable North American Industry Classification System (NAICS) code.
(vi) Funding agency.
(vii) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.
(viii) Subcontract number (the contract number assigned by the prime contractor).
(ix) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
(x) Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
(xi) Names and total compensation of each of the subcontractor's five most highly compensated officers, for the calendar year in which the subcontract is awarded if—
(A) In the subcontractor's preceding fiscal year, the subcontractor received—
(*1*) 80 percent or more of its annual gross revenues in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
(*2*) $25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
(B) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(End of clause)

■ 4. Amend section 52.212–5 by revising the date of the clause; and redesignating paragraphs (b)(4) through (b)(42) as (b)(5) through (b)(43), respectively, and adding a new paragraph (b)(4) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (MAR 2009)

* * * * *

(b) * * *

_ (4) 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009) (Pub. L. 111–5).

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[FR Doc. E9–7025 Filed 3–30–09; 8:45 am]
BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 14, 15, and 52

[FAC 2005–32; FAR Case 2009–011; Item V; Docket 2009–0012, Sequence 1]

RIN 9000–AL20

Federal Acquisition Regulation; FAR Case 2009–011, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515 of Division A.

DATES: *Effective Date:* March 31, 2009.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clauses (Alternates) for future orders, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–011, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov*. Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–011'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–011. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–011'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–011, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. Please cite FAC 2005–32, FAR case 2009–011. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515, by adding alternate clauses to 52.214–26, ''Audit and Records–Sealed Bidding,'' 52.212–5, ''Contract Terms and Conditions Required to Implement Statutes or Executive Orders–Commercial Items,'' and FAR 52.215–2, ''Audit and Records-Negotiation.''

Further, FAR 12.504(a)(7) is amended for contracts using Recovery Act funds to apply 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts that are otherwise exempt when subcontractors are not required to provide cost or pricing data.

Likewise, 13.006(d) is amended for contracts using Recovery Act funds to apply 52.215–2, ''Audit and Records-Negotiation'' to contracts and subcontracts which are otherwise exempt because they are under the simplified acquisition threshold. This requirement provides further transparency into Federal contracting whose contracts are funded with Recovery Act funds.

B. Discussion

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, which includes a number of provisions to be implemented in Federal Government contracts. Among these provisions are sections 902, 1514, and 1515 which serve to ''prevent the fraud, waste, and abuse'' of Recovery Act

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(iii) Amount of the subcontract award.
(iv) Date of the subcontract award.
(v) The applicable North American Industry Classification System (NAICS) code.
(vi) Funding agency.
(vii) A description of the products or services (including construction) being provided under the subcontract, including the overall purpose and expected outcomes or results of the subcontract.
(viii) Subcontract number (the contract number assigned by the prime contractor).
(ix) Subcontractor's physical address including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
(x) Subcontract primary performance location including street address, city, state, and country. Also include the nine-digit zip code and congressional district if applicable.
(xi) Names and total compensation of each of the subcontractor's five most highly compensated officers, for the calendar year in which the subcontract is awarded if—
(A) In the subcontractor's preceding fiscal year, the subcontractor received—
(*1*) 80 percent or more of its annual gross revenues in Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
(*2*) $25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants), and cooperative agreements; and
(B) The public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

(End of clause)

■ 4. Amend section 52.212–5 by revising the date of the clause; and redesignating paragraphs (b)(4) through (b)(42) as (b)(5) through (b)(43), respectively, and adding a new paragraph (b)(4) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (MAR 2009)

* * * * *

(b) * * *

_ (4) 52.204–11, American Recovery and Reinvestment Act—Reporting Requirements (MAR 2009) (Pub. L. 111–5).

* * * * *

[FR Doc. E9–7025 Filed 3–30–09; 8:45 am]
BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 13, 14, 15, and 52

[FAC 2005–32; FAR Case 2009–011; Item V; Docket 2009–0012, Sequence 1]

RIN 9000–AL20

Federal Acquisition Regulation; FAR Case 2009–011, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—GAO/IG Access

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515 of Division A.

DATES: *Effective Date:* March 31, 2009.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clauses (Alternates) for future orders, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–011, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov*. Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–011'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–011. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–011'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–011, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. Please cite FAC 2005–32, FAR case 2009–011. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to Sections 902, 1514, and 1515, by adding alternate clauses to 52.214–26, ''Audit and Records–Sealed Bidding,'' 52.212–5, ''Contract Terms and Conditions Required to Implement Statutes or Executive Orders–Commercial Items,'' and FAR 52.215–2, ''Audit and Records-Negotiation.''

Further, FAR 12.504(a)(7) is amended for contracts using Recovery Act funds to apply 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, to commercial item subcontracts that are otherwise exempt when subcontractors are not required to provide cost or pricing data.

Likewise, 13.006(d) is amended for contracts using Recovery Act funds to apply 52.215–2, ''Audit and Records-Negotiation'' to contracts and subcontracts which are otherwise exempt because they are under the simplified acquisition threshold. This requirement provides further transparency into Federal contracting whose contracts are funded with Recovery Act funds.

B. Discussion

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, which includes a number of provisions to be implemented in Federal Government contracts. Among these provisions are sections 902, 1514, and 1515 which serve to ''prevent the fraud, waste, and abuse'' of Recovery Act

funds through the review and audit of contracts using such funds. The interim rule is necessary to implement these measures to both protect, and provide transparency in the use of, Recovery Act funds.

Section 1514 provides for agency inspector general review of concerns raised by the public regarding investments of funds under the Recovery Act. Sections 902 and 1515 provide for respectively, Comptroller General and agency inspector general reviews of any records of the contractor or subcontractor regarding transactions using Recovery Act funds, and the interview of contractor officers or employees concerning such transactions. Section 902 also provides for the Comptroller General to interview subcontractor employees, while nowhere in the Recovery Act is corresponding authority provided to the agency inspector generals. The authority for Comptroller General audits of prime contractors already exists for Part 12 contracts under FAR 52.212–5, ''Contract Terms and Conditions Required to Implement Statutes or Executive Orders–Commercial Items'' and for Part 15 contracts under FAR 52.215–2, ''Audit and Records–Negotiation.'' FAR 52.215–2 also provides authority to audit subcontracts, while 52.212–5 does not provide corresponding authority. In the case of Part 13 contracts there are no authorities for the audit of either prime contracts or subcontracts. Likewise, except in the case of modifications involving cost or pricing data, for Part 14 contracts there are no authorities for the audit of either prime contracts or subcontracts.

In the matter of interviewing contractor or subcontractor employees concerning contracting transactions there are no current authorities under the FAR (but see changes under Item VI of this FAC 2005–32, FAR Case 2008–026).

Consequently, for contracts using Recovery Act funds this interim rule provides the following authorities to the Comptroller General:

- For Part 12 contracts the authority to audit subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.
- For Part 15 contracts the authority to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.
- For Part 14 contracts the authority to audit both contracts and subcontracts, and to interview contractor and subcontractor personnel, including contracts below the simplified acquisition threshold.

The interim rule provides the same authorities in the preceding paragraph to agency inspector generals, with the exception of interviewing subcontractor employees.

C. Applicability to Commercial Item Contracts

Section 8003 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. FASA provides if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the FAR Council has determined this rule should apply to commercial items, as defined at 2.101, both at the prime and subcontract levels.

D. Applicability to Commercially Available Off-The-Shelf (COTS) Item Contracts

Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of commercially available off-the-shelf (COTS) items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the Administrator, Office of the Federal Procurement Policy, has determined the rule should apply to Commercially Available Off-The-Shelf (COTS) item contracts, as defined at FAR 2.101.

E. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them. Therefore, given Sections 902 and 1515 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which require Comptroller General and agency inspector general access to contractor and subcontractor records and contractor personnel, the FAR Council has determined this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

F. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it requires contractors to make available existing records of transactions covered by the Act. Contractors are not obligated to create additional records. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 12, 13, 14, 15, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, (FAC 2005–32, FAR Case 2009–011) in correspondence.

G. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) applies to this interim rule. However, the information collection requirements imposed by the changes to 52.214–26 and 52.215–2 are currently covered by the approved collection

under OMB Control number 9000–0034 entitled, Examination of Records by Comptroller General and Contract Audit: Sections Affected 52.215–2; 52.212–5; 52.214–26, for these existing provisions. The Councils believe changes due to the use of these provisions will not result in a substantial increase in either the burden or the number of entities. However, the Council welcomes comments on both of these items as part of the 60-day comment period.

H. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the American Recovery and Reinvestment Act of 2009 became effective upon enactment, and contracts using funds appropriated by the Recovery Act will soon be ready to award. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 12, 13, 14, 15, and 52

Government procurement.

Dated: March 25, 2009.

Al Matera,

Director,Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 13, 14, 15, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 12, 13, 14, 15, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 12.301 by revising paragraph (b)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b) * * *

(4) *The clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.* This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212–5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as directed by 52.104(d). When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

(i) Use the clause with its Alternate I when the head of the agency has waived the examination of records by the Comptroller General in accordance with 25.1001.

(ii) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), the contracting officer shall use the clause with its Alternate II, and may not use Alternate I.

* * * * *

■ 3. Amend section 12.504 by revising paragraph (a)(7) to read as follows:

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) * * *

(7) 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c), Examination of Records of Contractor, when a subcontractor is not required to provide cost or pricing data (see 15.209(b)), unless using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Amend section 13.006 by revising paragraph (d) to read as follows:

13.006 Inapplicable provisions and clauses.

* * * * *

(d) 52.215–2, Audits and Records—Negotiation, except as used with its Alternate I, when using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

* * * * *

PART 14—SEALED BIDDING

■ 5. Amend section 14.201–7 by revising paragraph (a) to read as follows:

14.201–7 Contract Clauses.

(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214–26, Audit and Records-Sealed Bidding, in solicitations and contracts as follows:

(1) Use the basic clause if—

(i) The acquisition will not use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5); and

(ii) The contract amount is expected to exceed the threshold at 15.403–4(a)(1) for submission of cost or pricing data.

(2) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, use the clause with its Alternate I in all solicitations and contracts.

* * * * *

■ 6. Amend section 15.209 by revising the introductory text of paragraph (b)(1) and adding paragraph (b)(2) to read as follows:

15.209 Solicitation provisions and contract clauses.

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, the contracting officer shall insert the clause at 52.215–2, Audit and Records-Negotiation (10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A–133), in solicitations and contracts except those for—

* * * * *

(2) When using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5)—

(i) The exceptions in paragraphs (b)(1)(i) through (b)(1)(iii) are not applicable; and

(ii) Use the clause with its Alternate I.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.212–5 by adding Alternate II to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Alternate II (MAR 2009). As prescribed in 12.301(b)(4)(ii), substitute the following paragraphs (d)(1) and (e)(1) for paragraphs (d)(1) and (e)(1) of the basic clause as follows:

(d)(1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials shall have access to and right to—

(i) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract; and

(ii) Interview any officer or employee regarding such transactions.

(e)(1) Notwithstanding the requirements of the clauses in paragraphs (a), (b), and (c), of this clause, the Contractor is not required to flow down any FAR clause in a subcontract for commercial items, other than—

(i) *Paragraph (d) of this clause.* This paragraph flows down to all subcontracts, except the authority of the Inspector General under paragraph (d)(1)(ii) does not flow down; and

(ii) *Those clauses listed in this paragraph (e)(1).* Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—

(A) 52.203–13, Contractor Code of Business Ethics and Conduct (Dec 2008) (Pub. L. 110–252, Title VI, Chapter 1 (41 U.S.C. 251 note)).

(B) 52.219–8, Utilization of Small Business Concerns (May 2004) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $550,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219–8 in lower tier subcontracts that offer subcontracting opportunities.

(C) 52.222–26, Equal Opportunity (Mar 2007) (E.O. 11246).

(D) 52.222–35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (Sept 2006) (38 U.S.C. 4212).

(E) 52.222–36, Affirmative Action for Workers with Disabilities (June 1998) (29 U.S.C. 793).

(F) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (Dec 2004) (E.O. 13201).

(G) 52.222–41, Service Contract Act of 1965 (Nov 2007) (41 U.S.C. 351, *et seq.*).

(H) 52.222–50, Combating Trafficking in Persons (Feb 2009) (22 U.S.C. 7104(g)).

(I) 2.222–51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Requirements (Nov 2007) (41 U.S.C. 351, *et seq.*).

(J) 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services-Requirements (Feb 2009) (41 U.S.C. 351, *et seq.*).

(K) 52.222–54, Employment Eligibility Verification (Jan 2009).

(L) 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations. (Mar 2009) (Pub. L. 110–247). Flow down required in accordance with paragraph (e) of FAR clause 52.226–6.

(M) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247–64.

■ 8. Amend section 52.214–26 by adding Alternate I to read as follows:

52.214–26 Audit and Records—Sealed Bidding.

* * * * *

Alternate I (*MAR 2009*). As prescribed in 14.201–7(a)(2) substitute the following paragraphs (c) and (e) for paragraphs (c) and (e) of the basic clause:

(c) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, shall have access to and the right to—

(1) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract or a subcontract hereunder; and

(2) Interview any officer or employee regarding such transactions.

(e)(1) Except as provided in paragraph (e)(2), the Contractor shall insert a clause containing the provisions of this clause, including this paragraph (e), in all subcontracts.

(2) The authority of the Inspector General under paragraph (c)(2) of this clause does not flow down to subcontracts.

■ 9. Amend section 52.215–2 by adding Alternate I to read as follows:

52.215–2 Audit and Records—Negotiation.

* * * * *

Alternate I (MAR 2009). As prescribed in 15.209(b)(2), substitute the following paragraphs (d)(1) and (g) for paragraphs (d)(1) and (g) of the basic clause:

(d) *Comptroller General or Inspector General.* (1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials, shall have access to and the right to—

(i) Examine any of the Contractor's or any subcontractor's records that pertain to and involve transactions relating to this contract or a subcontract hereunder; and

(ii) Interview any officer or employee regarding such transactions.

(g)(1) Except as provided in paragraph (g)(2) of this clause, the Contractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all subcontracts under this contract. The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

(2) The authority of the Inspector General under paragraph (d)(1)(ii) of this clause does not flow down to subcontracts.

[FR Doc. E9–7029 Filed 3–30–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12 and 52

[FAC 2005–32; FAR Case 2008–026; Item VI; Docket 2009–0013, Sequence 1]

RIN 9000–AL25

Federal Acquisition Regulation; FAR Case 2008–026, GAO Access to Contractor Employees

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417) which allows the Government Accountability Office to interview current contractor employees during the audit of the contractor's records. FAR 52.215–2(d)(1), Audit and Records-Negotiation, is revised to allow for the

offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225–23 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225–23 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

[FR Doc. E9–7031 Filed 3–30–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3 and 52

[FAC 2005–32; FAR Case 2009–012; Item II; Docket 2009–0009, Sequence 1]

RIN 9000–AL19

Federal Acquisition Regulation; FAR Case 2009–012, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information.

DATES: *Effective Date:* March 31, 2009.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clause for future orders, if the Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of the Recovery Act funds.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–32, FAR case 2009–012, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2009–012'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2009–012. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2009–012'' on your attached document.

- *Fax:* 202–501–4067.
- Mail: General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–32, FAR case 2009–012, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–32, FAR case 2009–012.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements section 1553 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to the protection of whistleblowers, by adding a new section 3.907, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 and a new clause at FAR 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009, and its prescription in FAR 3.907–7.

On February 17, 2009, the President signed Public Law 111–5, the American Recovery and Reinvestment Act of 2009, including a number of provisions to be implemented in Federal Government contracts. Among these provisions is Section 1553 of the Recovery Act, ''Protecting State and Local Government and Contractor Whistleblowers''. This requirement promotes transparency in Federal contracting.

B. Discussion

FAR 3.907 provides that non-Federal employers receiving funds under the Recovery Act are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials or a person with supervisory authority over the employee. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority. FAR 3.907–7 prescribes a new clause at 52.203–15.

C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

Therefore, given section 1553 of the Recovery Act, which extends whistleblower protections to employees of contractors that receive contracts funded under the Recovery Act, and the initial implementing guidance for the Recovery Act issued on February 18,

2009 by the Director of the Office of Management and Budget committing to an unprecedented level of transparency and accountability for taxpayer dollars, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to acquisitions at or below the simplified acquisition threshold, as defined at FAR 2.101.

D. Applicability to Commercial Item Contracts

Section 8003 of Public Law 103–355, the FASA (41 U.S.C. 430), governs the applicability of laws to commercial items, and is intended to limit the applicability of laws to commercial items. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for commercial items. The same applies for subcontracts for commercial items.

Therefore, given section 1553 of the Recovery Act, which prohibits non-Federal employers working on contracts funded with the Recovery Act funds from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information the employee reasonably believes is evidence of information listed in section 1553(a), the FAR Council has determined that the rule should apply to contracts for commercial items, as defined at FAR 2.101, at both the prime and subcontract levels.

E. Applicability to Commercially Available Off-the-Shelf (COTS) Item Contracts

Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of COTS items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply.

Therefore, given section 1553 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which prohibits non-Federal employers working on contracts funded with the Recovery Act funds from discharging, demoting, or discriminating against an employee as a reprisal for disclosing information the employee reasonably believes is evidence of information listed in section 1553(a), the Administrator, Office of the Federal Procurement Policy, has determined that the rule should apply to COTS item contracts, as defined at FAR 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

F. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule applies similar, but not identical, whistleblower protections to contractor and subcontractor employees as currently covered in FAR Subpart 3.9. Likewise, this rule only applies to contracts funded in whole or in part with the Recovery Act funds. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 3 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, (FAC 2005–32, FAR Case 2009–012) in all correspondence.

G. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

H. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the American Recovery and Reinvestment Act of 2009 became effective on enactment, and contracts using funds appropriated by the Recovery Act will soon be ready to award. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 3 and 52

Government procurement.

Dated: March 25, 2009.

Al Matera,

Director,Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 3 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 3 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Revise section 3.900 to read as follows:

3.900 Scope of subpart.

(a) Sections 3.901 through 3.906 of this subpart implement 10 U.S.C. 2409 and 41 U.S.C. 265, as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355).

(b) Section 3.907 of this subpart implements Section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), and applies to all contracts funded in whole or in part by that Act.

3.902 [Removed and Reserved]

■ 3. Remove and reserve section 3.902.

■ 4. Add sections 3.907 through 3.907–7 to read as follows:

3.907 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act).

3.907–1 Definitions.

As used in this section—

Board means the Recovery Accountability and Transparency Board established by Section 1521 of the Recovery Act.

Covered funds means funds appropriated by or otherwise made available by the Recovery Act.

Covered information means information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds.

Inspector General means an Inspector General appointed under the Inspector General Act of 1978. In the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

Non-Federal employer, as used in this section, means any employer that receives Recovery Act funds, including a contractor, subcontractor, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal Acquisition Regulation.

3.907–2 Policy.

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information to any of the following entities or their representatives:

(1) The Board.

(2) An Inspector General.

(3) The Comptroller General.

(4) A member of Congress.

(5) A State or Federal regulatory or law enforcement agency.

(6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

(7) A court or grand jury.

(8) The head of a Federal agency.

3.907–3 Procedures for filing complaints.

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in 3.907–2, may submit a complaint regarding the reprisal to the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The covered information giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act; and

(5) The specific nature and date of the reprisal.

(c) A contracting officer who receives a complaint of reprisal of the type described in 3.907–2 shall forward it to the Office of the Inspector General, agency legal counsel or to the appropriate official in accordance with agency procedures.

3.907–4 Procedures for investigating complaints.

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

3.907–5 Access to investigative file of Inspector General.

(a) The employee alleging reprisal under this section shall have access to the investigation file of the Inspector General, in accordance with the Privacy Act, 5 U.S.C. 552a. The investigation of the Inspector General shall be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the agency head or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the non-Federal employer shall have access to the investigative file of the Inspector General in accordance with the Privacy Act.

(c) The Inspector General may exclude from disclosures made under 3.907–5(a) or (b)—

(1) Information protected from disclosure by a provision of law; and

(2) Any additional information the Inspector General determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the Inspector General determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An Inspector General investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with 5 U.S.C. 552a or as required by any other applicable Federal law.

3.907–6 Remedies and enforcement authority.

(a) *Burden of Proof.* (1) Disclosure as contributing factor in reprisal.

(i) An employee alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section 3.907–2 was a contributing factor in the reprisal.

(ii) A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal.* The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907–6(a)(1) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an Inspector General report in accordance with section 1553 of the Recovery Act, the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection 3.907–2 and shall either issue an order denying relief in whole or in part or shall take one or more of the following actions:

(1) Order the employer to take affirmative action to abate the reprisal.

(2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of United States, which shall have jurisdiction over such an action without regard to the amount in controversy if

(i) The head of an agency—

(A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint in accordance with section 1553 of the Recovery Act, or in the case of an extension of time in accordance with section 1553 of the Recovery Act, within 30 days after the expiration of the extension of time; or

(C) Decides in accordance with section 1553 of the Recovery Act not to investigate or to discontinue an investigation; and

(ii) There is no showing that such delay or decision is due to the bad faith of the complainant.

(2) Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(d) Whenever an employer fails to comply with an order issued under this section, the head of the agency shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under paragraph (b) of this subsection may obtain review of the order's conformance with the law, and this section, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency.

3.907–7 Contract Clause.

Use the clause at 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 in all solicitations and contracts funded in whole or in part with Recovery Act funds.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 52.203–15 to read as follows:

52.203–15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009

As prescribed in 3.907–7, use the following clause:

Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Mar 2009)

(a) The Contractor shall post notice of employees rights and remedies for whistleblower protections provided under section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5).

(b) The Contractor shall include the substance of this clause including this paragraph (b) in all subcontracts.

(End of clause)

■ 6. Amend section 52.212–4 by revising the date of the clause and paragraph (r) to read as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

Contract Terms and Conditions—Commercial Items (MAR 2009)

* * * * *

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 3701, *et seq.*, Contract Work Hours and Safety Standards Act; 41 U.S.C. 51–58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistleblower protections; Section 1553 of the American Recovery and Reinvestment Act of 2009 relating to whistleblower protections for contracts funded under that Act; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity.

* * * * *

(End of clause)

■ 7. Amend section 52.212–5 by—

a. Revising the date of the clause;

b. Redesignating paragraphs (b)(3) thru (b)(41) as paragraphs (b)(4) thru (b)(42), respectively, and adding a new paragraph (b)(3); and

c. Redesignating paragraphs (e)(1)(iii) thru (e)(1)(xiii) as paragraphs (e)(1)(iv) thru (e)(1)(xiv), respectively, and adding a new paragraph (e)(1)(iii). The revised and added text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Mar 2009)

* * * * *

(b) * * *

(3) 52.203–15, Whistleblower Protections under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111–5).

* * * * *

(e)(1) * * *

(iii) 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111–5). Applies to subcontracts funded under the Act.

* * * * *

(End of clause)

■ 8. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(vi) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Mar 2009)

(a) * * *

(2) * * *

(vi) 52.244–6, Subcontracts for Commercial Items. (MAR 2009)

* * * * *

■ 9. Amend section 52.244–6 by revising the date of the clause; redesignating paragraphs (c)(1)(ii) thru (c)(1)(viii) as paragraphs (c)(1)(iii) thru (c)(1)(ix), respectively, and adding a new paragraph (c)(1)(ii).

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Mar 2009)

* * * * *

(c)(1) * * *

(ii) 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (Section 1553 of Pub. L. 111–5). Applies to subcontracts funded under the Act.

* * * * *

(End of clause)

[FR Doc. E9–7020 Filed 3–30–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 5, 8, 13, and 16

[FAC 2005–32; FAR Case 2009–010; Item III; Docket 2009–0010, Sequence 1]

RIN 9000–AL24

Federal Acquisition Regulation; FAR Case 2009–010, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Publicizing Contract Actions

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

JANUARY 21, 2009 PRESIDENTAL MEMORANDUM

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Freedom of Information Act

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA

Office of the Attorney General

Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound

legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

FOIA Is Everyone's Responsibility

Application of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the Assistant Secretary level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work "in a spirit of cooperation" with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed.

Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at www.usdoj.gov/oip/foiapost/2008foiapost30.htm.

*****

Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.

"Deemed Export" Questions and Answers

UPDATE (11/15/04): Point of clarification on the current policy regarding citizenship policy.

There is no change in the current policy regarding citizenship and permanent residents. The current policy still applies as outlined in questions 6-11 of the deemed export FAQ's.

The recently published Deemed Export license exceptions for both Microprocessors and High Performance Computers contains an error in the policy regarding citizenship and permanent residency. In the preamble under the heading "Deemed Export Revision" second to the last paragraph the last sentence reads, "Applications for foreign nationals with temporary or permanent residence status of a third country (i.e., non-U.S. and a temporary or permanent residence status other than a foreign national's country of origin) should be based on the foreign national's country of citizenship." This is not correctly stated, the policy in recognizing the most current citizenship and permanent residency still applies.

1. What is the "deemed export" rule?

An export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States. See §734.2(b)(2)(ii) of the Export Administration Regulations (EAR). For brevity, these questions and answers refer only to "technology" but apply equally to source code.

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2. What is a "release" of technology?

Technology is "released" for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. See §734.2(b)(3) of the Export Administration Regulations (EAR).

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3. What is "technology"?

Per Part 772 of the Export Administration Regulations (EAR), "technology" is specific information necessary for the "development," "production," or "use" of a product. The General Technology Note states that the "export of technology.is controlled according to the provisions of each Category." It further states that "technology required for the development, production, or use of a controlled product remains controlled even when applicable to a product controlled at a lower level." Please note that the terms "required," "development," "production," "use," and "technology" are all defined in Part 772 of the EAR. Controlled technology is that which is listed on the Commerce Control List.

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4. When do I need to apply for an export license for technology

under the "deemed export" rule?

Assuming that a license is required because the technology does not qualify for treatment under EAR99 and no license exception is available, U.S. entities must apply for an export license under the "deemed export" rule when both of the following conditions are met: (1) they intend to transfer controlled technologies to foreign nationals in the United States; and (2) transfer of the same technology to the foreign national's home country would require an export license.

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Foreign Nationals

5. How do I know if a foreign national would be subject to the "deemed export" rule?

Any foreign national is subject to the "deemed export" rule except a foreign national who (1) is granted permanent residence, as demonstrated by the issuance of a permanent resident visa (i.e., "Green Card"); or (2) is granted U.S. citizenship; or (3) is granted status as a "protected person" under 8 U.S.C. 1324b(a)(3). This includes all persons in the U.S. as tourists, students, businesspeople, scholars, researchers, technical experts, sailors, airline personnel, salespeople, military personnel, diplomats, etc. As noted, one exception to this general statement is a "protected person." "Protected persons" include political refugees and political asylum holders. Be aware that individuals seeking "protected person" status must satisfy all of the terms and conditions that are fully set forth in 8 U.S.C. 1324b(a)(3). It should be emphasized that although the deemed export rule may be triggered, this does not necessarily mean that a license is required. For example, the technology may be EAR99 or license exception eligible.

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6. How are individuals handled who are permanent residents or citizens of countries other than those of their nationality?

As noted above in Question 5, if the individual is a naturalized citizen or permanent resident of the United States, the "deemed export" rule does not apply. In other words, he or she is not subject to the provisions of the "deemed export" regulation. For individuals who are citizens of more than one foreign country, or have citizenship in one foreign country and permanent residence in another, as a general policy, the last permanent resident status or citizenship obtained governs. Questions 7 through 11 provide examples of situations involving individuals who are citizens of more than one foreign country, or have citizenship in one foreign country and permanent residence in another. If, for some reason, the status of a foreign national is not certain, then you should ask the Bureau of Export Administration (BXA), to determine where the stronger ties lie, based on the facts of the specific case. For instance, the status of a foreign national could be uncertain in situations where information may indicate involvement with prohibited entities or activities, for example, missile or nuclear-related end-uses or end-users as identified in Part 744 of the EAR. In response to a request for the status of a foreign national, BXA will look at the foreign national's family, professional, financial, and employment ties.

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7. What if the individual is a foreign national of one country, say India, but has obtained permanent residency in another, say the U.K.?

Release of controlled technology to that individual in the U.K. would be treated as if the shipment were being made to the U.K. and licensing requirements, if any, would be the same as for a British national in the U.K.

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8. If this same Indian foreign national traveled to visit facilities in a third country, say Germany, do the licensing requirements change, or is the release still treated as a transfer to the U.K. for licensing purposes?

The Indian national's U.K. permanent residency status still drives the licensing requirements and releases of technology to him or her would be considered as transfers to the U.K.

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9. What if that same Indian foreign national comes to the United States?

As long as the Indian foreign national maintains his or her permanent residency status in the U.K., transfers of technology to that individual would be deemed as transfers to the U.K.

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10. Now, what about changes in nationality? If a person was a citizen of India but subsequently became a citizen of the U.K., how is that person treated for export control purposes?

If the former Indian national becomes a British citizen, transfers of technology would be viewed as transfers to the U.K.

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11. What if the Indian foreign national becomes a citizen of the U.K. but retains his or her Indian citizenship, as well? This is the situation of people who have dual-citizenship.

As a general principle, the last citizenship obtained governs. As is clear in response to Question 10 above, the individual's most recent citizenship is with the U.K. and releases of technology would be viewed as releases to the U.K.

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12. I have read elsewhere on your web page the requirements for information that the Bureau of Export Administration (BXA) wants

in order to process a "deemed export" license application. I see that you require a lot of personal data, including citizenship and country of origin. I understand that I cannot ask for such information from my employees under the Equal Employment Opportunities Commission (EEOC) rules. How do I get that information?

The information we normally request derives from a curriculum vitae/resume or from company background checks. The information that BXA may request as part of the license application process is requested in order to determine whether BXA should authorize the release of such controlled sensitive technology. The hiring of foreign nationals is not prohibited nor regulated by the Export Administration Regulations (EAR). The EAR does not regulate employment matters. The justification for the "deemed export" rule is that there is no more effective way of disclosing sensitive technical information (e.g., design know-how) than to work side-by-side in a laboratory or on the production floor of a company. Our web page guidance[PDF] is designed to assist you in pointing out the types of relevant information that BXA examines in connection with the license application review.

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13. What is a "deemed re-export"?

The term "deemed re-export" is often used to indicate the transfer of controlled U.S. technology to a third-country national overseas. As an example, a U.S. exporter transfers its controlled proprietary technology to a firm in country A. The firm in country A, in turn, will employ an individual from country B who is not a permanent resident of country A, nor of the United States, and who will need the controlled proprietary technology to perform his or her assigned duties. If the U.S. exporter intends to transfer the controlled technology to the country B national who is now an employee of the country A firm, the U.S. exporter is responsible for obtaining any required deemed export license, as if it were transferring the technology to country B. If the country A firm intends to transfer the controlled technology that it received from the United States to the country B national, then the country A firm is responsible for obtaining any required deemed re-export license from BXA. Please see §734.2(b)(4) of the Export Administration Regulations (EAR).

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Technology

14. What technologies are subject to the Commerce Department controls?

Generally, technologies subject to the Export Administration Regulations (EAR) are those which are in the United States or of U.S. origin, in whole or in part. Most are proprietary. Technologies which tend to require licensing for transfer to foreign nationals are also dual-use (i.e., have both civil and military applications) and are subject to one or more control regimes, such as National Security, Nuclear Proliferation, Missile Technology, or Chemical and Biological Warfare.

Foreign technology with U.S.-origin technology commingled to a degree above a de minimis level is considered to be subject to the EAR. Technologies which may require an export license are those which are subject to the EAR and which are listed in the Commerce Control List, see Parts 734, 738, and 774 of the EAR.

Some technologies are under the exclusive jurisdiction of another agency of the U.S. government and are not subject to the EAR. These include defense services which are under the jurisdiction of the State Department and technology related to the production of special nuclear materials which is under the jurisdiction of the Energy Department.

Still other technologies do not require any authorization because they are already "publicly available." These include patent applications; publicly available technology and software (other than software and technology controlled as encryption items) that are already published or will be published; technology which arises during or as a result of fundamental research; or technology which is educational. See Part 734 of the EAR for details.

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15. Is software considered "technology" and is it similarly controlled?

The Export Administration Regulations (EAR) definitions distinguish between software and technology. Software is one of the groups within each of the categories of items listed on the Commerce Control List (CCL). Software which is delineated on the CCL is controlled.

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16. What technologies are considered "fundamental research"?

"Fundamental research" is basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community. It is distinguished from proprietary research and from industrial development, design, production, and product utilizations, the results of which ordinarily are restricted for proprietary and/or specific national security reasons. Normally, the results of "fundamental research" are published in scientific literature, thus making it publicly available. Research which is intended for publication, whether it is ever accepted by scientific journals or not, is considered to be "fundamental research." A large segment of academic research is considered "fundamental research." Because any information, technological or otherwise, that is publicly available is not subject to the Export Administration Regulations (EAR) (except for encryption object code and source code in electronic form or media) and thus does not require a license, "fundamental research" is not subject to the EAR and does not require a license. Please see §734.8 for a full discussion.

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17. Are cryptographic technology and software source code "deemed exports" handled the same way as other technology and software source code?

No, they are not. The encryption regulation published on January 14, 2000, changed the deemed export rule for encryption technology. The authorization for encryption technology was updated to allow some encryption technology under License Exception ENC. ENC is now also allowed for foreign employees of U.S. companies coming to the United States to work. However, ENC would not cover employees of a Romanian firm, for example, working at a U.S. company. These foreign nationals are not "employees" of the U.S. company. As far as encryption source and object code are concerned, while in the United States, foreign nationals may use any type of encryption source code and object code. The only deemed export authorization required for encryption relates to encryption technology and when a U.S. person intends to provide technical assistance to foreign nationals using source code. (Please note that Export Administration Regulations (EAR) licensing requirements may apply for transfers of encryption software in the United States to an embassy or affiliate of a foreign country.) See our related deemed export encryption chart for more guidance.

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More direct hypothetical situations

18. At our Canadian subsidiary, we develop semiconductor manufacturing technologies that are controlled by ECCN 3E001. If we transfer those technologies to a Chinese national in that facility, do we require U.S. authorization? What about transferring the same Canadian developed technologies to PRC nationals at our PRC facility?

You may require a license if the technologies are considered to be of U.S. origin. If the technologies developed in your Canadian facility are commingled with or drawn from controlled U.S.-origin technology, you must decide the extent of the mix to determine if U.S. re-export controls apply. Depending on the percentage of the controlled-U.S. technology component, a license may be required for the transfer of that technology to the Chinese national, whether he or she is at your Canadian or PRC facilities. Please see §734.4(c)(3), (d)(3), and (e) of the Export Administration Regulations (EAR). Also, the EAR (Supp. 2 to 734, (b)) requires that you file a one-time review of your technology before you can use the de minimis exclusion. We strongly suggest that you consult with BXA on this question.

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19. We have several foreign national employees in our firm, which has several divisions and an administrative area. Two of the divisions, the Research and Development (R&D) division and the Advanced Manufacturing/Processing (ADMP) division, work with technical data for advanced materials used in electronic and jet engine manufacturing which is controlled under ECCNs 2E001, 3E001, and 9E003, and we have several foreign national engineers working there. None of the other divisions work with controlled technical data, and we have some foreign national employees in them as well. The divisions are not co-located. Do I need an export license for all of the foreign national employees?

Probably not. Your firm would likely need a license for those foreign

national engineers and technical people who work in the R&D and ADMP divisions with the controlled technologies. Your firm would probably not need licenses for those individuals who do not normally come into contact with the controlled technologies, such as those in the administrative area. However, you should review the job descriptions of all your foreign national employees. For example, technical managers and technical training personnel who are NOT at the sensitive divisions may need access to the controlled technologies in order to do their jobs, and so you may need to have deemed export licenses for technology transfer to them.

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20. My company wants to employ an Indian foreign national who spent three years working for an Indian organization that is on the Entity List. May I do so? Do I require a license?

If he or she is properly documented for work in the United States, you may employ him or her. You must apply for an export license if you intend to release technology listed on the Commerce Control List which would require a license for export to India.

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21. An Indian foreign national who is on sabbatical from an Indian organization that is on the Entity List wants to work with our firm in our executive training program where we will discuss proprietary technology which is not controlled to India. We have had an ongoing exchange of executives and scientists from this organization for years. Do I require a license?

Yes, you are required to apply for a deemed export license. Under the sanctions imposed by the U.S. Government, any export which includes transfers of technology to foreign nationals requires a license to organizations on the Entity List. Because the Indian foreign national is still employed by the organization that is on the Entity List, a technology transfer to him or her is considered a technology transfer to the employer organization. Note that the sanctions apply to any technology subject to the Export Administration Regulations (EAR).

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22. Our university has several departments that are conducting research under contract with private corporations. Some of this research is controlled "development" technology. We often have researchers (visiting faculty, post-graduate fellows, and research assistants) who are foreign nationals working on controlled "development" technology research. Does the university need to apply for a deemed export license?

It depends. You need to look at the research and the contract terms for release of the results of the research. If there are no conditions placed on the research, and it is the intent of the research team to publish its findings in scientific literature, then it is considered "fundamental research," and no license is required. If the contract requires that the private corporation review the findings of the research team with the intent of controlling what results are to be released in open literature, then the research is considered proprietary, and a license is required.

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23. Our university does research under U.S. government sponsorship. We may have foreign national researchers working on this. Is a deemed export license required?

Under the Export Administration Regulations (EAR), U.S. government sponsored research is handled very much like corporate sponsored research. It may be "fundamental research", or it may be proprietary (See Question 22). See §§ 734.8 and 734.11 of the EAR for details. In addition, some U.S. government data my be subject to separate restrictions on dissemination such as security classification.

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PART 176—AWARD TERMS FOR ASSISTANCE AGREEMENTS THAT INCLUDE FUNDS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, PUBLIC LAW 111–5

Section Contents

Authority: American Recovery and Reinvestment Act of 2009, Public Law 111–5; Federal Funding Accountability and Transparency Act of 2006, (Pub. L. 109–282), as amended.

Source: 74 FR 18450, Apr. 23, 2009, unless otherwise noted.

§ 176.10 Purpose of this part.

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This part establishes Federal Governmentwide award terms for financial assistance awards, namely, grants, cooperative agreements, and loans, to implement the cross-cutting requirements of the American Recovery and Reinvestment Act of 2009, Public Law 111–5 (Recovery Act). These requirements are cross-cutting in that they apply to more than one agency's awards.

§ 176.20 Agency responsibilities (general).

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(a) In any assistance award funded in whole or in part by the Recovery Act, the award official shall indicate that the award is being made under the Recovery Act, and indicate what projects and/or activities are being funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the assistance type.

(b) To maximize transparency of Recovery Act funds required for reporting by the assistance recipient, the award official shall consider structuring assistance awards to allow for separately tracking Recovery Act funds.

(c) Award officials shall ensure that recipients comply with the Recovery Act requirements of Subpart A. If the recipient fails to comply with the reporting requirements or other award terms, the award official or other authorized agency action official shall take the appropriate enforcement or termination action in accordance with 2 CFR 215.62 or the agency's implementation of the OMB Circular A–102 grants management common rule. OMB Circular A–102 is available at *http://www.whitehouse.gov/omb/circulars/a102/a102.html.*

(d) The award official shall make the recipient's failure to comply with the reporting requirements a part of the recipient's performance record.

§ 176.30 Definitions.

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As used in this part—

Award means any grant, cooperative agreement or loan made with Recovery Act funds. Award official means a person with the authority to enter into, administer, and/or terminate financial assistance awards and make related determinations and findings.

Classified or *"classified information"* means any knowledge that can be communicated or any documentary material, regardless of its physical form or characteristics, that—

(1)(i) Is owned by, is produced by or for, or is under the control of the United States Government; or

(ii) Has been classified by the Department of Energy as privately generated restricted data following the procedures in 10 CFR 1045.21; and

(2) Must be protected against unauthorized disclosure according to Executive Order 12958, Classified National Security Information, April 17, 1995, or classified in accordance with the Atomic Energy Act of 1954.

Recipient means any entity other than an individual that receives Recovery Act funds in the form of a grant, cooperative agreement or loan directly from the Federal Government.

Recovery funds or Recovery Act funds are funds made available through the appropriations of the American Recovery and Reinvestment Act of 2009, Public Law 111–5.

Subaward means—

(1) A legal instrument to provide support for the performance of any portion of the substantive project or program for which the recipient received this award and that the recipient awards to an eligible subrecipient;

(2) The term does not include the recipient's procurement of property and services needed to carry out the project or program (for further explanation, see §__.210 of the attachment to OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations"). OMB Circular A–133 is available at *http://www.whitehouse.gov/omb/circulars/a133/a133.html.*

(3) A subaward may be provided through any legal agreement, including an agreement that the recipient or a subrecipient considers a contract.

Subcontract means a legal instrument used by a recipient for procurement of property and services needed to carry out the project or program.

Subrecipient or *Subawardee* means a non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency. Guidance on distinguishing between a subrecipient and a vendor is provided in §__.210 of OMB Circular A–133.

Subpart A—Reporting and Registration Requirements Under Section 1512 of the American Recovery and Reinvestment Act of 2009

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§ 176.40 Procedure.

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The award official shall insert the standard award term in this Subpart in all awards funded in whole or in part with Recovery Act funds, except for those that are classified, awarded to individuals, or awarded under mandatory and entitlement programs, except as specifically required by OMB, or expressly exempted from the reporting requirement in the Recovery Act.

§ 176.50 Award term—Reporting and registration requirements under section 1512 of the Recovery Act.

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Agencies are responsible for ensuring that their recipients report information required under the Recovery Act in a timely manner. The following award term shall be used by agencies to implement the recipient reporting and registration requirements in section 1512:

(a) This award requires the recipient to complete projects or activities which are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act) and to report on use of Recovery Act funds provided through this award. Information from these reports will be made available to the public.

(b) The reports are due no later than ten calendar days after each calendar quarter in which the recipient receives the assistance award funded in whole or in part by the Recovery Act.

(c) Recipients and their first-tier recipients must maintain current registrations in the Central Contractor Registration (*http://www.ccr.gov*) at all times during which they have active federal awards funded with Recovery Act funds. A Dun and Bradstreet Data Universal Numbering System (DUNS) Number (*http://www.dnb.com*) is one of the requirements for registration in the Central Contractor Registration.

(d) The recipient shall report the information described in section 1512(c) of the Recovery Act using the reporting instructions and data elements that will be provided online at *http://www.FederalReporting.gov* and ensure that any information that is pre-filled is corrected or updated as needed.

Subpart B—Buy American Requirement Under Section 1605 of the American Recovery and Reinvestment Act of 2009

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§ 176.60 Statutory requirement.

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Section 1605 of the Recovery Act prohibits use of recovery funds for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. The law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements, and it provides for waiver under three circumstances:

(a) Iron, steel, or relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;

(b) Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent; or

(c) Applying the domestic preference would be inconsistent with the public interest.

§ 176.70 Policy.

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Except as provided in §176.80 or §176.90—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (see definitions at §§176.140 and 176.160) unless—

(1) The public building or public work is located in the United States; and

(2) All of the iron, steel, and manufactured goods used in the project are produced or manufactured in the United States.

(i) Production in the United States of the iron or steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.

(ii) There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the United States.

(b) Paragraph (a) of this section shall not apply where the Recovery Act requires the application of alternative Buy American requirements for iron, steel, and manufactured goods.

§ 176.80 Exceptions.

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(a) When one of the following exceptions applies in a case or category of cases, the award official may allow the recipient to use foreign iron, steel and/or manufactured goods in the project without regard to the restrictions of section 1605 of the Recovery Act:

(1) *Nonavailability.* The head of the Federal department or agency may determine that the iron, steel or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 48 CFR 25.104(a) and the procedures at 48 CFR 25.103(b)(1) also apply if any of those articles are manufactured goods needed in the project.

(2) *Unreasonable cost*. The head of the Federal department or agency may determine that the cost of domestic iron, steel, or relevant manufactured goods will increase the cost of the overall project by more than 25 percent in accordance with §176.110.

(3) *Inconsistent with public interest*. The head of the Federal department or agency may determine that application of the restrictions of section 1605 of the Recovery Act would be inconsistent with the public interest.

(b) When a determination is made for any of the reasons stated in this section that certain foreign iron, steel, and/or manufactured goods may be used—

(1) The award official shall list the excepted materials in the award; and

(2) The head of the Federal department or agency shall publish a notice in the Federal Register within two weeks after the determination is made, unless the item has already been determined to be domestically nonavailable. A list of items that are not domestically available is at 48 CFR 25.104(a). The Federal Register notice or information from the notice may be posted by OMB to Recovery.gov. The notice shall include—

(i) The title "Buy American Exception under the American Recovery and Reinvestment Act of 2009";

(ii) The dollar value and brief description of the project; and

(iii) A detailed written justification as to why the restriction is being waived.

§ 176.90 Non-application to acquisitions covered under international agreements.

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Acquisitions covered by international agreements. Section 1605(d) of the Recovery Act provides that the Buy American requirement in section 1605 shall be applied in a manner consistent with U.S. obligations under international agreements.

(a) The Buy American requirement set out in §176.70 shall not be applied where the iron, steel, or manufactured goods used in the project are from a Party to an international agreement, listed in paragraph (b)(2) of this section, and the recipient is required under an international agreement, described in the appendix to this subpart, to treat the goods and services of that Party the same as domestic goods and services. This obligation shall only apply to projects with an estimated value of $7,443,000 or more and projects that are not specifically excluded from the application of those agreements.

(b) The international agreements that obligate recipients that are covered under an international agreement to treat the goods and services of a Party the same as domestic goods and services and the respective Parties to the agreements are:

(1) The World Trade Organization Government Procurement Agreement (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom);

(2) The following Free Trade Agreements:

(i) Dominican Republic-Central America-United States Free Trade Agreement (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua);

(ii) North American Free Trade Agreement (NAFTA) (Canada and Mexico);

(iii) United States-Australia Free Trade Agreement;

(iv) United States-Bahrain Free Trade Agreement;

(v) United States-Chile Free Trade Agreement;

(vi) United States-Israel Free Trade Agreement;

(vii) United States-Morocco Free Trade Agreement;

(viii) United States-Oman Free Trade Agreement;

(ix) United States-Peru Trade Promotion Agreement; and

(x) United States-Singapore Free Trade Agreement.

(3) United States-European Communities Exchange of Letters (May 15, 1995): Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom.

§ 176.100 Timely determination concerning the inapplicability of section 1605 of the Recovery Act.

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(a) The head of the Federal department or agency involved may make a determination regarding inapplicability of section 1605 to a particular case or to a category of cases.

(b) Before Recovery Act funds are awarded by the Federal agency or obligated by the recipient for a project for the construction, alteration, maintenance, or repair of a public building or public work, an applicant or recipient may request from the award official a determination concerning the inapplicability of section 1605 of the Recovery Act for specifically identified items.

(c) The time for submitting the request and the information and supporting data that must be included in the request are to be specified in the agency's and recipient's request for applications and/or proposals, and as appropriate, in other written communications. The content of those communications should be consistent with the notice in §176.150 or §176.170, whichever applies.

(d) The award official must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(e) In making a determination based on the increased cost to the project of using domestic iron, steel, and/or manufactured goods, the award official must compare the total estimated cost of the project using foreign iron, steel and/or relevant manufactured goods to the estimated cost if all domestic iron, steel, and/or relevant manufactured goods were used. If use of domestic iron, steel, and/or relevant manufactured goods would increase the cost of the overall project by more than 25 percent, then the award official shall determine that the cost of the domestic iron, steel, and/or relevant manufactured goods is unreasonable.

§ 176.110 Evaluating proposals of foreign iron, steel, and/or manufactured goods.

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(a) If the award official receives a request for an exception based on the cost of certain domestic iron, steel, and/or manufactured goods being unreasonable, in accordance with §176.80, then the award official shall apply evaluation factors to the proposal to use such foreign iron, steel, and/or manufactured goods as follows:

(1) Use an evaluation factor of 25 percent, applied to the total estimated cost of the project, if the foreign iron, steel, and/or manufactured goods are to be used in the project based on an exception for unreasonable cost requested by the applicant.

(2) Total evaluated cost = project cost estimate + (.25 × project cost estimate, if paragraph (a)(1) of this section applies).

(b) Applicants or recipients also may submit alternate proposals based on use of equivalent domestic iron, steel, and/or manufactured goods to avoid possible denial of Recovery Act funding for the proposal if the Federal Government determines that an exception permitting use of the foreign item(s) does not apply.

(c) If the award official makes an award to an applicant that proposed foreign iron, steel, and/or manufactured goods not listed in the applicable notice in the request for applications or proposals, then the award official must add the excepted materials to the list in the award term.

§ 176.120 Determinations on late requests.

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(a) If a recipient requests a determination regarding the inapplicability of section 1605 of the Recovery Act after obligating Recovery Act funds for a project for construction, alteration, maintenance, or repair (late request), the recipient must explain why it could not request the determination before making the obligation or why the need for such determination otherwise was not reasonably foreseeable. If the award official concludes that the recipient should have made the request before making the obligation, the award official may deny the request.

(b) The award official must base evaluation of any late request for a determination regarding the inapplicability of section 1605 of the Recovery Act on information required by §176.150(c) and (d) or §176.170(c) and (d) and/or other readily available information.

(c) If a determination, under §176.80 is made after Recovery Act funds were obligated for a project for construction, alteration, maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official must amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods.

When the basis of the exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other appropriate actions taken to cover costs associated with acquiring or using the foreign iron, steel, and/or manufactured goods. When the basis for the exception is the unreasonable cost of domestic iron, steel, and/or manufactured goods the award official shall adjust the award amount or the budget, as appropriate, by at least the differential established in §176.110(a).

§ 176.130 Noncompliance.

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The award official must—

(a) Review allegations of violations of section 1605 of the Recovery Act;

(b) Unless fraud is suspected, notify the recipient of the apparent unauthorized use of foreign iron, steel, and/or manufactured goods and request a reply, to include proposed corrective action; and

(c) If the review reveals that a recipient or subrecipient has used foreign iron, steel, and/or manufactured goods without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act in accordance with §176.120.

(2) Consider requiring the removal and replacement of the unauthorized foreign iron, steel, and/or manufactured goods.

(3) If removal and replacement of foreign iron, steel, and/or manufactured goods used in a public building or a public work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Federal Government, the award official may determine in writing that the foreign iron, steel, and/or manufactured goods need not be removed and replaced. A determination to retain foreign iron, steel, and/or manufactured goods does not constitute a determination that an exception to section 1605 of the Recovery Act applies, and this should be stated in the determination. Further, a determination to retain foreign iron, steel, and/or manufactured goods does not affect the Federal Government's right to reduce the amount of the award by the cost of the steel, iron, or manufactured goods that are used in the project or to take enforcement or termination action in accordance with the agency's grants management regulations.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate remedies, such as withholding cash payments pending correction of the deficiency, suspending or terminating the award, and withholding further awards for the project. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with the agency's debarment rule implementing 2 CFR part 180. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

§ 176.140 Award term—Required Use of American Iron, Steel, and Manufactured Goods—Section 1605 of the American Recovery and Reinvestment Act of 2009.

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When awarding Recovery Act funds for construction, alteration, maintenance, or repair of a public building or public work that does not involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the award term described in the following paragraphs:

(a) *Definitions.* As used in this award term and condition—

(1) *Manufactured good* means a good brought to the construction site for incorporation into the building or work that has been—

(i) Processed into a specific form and shape; or

(ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

(2) *Public building and public work* means a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

(3) *Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

(b) *Domestic preference.* (1) This award term and condition implements Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111–5), by requiring that all iron, steel, and manufactured goods used in the project are produced in the United States except as provided in paragraph (b)(3) and (b)(4) of this section and condition.

(2) This requirement does not apply to the material listed by the Federal Government as follows:

_____

[*Award official to list applicable excepted materials or indicate "none"*]

(3) The award official may add other iron, steel, and/or manufactured goods to the list in paragraph (b)(2) of this section and condition if the Federal Government determines that—

(i) The cost of the domestic iron, steel, and/or manufactured goods would be unreasonable. The cost of domestic iron, steel, or manufactured goods used in the project is unreasonable when the cumulative cost of such material will increase the cost of the overall project by more than 25 percent;

(ii) The iron, steel, and/or manufactured good is not produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of Section 1605 of the Recovery Act* . (1)(i) Any recipient request to use foreign iron, steel, and/or manufactured goods in accordance with paragraph (b)(3) of this section shall include adequate information for Federal Government evaluation of the request, including—

(A) A description of the foreign and domestic iron, steel, and/or manufactured goods;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign iron, steel, and/or manufactured goods cited in accordance with paragraph (b)(3) of this section.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this section.

(iii) The cost of iron, steel, and/or manufactured goods material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any recipient request for a determination submitted after Recovery Act funds have been obligated for a project for construction, alteration, maintenance, or repair shall explain why the recipient could not reasonably foresee the need for such determination and could not have requested the determination before the funds were obligated. If the recipient does not submit a satisfactory explanation, the award official need not make a determination

(2) If the Federal Government determines after funds have been obligated for a project for construction, alteration, maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official will amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other actions taken to cover costs associated with acquiring or using the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is the unreasonable cost of the domestic iron, steel, or manufactured goods, the award official shall adjust the award amount or redistribute budgeted funds by at least the differential established in 2 CFR 176.110(a).

(3) Unless the Federal Government determines that an exception to section 1605 of the Recovery Act applies, use of foreign iron, steel, and/or manufactured goods is noncompliant with section 1605 of the American Recovery and Reinvestment Act.

(d) *Data.* To permit evaluation of requests under paragraph (b) of this section based on unreasonable cost, the Recipient shall include the following information and any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Items Cost Comparison

Description	Unit of measure	Quantity	Cost (dollars)*
Item 1:			
Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good	_____	_____	_____
Item 2:			
Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good	_____	_____	_____

[List name, address, telephone number, email address, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.]

[Include other applicable supporting information.]

*[*Include all delivery costs to the construction site.]*

§ 176.150 Notice of Required Use of American Iron, Steel, and Manufactured Goods—Section 1605 of the American Recovery and Reinvestment Act of 2009.

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When requesting applications or proposals for Recovery Act programs or activities that may involve construction, alteration, maintenance, or repair of a public building or public work, and do not involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the notice described in the following paragraphs in their solicitations:

(a) *Definitions.* Manufactured good, public building and public work, and steel, as used in this notice, are defined in the 2 CFR 176.140.

(b) *Requests for determinations of inapplicability.* A prospective applicant requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) should submit the request to the award official in time to allow a determination before submission of applications or proposals. The prospective applicant shall include the information and applicable supporting data required by paragraphs at 2 CFR 176.140(c) and (d) in the request. If an applicant has not requested a determination regarding the inapplicability of 1605 of the Recovery Act before submitting its application or proposal, or has not received a response to a previous request, the applicant shall include the information and supporting data in the application or proposal.

(c) *Evaluation of project proposals.* If the Federal Government determines that an exception based on unreasonable cost of domestic iron, steel, and/or manufactured goods applies, the Federal Government will evaluate a project requesting exception to the requirements of section 1605 of the Recovery Act by adding to the estimated total cost of the project 25 percent of the project cost, if foreign iron, steel, or manufactured goods are used in the project based on unreasonable cost of comparable manufactured domestic iron, steel, and/or manufactured goods.

(d) *Alternate project proposals.* (1) When a project proposal includes foreign iron, steel, and/or manufactured goods not listed by the Federal Government at 2 CFR 176.140(b)(2), the applicant also may submit an alternate proposal based on use of equivalent domestic iron, steel, and/or manufactured goods.

(2) If an alternate proposal is submitted, the applicant shall submit a separate cost comparison table prepared in accordance with 2 CFR 176.140(c) and (d) for the proposal that is based on the use of any foreign iron, steel, and/or manufactured goods for which the Federal Government has not yet determined an exception applies.

(3) If the Federal Government determines that a particular exception requested in accordance with 2 CFR 176.140(b) does not apply, the Federal Government will evaluate only those proposals based on use of the equivalent domestic iron, steel, and/or manufactured goods, and the applicant shall be required to furnish such domestic items.

§ 176.160 Award term—Required Use of American Iron, Steel, and Manufactured Goods (covered under International Agreements)—Section 1605 of the American Recovery and Reinvestment Act of 2009.

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When awarding Recovery Act funds for construction, alteration, maintenance, or repair of a public building or public work that involves iron, steel, and/or manufactured goods materials covered under international agreements, the agency shall use the award term described in the following paragraphs:

(a) *Definitions.* As used in this award term and condition—

Designated country —(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom;

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore); or

(3) A United States-European Communities Exchange of Letters (May 15, 1995) country: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom.

Designated country iron, steel, and/or manufactured goods —(1) Is wholly the growth, product, or manufacture of a designated country; or

(2) In the case of a manufactured good that consist in whole or in part of materials from another country, has been substantially transformed in a designated country into a new and different manufactured good distinct from the materials from which it was transformed.

Domestic iron, steel, and/or manufactured good —(1) Is wholly the growth, product, or manufacture of the United States; or

(2) In the case of a manufactured good that consists in whole or in part of materials from another country, has been substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed. There is no requirement with regard to the origin of components or subcomponents in manufactured goods or products, as long as the manufacture of the goods occurs in the United States.

Foreign iron, steel, and/or manufactured good means iron, steel and/or manufactured good that is not domestic or designated country iron, steel, and/or manufactured good.

Manufactured good means a good brought to the construction site for incorporation into the building or work that has been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

Public building and *public work* means a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

(b) *Iron, steel, and manufactured goods.* (1) The award term and condition described in this section implements —

(i) Section 1605(a) of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act), by requiring that all iron, steel, and manufactured goods used in the project are produced in the United States; and

(ii) Section 1605(d), which requires application of the Buy American requirement in a manner consistent with U.S. obligations under international agreements. The restrictions of section 1605 of the Recovery Act do not apply to designated country iron, steel, and/or manufactured goods. The Buy American requirement in section 1605 shall not be applied where the iron, steel or manufactured goods used in the project are from a Party to an international agreement that obligates the recipient to treat the goods and services of that Party the same as domestic goods and services. This obligation shall only apply to projects with an estimated value of $7,443,000 or more.

(2) The recipient shall use only domestic or designated country iron, steel, and manufactured goods in performing the work funded in whole or part with this award, except as provided in paragraphs (b)(3) and (b)(4) of this section.

(3) The requirement in paragraph (b)(2) of this section does not apply to the iron, steel, and manufactured goods listed by the Federal Government as follows:

_____

[*Award official to list applicable excepted materials or indicate "none"*]

(4) The award official may add other iron, steel, and manufactured goods to the list in paragraph (b)(3) of this section if the Federal Government determines that—

(i) The cost of domestic iron, steel, and/or manufactured goods would be unreasonable. The cost of domestic iron, steel, and/or manufactured goods used in the project is unreasonable when the cumulative cost of such material will increase the overall cost of the project by more than 25 percent;

(ii) The iron, steel, and/or manufactured good is not produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of section 1605 of the Recovery Act or the Buy American Act.* (1)(i) Any recipient request to use foreign iron, steel, and/or manufactured goods in accordance with paragraph (b)(4) of this section shall include adequate information for Federal Government evaluation of the request, including —

(A) A description of the foreign and domestic iron, steel, and/or manufactured goods;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign iron, steel, and/or manufactured goods cited in accordance with paragraph (b)(4) of this section.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this section.

(iii) The cost of iron, steel, or manufactured goods shall include all delivery costs to the construction site and any applicable duty.

(iv) Any recipient request for a determination submitted after Recovery Act funds have been obligated for a project for construction, alteration, maintenance, or repair shall explain why the recipient could not reasonably foresee the need for such determination and could not have requested the determination before the funds were obligated. If the recipient does not submit a satisfactory explanation, the award official need not make a determination.

(2) If the Federal Government determines after funds have been obligated for a project for construction, alteration,

maintenance, or repair that an exception to section 1605 of the Recovery Act applies, the award official will amend the award to allow use of the foreign iron, steel, and/or relevant manufactured goods. When the basis for the exception is nonavailability or public interest, the amended award shall reflect adjustment of the award amount, redistribution of budgeted funds, and/or other appropriate actions taken to cover costs associated with acquiring or using the foreign iron, steel, and/or relevant manufactured goods.. When the basis for the exception is the unreasonable cost of the domestic iron, steel, or manufactured goods, the award official shall adjust the award amount or redistribute budgeted funds, as appropriate, by at least the differential established in 2 CFR 176.110(a).

(3) Unless the Federal Government determines that an exception to section 1605 of the Recovery Act applies, use of foreign iron, steel, and/or manufactured goods other than designated country iron, steel, and/or manufactured goods is noncompliant with the applicable Act.

(d) *Data.* To permit evaluation of requests under paragraph (b) of this section based on unreasonable cost, the applicant shall include the following information and any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Items Cost Comparison

Description	Unit of measure	Quantity	Cost (dollars)*
Item 1:			
Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good	_____	_____	_____
Item 2:			
Foreign steel, iron, or manufactured good	_____	_____	_____
Domestic steel, iron, or manufactured good	_____	_____	_____

[List name, address, telephone number, email address, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.]

[Include other applicable supporting information.]

*[*Include all delivery costs to the construction site.]*

§ 176.170 Notice of Required Use of American Iron, Steel, and Manufactured Goods (covered under International Agreements) —Section 1605 of the American Recovery and Reinvestment Act of 2009.

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When requesting applications or proposals for Recovery Act programs or activities that may involve construction, alteration, maintenance, or repair of a public building or public work, and involve iron, steel, and/or manufactured goods covered under international agreements, the agency shall use the notice described in the following paragraphs in the solicitation:

(a) *Definitions. Designated country iron, steel, and/or manufactured goods, foreign iron, steel, and/or manufactured good, manufactured good, public building* and *public work* , and *steel* , as used in this provision, are defined in 2 CFR 176.160(a).

(b) *Requests for determinations of inapplicability.* A prospective applicant requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) should submit the request to the award official in time to allow a determination before submission of applications or proposals. The prospective applicant shall include the information and applicable supporting data required by 2 CFR 176.160 (c) and (d) in the request. If an applicant has not requested a determination regarding the inapplicability of section 1605 of the Recovery Act before submitting its application or proposal, or has not received a response to a previous request, the applicant shall include the information and supporting data in the application or proposal.

(c) *Evaluation of project proposals.* If the Federal Government determines that an exception based on unreasonable cost of domestic iron, steel, and/or manufactured goods applies, the Federal Government will evaluate a project requesting exception to the requirements of section 1605 of the Recovery Act by adding to the estimated total cost of the project 25 percent of the project cost if foreign iron, steel, or manufactured goods are used based on unreasonable cost of comparable domestic iron, steel, or manufactured goods.

(d) *Alternate project proposals* . (1) When a project proposal includes foreign iron, steel, and/or manufactured goods, other than designated country iron, steel, and/or manufactured goods, that are not listed by the Federal Government in this Buy American notice in the request for applications or proposals, the applicant may submit an alternate proposal based on use of equivalent domestic or designated country iron, steel, and/or manufactured goods.

(2) If an alternate proposal is submitted, the applicant shall submit a separate cost comparison table prepared in accordance with paragraphs 2 CFR 176.160(c) and (d) for the proposal that is based on the use of any foreign iron, steel, and/or manufactured goods for which the Federal Government has not yet determined an exception applies.

(3) If the Federal Government determines that a particular exception requested in accordance with 2 CFR 176.160(b) does not apply, the Federal Government will evaluate only those proposals based on use of the equivalent domestic or designated country iron, steel, and/or manufactured goods, and the applicant shall be required to furnish such domestic or designated country items.

Appendix to Subpart B of Part 176—U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations Under International Agreements

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States	Entities covered	Exclusions	Relevant international agreements
Arizona	Executive branch agencies	—WTO GPA (except Canada).	
			—U.S.-Chile FTA.
			—U.S.-Singapore FTA.
Arkansas	Executive branch agencies, including universities but excluding the Office of Fish and Game	construction services	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA.

			—U.S.-Morocco FTA.
			—US.-Peru TPA.
			—U.S.-Singapore FTA.
California	Executive branch agencies	—WTO GPA (except Canada).	
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Singapore FTA.
Colorado	Executive branch agencies	—WTO GPA (except Canada).	
			—DR–CAFTA.
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Peru TPA.
			—U.S.-Singapore FTA.
Connecticut	—Department of Administrative Services	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA. —U.S.-Singapore FTA.	
	—Department of Transportation.		
	—Department of Public Works.		
	—Constituent Units of Higher Education.		
Delaware	—Administrative Services (Central Procurement Agency)	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —DR–CAFTA (except Honduras). —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA. —U.S.-Singapore FTA.
	—State Universities.		
	—State Colleges.		
Florida	Executive branch agencies	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA.

			—U.S.-Peru TPA. —U.S.-Singapore FTA.
Georgia	—Department of Administrative Services —Georgia Technology Authority.	beef; compost; mulch	—U.S.-Australia FTA.
Hawaii	Department of Accounting and General Services	software developed in the state; construction	—WTO GPA (except Canada). —DR–CAFTA (except Honduras).
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.
Idaho	Central Procurement Agency (including all colleges and universities subject to central purchasing oversight)	—WTO GPA (except Canada). —DR–CAFTA (except Honduras). —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA. —U.S.-Singapore FTA.	
Illinois	—Department of Central Management Services	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Peru TPA.
			—U.S.-Singapore FTA.
			—U.S.-EC Exchange of Letters (applies to EC Member States for procurement not covered by WTO GPA and only where the state considers out-of-state suppliers).
Iowa	—Department of General Services —Department of Transportation. —Board of Regents' Institutions (universities)	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —U.S.-Chile FTA. —U.S.-Singapore FTA.
Kansas	Executive branch agencies	construction services; automobiles; aircraft	—WTO GPA (except Canada). —U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.
Kentucky	Division of Purchases, Finance and Administration	construction projects	—WTO GPA (except Canada). —DR–CAFTA.

	Cabinet		—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.
Louisiana	Executive branch agencies	—WTO GPA (except Canada).	
			—DR–CAFTA.
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.
Maine	—Department of Administrative and Financial Services —Bureau of General Services (covering state government agencies and school construction)	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Singapore FTA.
	—Department of Transportation		
Maryland	—Office of the Treasury. —Department of the Environment. —Department of General Services —Department of Housing and Community Development —Department of Human Resources —Department of Licensing and Regulation —Department of Natural Resources —Department of Public Safety and Correctional Services —Department of Personnel. —Department of Transportation.	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA. —U.S.-Singapore FTA.
Massachusetts	—Executive Office for Administration and Finance	—WTO GPA (except Canada).	

		—U.S.-Chile FTA.	
	—Executive Office of Communities and Development		—U.S.-Singapore FTA.
	—Executive Office of Consumer Affairs		
	—Executive Office of Economic Affairs		
	—Executive Office of Education		
	—Executive Office of Elder Affairs		
	—Executive Office of Environmental Affairs		
	—Executive Office of Health and Human Service		
	—Executive Office of Labor		
	—Executive Office of Public Safety		
	—Executive Office of Transportation and Construction		
Michigan	Department of Management and Budget	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Singapore FTA.
Minnesota	Executive branch agencies	—WTO GPA (except Canada).	
			—U.S.-Chile FTA.
			—U.S.-Singapore FTA.
Mississippi	Department of Finance and Administration	services	—WTO GPA (except Canada). —DR–CAFTA.
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Peru TPA.
			—U.S.-Singapore FTA.
Missouri	—Office of Administration	—WTO GPA (except Canada).	
	—Division of Purchasing and Materials Management		—U.S.-Chile FTA. —U.S.-Singapore FTA.

Montana	Executive branch agencies	goods	—WTO GPA (except Canada).
			—U.S.-Chile FTA.
			—U.S.-Singapore FTA.
Nebraska	Central Procurement Agency	—WTO GPA (except Canada). —DR–CAFTA.	
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.
New Hampshire	Central Procurement Agency	construction-grade steel (including requirements on subcontracts), motor vehicles; coal	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.
New York	—State agencies		
	—State university system. —Public authorities and public benefit corporations, with the exception of those entities with multi-state mandates	construction-grade steel (including requirements on subcontracts); motor vehicles; coal; transit cars, buses and related equipment	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA. —U.S.-Peru TPA. —U.S.-Singapore FTA.
North Dakota	—U.S.-EC Exchange of Letters (applies to EC Member States and only where the state considers out-of-state suppliers).		
Oklahoma	Department of Central Services and all state agencies and departments subject to the Oklahoma Central Purchasing Act	construction services; construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Peru TPA. —U.S.-Singapore FTA.
Oregon	Department of Administrative Services	—WTO GPA (except Canada). —DR–CAFTA (except Honduras).	
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.

Pennsylvania	Executive branch agencies, including: —Governor's Office. —Department of the Auditor General	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Singapore FTA.
	—Treasury Department.		
	—Department of Agriculture.		
	—Department of Banking.		
	—Pennsylvania Securities Commission.		
	—Department of Health.		
	—Department of Transportation.		
	—Insurance Department.		
	—Department of Aging.		
	—Department of Correction.		
	—Department of Labor and Industry.		
	—Department of Military Affairs.		
	—Office of Attorney General.		
	—Department of General Services.		
	—Department of Education.		
	—Public Utility Commission.		
	—Department of Revenue.		
	—Department of State.		
	—Pennsylvania State Police.		
	—Department of Public Welfare.		
	—Fish Commission.		
	—Game Commission.		
	—Department of Commerce.		
	—Board of Probation and Parole.		

	—Liquor Control Board.		
	—Milk Marketing Board.		
	—Lieutenant Governor's Office.		
	—Department of Community Affairs.		
	—Pennsylvania Historical and Museum Commission.		
	—Pennsylvania Emergency Management Agency.		
	—State Civil Service Commission.		
	—Pennsylvania Public Television Network.		
	—Department of Environmental Resources.		
	—State Tax Equalization Board.		
	—Department of Public Welfare.		
	—State Employees' Retirement System.		
	—Pennsylvania Municipal Retirement Board.		
	—Public School Employees' Retirement System.		
	—Pennsylvania Crime Commission.		
	—Executive Offices.		
Rhode Island	Executive branch agencies	boats, automobiles, buses and related equipment	—WTO GPA (except Canada). —DR–CAFTA (except Honduras).
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.
South Dakota	Central Procuring Agency (including universities and penal institutions)	beef	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.

Tennessee	Executive branch agencies	Services; construction	—WTO GPA (except Canada). —U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Singapore FTA.
Texas	Texas Building and Procurement Commission	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA.	
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Peru TPA.
			—U.S.-Singapore FTA.
Utah	Executive branch agencies	—WTO GPA (except Canada). —DR–CAFTA (except Honduras).	
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Peru TPA.
			—U.S.-Singapore FTA.
Vermont	Executive branch agencies	—WTO GPA (except Canada). —DR–CAFTA.	
			—U.S.-Australia FTA.
			—U.S.-Chile FTA.
			—U.S.-Morocco FTA.
			—U.S.-Singapore FTA.
Washington	Executive branch agencies, including: —General Administration. —Department of Transportation. —State Universities.	fuel; paper products; boats; ships; and vessels	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA. —U.S.-Singapore FTA.
West Virginia	—U.S.-EC Exchange of Letters (applies to EC Member States and only where the state considers out-of-state suppliers).		
Wisconsin	Executive branch agencies, including: —Department of	—WTO GPA (except Canada). —U.S.-Chile FTA.	

	Administration.	—U.S.-Singapore FTA.	
	—State Correctional Institutions.		
	—Department of Development.		
	—Educational Communications Board.		
	—Department of Employment Relations.		
	—State Historical Society.		
	—Department of Health and Social Services.		
	—Insurance Commissioner.		
	—Department of Justice.		
	—Lottery Board.		
	—Department of Natural Resources.		
	—Administration for Public Instruction.		
	—Racing Board.		
	—Department of Revenue.		
	—State Fair Park Board.		
	—Department of Transportation.		
	—State University System.		
Wyoming	—Procurement Services Division —Wyoming Department of Transportation —University of Wyoming	construction-grade steel (including requirements on subcontracts); motor vehicles; coal	—WTO GPA (except Canada). —DR–CAFTA. —U.S.-Australia FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA. —U.S.-Singapore FTA.
Other sub-federal entities	Entities covered	Exclusions	Relevant international agreements
Puerto Rico	—Department of State	construction services	—DR–CAFTA. —U.S.-Peru TPA.
	—Department of Justice.		
	—Department of the Treasury.		
	—Department of Economic Development and Commerce.		

	—Department of Labor and Human Resources.		
	—Department of Natural and Environmental Resources.		
	—Department of Consumer Affairs.		
	—Department of Sports and Recreation.		
Port Authority of New York and New Jersey	restrictions attached to Federal funds for airport projects; maintenance, repair and operating materials and supplies	—WTO GPA (except Canada). —U.S.-Chile FTA. —U.S.-Singapore FTA.	
Port of Baltimore	restrictions attached to Federal funds for airport projects	—WTO GPA (except Canada). —U.S.-Chile FTA. —U.S.-Singapore FTA.	
New York Power Authority	restrictions attached to Federal funds for airport projects; conditions specified for the State of New York	—WTO GPA (except Canada). —U.S.-Chile FTA. —U.S.-Singapore FTA.	
Massachusetts Port Authority	U.S.-EC Exchange of Letters (applies to EC Member States and only where the Port Authority considers out-of-state suppliers).		
Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville, and San Antonio	U.S.-EC Exchange of Letters (only applies to EC Member States and where the city considers out-of-city suppliers).		
Other entities	Entities covered	Exclusions	Relevant international agreements
Rural Utilities Service (waiver of Buy American restriction on financing for all power generation projects)	—WTO GPA. —DR–CAFTA. —NAFTA. —U.S.-Australia FTA. —U.S.-Bahrain FTA. —U.S.-Chile FTA. —U.S.-Morocco FTA. —U.S.-Oman FTA. —U.S.-Peru TPA.		

	—U.S.-Singapore FTA.		
Rural Utilities Service (waiver of Buy American restriction on financing for telecommunications projects)	—NAFTA. —U.S.-Israel FTA.		

General Exceptions: The following restrictions and exceptions are excluded from U.S. obligations under international agreements:

1. The restrictions attached to Federal funds to states for mass transit and highway projects.

2. Dredging.

The World Trade Organization Government Procurement Agreement (WTO GPA) Parties: Aruba, Austria, Canada, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom.

The Free Trade Agreements and the respective Parties to the agreements are:

(1) Dominican Republic-Central America-United States Free Trade Agreement (DR–CAFTA): Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua;

(2) North American Free Trade Agreement (NAFTA): Canada and Mexico;

(3) United States-Australia Free Trade Agreement (U.S.-Australia FTA);

(4) United States-Bahrain Free Trade Agreement (U.S.-Bahrain FTA);

(5) United States-Chile Free Trade Agreement (U.S.-Chile FTA);

(6) United States-Israel Free Trade Agreement (U.S.-Israel FTA);

(7) United States-Morocco Free Trade Agreement (U.S.-Morocco FTA);

(8) United States-Oman Free Trade Agreement (U.S.-Oman FTA);

(9) United States-Peru Trade Promotion Agreement (U.S.-Peru TPA); and

(10) United States-Singapore Free Trade Agreement (U.S.-Singapore FTA).

United States-European Communities Exchange of Letters (May 30, 1995) (U.S.-EC Exchange of Letters) applies to EC Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom.

Subpart C—Wage Rate Requirements Under Section 1606 of the American Recovery and Reinvestment Act of 2009

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§ 176.180 Procedure.

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The award official shall insert the standard award term in this Subpart in all awards funded in whole or in part with Recovery Act funds.

§ 176.190 Award term—Wage Rate Requirements under Section 1606 of the Recovery Act.

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When issuing announcements or requesting applications for Recovery Act programs or activities that may involve construction, alteration, maintenance, or repair the agency shall use the award term described in the following paragraphs:

(a) Section 1606 of the Recovery Act requires that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to the Recovery Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code.

Pursuant to Reorganization Plan No. 14 and the Copeland Act, 40 U.S.C. 3145, the Department of Labor has issued regulations at 29 CFR parts 1, 3, and 5 to implement the Davis-Bacon and related Acts. Regulations in 29 CFR 5.5 instruct agencies concerning application of the standard Davis-Bacon contract clauses set forth in that section. Federal agencies providing grants, cooperative agreements, and loans under the Recovery Act shall ensure that the standard Davis-Bacon contract clauses found in 29 CFR 5.5(a) are incorporated in any resultant covered contracts that are in excess of $2,000 for construction, alteration or repair (including painting and decorating).

(b) For additional guidance on the wage rate requirements of section 1606, contact your awarding agency. Recipients of grants, cooperative agreements and loans should direct their initial inquiries concerning the application of Davis-Bacon requirements to a particular federally assisted project to the Federal agency funding the project. The Secretary of Labor retains final coverage authority under Reorganization Plan Number 14.

Subpart D—Single Audit Information for Recipients of Recovery Act Funds

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§ 176.200 Procedure.

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The award official shall insert the standard award term in this Subpart in all awards funded in whole or in part with Recovery Act funds.

§ 176.210 Award term—Recovery Act Transactions listed in Schedule of Expenditures of Federal Awards and Recipient Responsibilities for Informing Subrecipients.

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The award term described in this section shall be used by agencies to clarify recipient responsibilities regarding tracking and documenting Recovery Act expenditures:

(a) To maximize the transparency and accountability of funds authorized under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) as required by Congress and in accordance with 2 CFR 215.21 "Uniform Administrative Requirements for Grants and Agreements" and OMB Circular A–102 Common Rules provisions, recipients agree to maintain records that identify adequately the source and application of Recovery Act funds. OMB Circular A–102 is available at *http://www.whitehouse.gov/omb/circulars/a102/a102.html.*

(b) For recipients covered by the Single Audit Act Amendments of 1996 and OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations," recipients agree to separately identify the expenditures for Federal awards under the Recovery Act on the Schedule of Expenditures of Federal Awards (SEFA) and the Data Collection Form (SF–SAC) required by OMB Circular A–133. OMB Circular A–133 is available at *http://www.whitehouse.gov/omb/circulars/a133/a133.html.* This shall be accomplished by identifying expenditures for Federal awards made under the Recovery Act separately on the SEFA, and as separate rows under Item 9 of Part III on the SF–SAC by CFDA number, and inclusion of the prefix "ARRA-" in identifying the name of the Federal program on the SEFA and as the first characters in Item 9d of Part III on the SF–SAC.

(c) Recipients agree to separately identify to each subrecipient, and document at the time of subaward and at the time of disbursement of funds, the Federal award number, CFDA number, and amount of Recovery Act funds. When a recipient awards Recovery Act funds for an existing program, the information furnished to subrecipients shall distinguish the subawards of incremental Recovery Act funds from regular subawards under the existing program.

(d) Recipients agree to require their subrecipients to include on their SEFA information to specifically identify Recovery Act funding similar to the requirements for the recipient SEFA described above. This information is needed to allow the recipient to properly monitor subrecipient expenditure of ARRA funds as well as oversight by the Federal awarding agencies, Offices of Inspector General and the Government Accountability Office.

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Subpart 25.6—American Recovery and Reinvestment Act—Buy American Act—Construction Materials

25.600 Scope of subpart.

This subpart implements section 1605 in Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) and the Buy American Act. It applies to construction projects that use funds appropriated or otherwise provided by the Recovery Act.

25.601 Definitions.

As used in this subpart—

"Domestic construction material" means—

(1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States.

"Foreign construction material" means a construction material other than a domestic construction material.

"Manufactured construction material" means any construction material that is not unmanufactured construction material.

"Recovery Act designated country" means a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, or a least developed country.

"Steel" means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

"Unmanufactured construction material" means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

25.602 Policy.

Except as provided in 25.603—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (as defined at 22.401) unless—

(1) The public building or public work is located in the United States; and

(2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.

(i) Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.

(ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

25.603 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the Recovery Act or the Buy American Act:

(1) *Nonavailability.* The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(2) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.605.

(3) *Inconsistent with public interest.* The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(b) *Determinations.* When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and

(2) The head of the agency shall publish a notice in the Federal Register within two weeks after the determination is made, unless the construction material has already been determined in the FAR to be domestically nonavailable (see list at 25.104). The notice shall include—

(i) The title "Buy American Exception under the American Recovery and Reinvestment Act of 2009";

(ii) The dollar value and brief description of the project; and

(iii) A detailed justification as to why the restriction is being waived.

(c) Acquisitions under trade agreements.

(1) For construction contracts with an estimated acquisition value of $7,443,000 or more, also see Subpart 25.4. Offers of products determined to be eligible products per Subpart 25.4 shall receive equal consideration with domestic offers per

Subpart 25.4.

(2) For purposes of the Recovery Act, designated countries do not include the Caribbean Basin Countries.

25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225-22 or 52.225-24, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either 52.225-21 or 52.225-23, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(c) Determination based on unreasonable cost of domestic construction material.

(1) *Iron, steel, and other manufactured construction material*. The contracting officer must compare the offered price of the contract using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.

(2) *Unmanufactured construction material*. The contracting officer must compare the cost of each foreign unmanufactured construction material to the cost of domestic unmanufactured construction material. If the cost of the domestic unmanufactured construction material exceeds the cost of the foreign unmanufactured construction material by more than 6 percent, then the contracting officer shall determine that the cost of the unmanufactured construction material is unreasonable.

25.605 Evaluating offers of foreign construction material.

(a) If the contracting officer has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with section 25.604, then the contracting officer shall apply evaluation factors to the offer incorporating the use of such foreign construction material as follows:

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign iron, steel, or other manufactured goods are incorporated in the offer as construction material based on an exception for unreasonable cost requested by the offeror.

(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost requested by the offeror.

(3) Total evaluated price = offered price + (.25 x offered price, if (a)(1) applies) + (.06 x cost of foreign unmanufactured construction material, if (a)(2) applies).

(b) If two or more offers are equal in price, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(3) of 52.225-21, or paragraph (b)(3) of 52.225-23), the contracting officer must add the excepted materials to the list in the contract clause.

25.606 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225-21 or 52.225-23 and/or other readily available information.

(c) If a determination, under 25.603(a), is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is at least the differential established in 25.605(a).

25.607 Noncompliance.

The contracting officer must—

(a) Review allegations of violations of section 1605 of the Recovery Act or Buy American Act;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act in accordance with 25.606.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspension or debarment official in accordance with Subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

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Program Office. It should be noted that reporting non-appropriated funds may impact certain reports generated using FPDS data regarding appropriated funds. FAR language remains unchanged.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because contract reporting is not accomplished by the vendor community, only by Government contracting entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq*.

List of Subjects in 48 CFR Parts 1, 2, 4, 12, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 1, 2, 4, 12, and 52, which was published in the **Federal Register** at 73 FR 21773, April 22, 2008, as a final rule with the following change:

PART 4—ADMINISTRATIVE MATTERS

■ 1. The authority citation for 48 CFR part 4 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

4.601 [Amended]

■ 2. Amend section 4.601 by removing from the introductory paragraph of the definition ''Indefinite delivery vehicle (IDV)'' the word ''contract'' and adding ''contract or agreement'' in its place.

[FR Doc. E9–556 Filed 1–14–09; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 12, 23, 25, and 52

[FAC 2005–30; FAR Case 2000–305; Item II; Docket 2009-0001; Sequence 1]

RIN 9000–AJ55

Federal Acquisition Regulation; FAR Case 2000–305, Commercially Available Off-the-Shelf (COTS) Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) (the Act) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

DATES: *Effective Date*: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2000–305.

SUPPLEMENTARY INFORMATION:

A. Background

Section 35 of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 431) requires that the Federal Acquisition Regulation (FAR) include a list of provisions of law that are inapplicable to contracts for the acquisition of commercially available off-the-shelf (COTS) items. Certain laws cannot be exempt from the acquisition of COTS and they include laws that—

- Provide for criminal or civil penalties;
- Specifically refer to 41 U.S.C. 431 and the laws state that it applies to COTS;
- Provide for a bid protest procedure or small business preference listed at 41 U.S.C. 431(a)(3); or
- Are applicable because the Administrator of OFPP makes a written determination that it would not be in the best interest of the United States to exempt such COTS contracts from the applicability of the laws.

In order to implement section 4203 of the Clinger-Cohen Act of 1996, DoD, GSA, and NASA published an advanced notice of proposed rule (ANPR) in the **Federal Register** at 68 FR 4874, January 30, 2003. The ANPR listed provisions that may be inapplicable to the acquisition of COTS items, and requested public comment. (A prior ANPR had been issued under FAR Case 96–308.) The Councils published a proposed rule at 69 FR 2448, January 15, 2004. The comment period closed on March 15, 2004. The Councils received comments from 56 respondents, of which 3 were duplicates. The comments were thoroughly examined by the FAR Acquisition Law Team, Civilian Agency Acquisition Council (CAAC), and Defense Acquisition Regulations Council (DARC).

B. Definition of COTS.

The Councils received several comments on the definition of COTS.

1. Include services/IT in the definition. One respondent suggested that the definition of COTS item should delete the words ''of supply'' from the definition. The respondent states that this is not part of the statutory definition. Further, three respondents commented that definition of COTS should specifically include services. Another respondent suggested additional language in the definition of COTS to address software and other information technology products.

Response: The statute defines ''COTS item'' as an item that ''Is a commercial item as described in section 4(12)(A).'' ''Commercial item'' is defined at 41 U.S.C. 403(12). Paragraph (A) of that definition reads as follows:

''Any item, other than real property, that is of a type customarily used by the general public or by non-governmental purposes, and that—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease or license to the general public.''

Paragraphs (F) and (G) of the definition deal with commercial services. These paragraphs were not referenced in the statutory definition of a COTS item. Services are therefore necessarily excluded from the definition. To make the definition clearer, the reference to the definition of commercial item has been revised to point to the first paragraph of the definition of commercial item.

The Councils have clarified that the words ''of supply'' include

''construction material''. Although the definition of ''construction materials'' states that they are ''supplies'', FAR Part 25 distinguishes between Buy American Act—Supplies (FAR Subpart 25.1) and Buy American Act—Construction materials (FAR Subpart 25.2). Therefore, this clarification is beneficial. The OFPP memorandum, dated February 14, 2008, specifically mentions waiver of the component test at 41 U.S.C. 10a (supply) and 10b (construction.)

Since the only laws waived are the component test of the Buy American Act and the recycled material estimate and certification, and no laws relating to FAR Part 27 have been waived, it is unnecessary to specifically mention information technology (IT) or software in the definition of COTS item.

2. ''Without modification''. One respondent considers the phrase ''without modification'' to be too restrictive. Some COTS products may require some type of modification to suit the intended use of the product.

Response: The phrase ''without modification'' is required by statute. However, the Councils have added ''under a contract or subcontract at any tier'' to clarify that whether an item is a COTS item is determined at the point of sale to the next higher tier subcontractor. This is consistent with the DoD definition of ''COTS item'' as applied to the waiver of specialty metals restrictions when acquiring COTS items. If a COTS item is accepted by the next high tier without modification, then any waiver applicable to COTS items is applicable to this item at the time of acceptance, even if it is subsequently modified. Although this distinction is not necessary in this particular rule, because both laws being waived apply only at the level of the prime contract, it is beneficial to keep this definition clear and consistent, in case a law is waived in the future that applies at the subcontract level. This intent to address COTS items at the subcontract level is demonstrated in section 804 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181), which states in paragraph (b) (10 U.S.C. 2533b(h)) that ''This section does not apply to contracts or subcontracts for the acquisition of commercially available off-the-shelf items, as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))…''.

3. ''Sold in substantial quantities.'' One respondent requests that this should be clarified, that it is not necessary that the contractor itself sells substantial quantities. Multiple vendors may sell the item in substantial quantities in the commercial marketplace.

Response: This definition is statutory. There is nothing in the definition that implies that it is the contractor that must sell the item in substantial quantities in the commercial marketplace. The way the definition reads, the substantial quantities test does apply to the item, as suggested by the respondent.

4. Incorporate definition of COTS into FAR 52.202–1, Definitions. One respondent recommended that the definition of COTS item should be incorporated into FAR 52.202–1, Definitions, because the proposed rule added a cross reference in FAR 52.244–6 to the definition of COTS item at FAR 52.202–1.

Response: This comment was correct at the time, but has been overtaken by events. First, the final rule does not make the proposed change to FAR 52.244–6. In addition, the clause at FAR 52.202–1 was rewritten under another case, so that it no longer contains a list of definitions. Rather, it refers to where definitions can be found and provides guidance as to which definitions apply, when a term is defined in more than one place.

5. Subset of commercial items. The proposed rule included in the definition of COTS item the statement that COTS items are a subset of commercial items. Although no public comments were received on this issue, the Councils decided that it is redundant to state that COTS items are a subset of commercial items when the definition itself requires that COTS items meet the definition of the first paragraph of the definition of commercial item. This information that COTS items are a subset of commercial items is now provided at FAR 12.505, rather than in the definition.

C. Implementation of COTS in FAR Part 12.

The draft final rule modifies FAR Subparts 12.1, 12.3, and 12.5 as proposed, to address COTS items, and adds the section 12.505. However, because only 2 laws are being waived, section 12.505 has been modified to include only those 2 laws, while stating that all laws waived for contracts or subcontracts for the acquisition of commercial items are also waived for COTS (because it is a subset). This more clearly identifies the differences that apply to COTS items.

The rule does not make any change to FAR 12.504, based on the recommendation of SBA. An extraneous proposal to delete 15 U.S.C. 644(d), not directly related to this case, has been removed. SBA states that, although FASA attempted to eliminate labor surplus areas for purposes of subcontracting, the drafters of FASA missed the reference to subcontracting in 15(d) of the Small Business Act. Therefore, until this error is corrected, it is better to leave it on the list of laws that are inapplicable to subcontracts for the acquisition of COTS items.

D. Determination by OFPP.

After considering the analysis and recommendations as to laws that should be waived for the acquisition of COTS items, the Administrator for the Office of Federal Procurement Policy, made a determination on February 14, 2008, of the laws applicable and laws inapplicable to the acquisition of COTS items.

1. Laws Waived. The Administrator of OFPP exercised the authority to wholly or partially waive the following laws:

a. Buy American Act. A partial waiver of the Buy American Act (BAA)(41 U.S.C. 10a and 10b), limited to the Act's domestic components test was granted.

b. Estimate of Percentage of Recovered Material Act. The Estimate of Percentage of Recovered Material Act (42 U.S.C. 6962(c)(3)(A)) was waived in its entirety.

2. Waiver still under consideration. A partial waiver of the following law is under consideration and a determination and findings will be made on this law at a later date:

Rights in Technical Data (41 U.S.C. 418a and 10 U.S.C. 2520), specifically waiver of—

- Unlimited Government rights in data for operation, maintenance, installation, or training; and
- The Government's right to make unlimited copies.

3. Laws already inapplicable or modified for the acquisition of commercial items. No further modification was made to any of the following laws, which have already been determined inapplicable or modified for the acquisition of commercial items:

a. Walsh-Healey, 41 U.S.C. 43.

b. Contingent Fees, 41 U.S.C. 254(a) and 10 U.S.C. 2306(b).

c. Minimum response time, 41 U.S.C. 416(a) (3) and (6).

d. Drug Free Workplace, 41 U.S.C. 701.

e. Limitation on the use of appropriated funds, 31 U.S.C. 1354(a).

f. Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701.

g. Anti-Kickback Act of 1986, 41 U.S.C. 57 (a) and (b), and 58.

h. Truth in Negotiations Act, 41 U.S.C. 254(d) and 10 U.S.C. 2306a.

i. Cost Accounting Standards, 41 U.S.C. 422.

4. Law not subject to waiver.

Limitation on appropriated funds to influence certain Federal contracting and financial transactions (31 U.S.C. 1352).

5. Laws that will not be waived because it is not in the best interest of the Government. A determination was made that the following laws will not be waived for the acquisition of COTS because it is not in the best interest of the Government:

a. Trade Agreements Act (19 U.S.C. 2501 and 19 U.S.C. 2512);

b. Restrictions on Advance Payments (31 U.S.C. 3324).

c. Employment Reports for Veterans (38 U.S.C. 4212(d)(l)).

d. Validation of Proprietary Data Restrictions (41 U.S.C. 253d and 10 U.S.C. 2321).

e. Prohibition on Limiting Subcontractor Direct Sales (41 U.S.C. 253g and 10 U.S.C. 2402).

f. Cargo Preference, 10 U.S.C. 2631(a) and 46 U.S.C. 1241(b).

g. Affirmative Action for Workers with Disabilities, 29 U.S.C. 793.

h. Equal opportunity for Special Disabled Veterans, 38 U.S.C. 4212.

i. Examination of records by the Comptroller General, 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c).

j. Fly American Act, 49 U.S.C. 40118 (but see 12.503).

E. Discussion and analysis of laws considered for waiver.

1. Laws Waived.

a. Buy American Act (41 U.S.C. 10a and 10b), component test. Ten respondents specifically endorse waiver of the application of the Buy American Act (BAA) to COTS and 4 respondents endorse the waiver as part of a broad endorsement of the waivers in general, without specific identification or comment. Two respondents oppose the waiver of the BAA as a whole.

Some respondents state that the BAA makes it increasingly difficult for U.S. companies to compete for Federal business. These laws are out of place in the contemporary international market for commercial items. Companies must source products globally in order to be competitive in the worldwide marketplace. Therefore, companies must choose between being competitive in the global market and being competitive in the Government market. The BAA usually does not influence COTS manufacturers because revenue derived from Government sales is typically a very small percentage of overall revenue for COTS.

• Therefore, Federal agencies are often denied access to the most productive, cost-effective technology.

• BAA restrictions may also hamper the Government's ability to fully implement federal policies. It may hinder Government access to technology compliant with Section 508 of the Rehabilitation Act of 1973 (accessible to employees with disabilities) and the most energy-efficient products, as required by E.O. 13101 and 13123.

Some respondents are concerned that the Government-unique requirement to track where components are being manufactured imposes a severe administrative burden, especially on small business. It requires contractors to establish and maintain costly and labor intensive management systems. Tracking the place of manufacture and component value is not necessary for the general origin labeling requirements applicable generally in the U.S. commercial market place. BAA compliance is a major procurement requirement that adds complexity and cost to the delivery of goods to the Government. The increased cost of ensuring compliance with the BAA keeps some firms out of the market completely and affects the price of products sold to the Government.

Another issue for respondents is that application of the regulations relating to the BAA is very complex and difficult. The certification requirements potentially expose manufacturers to civil false claims and other legal sanctions, even when they have taken extraordinary steps to comply with the BAA.

Some respondents contend that Congress mandates the elimination, where possible, of barriers to the Government's ability to procure commercial items.

Federal agencies contend that it is difficult and causes delay to try to obtain case-by-case waivers of the BAA.

On the other hand, two respondents were concerned that a permanent waiver of the BAA should not be granted without reciprocity. These respondents believed that the Government needs these provisions to stay in general effect so that possibility of waiver will provide incentive to encourage other countries to provide reciprocal access. Agencies can waive the BAA on a case-by-case basis or for a class of items when it is in the public interest to do so.

Response: The Councils concur with the respondents on the especially burdensome nature of the component test. Today's markets are globally integrated with foreign components often indistinguishable from domestic components. Manufacturers' component purchasing decisions are based on factors such as cost, quality, availability, and maintaining the state of the art, not the country of origin, making it much more difficult in today's market for a manufacturer to guarantee the source of its components over the term of a contract. It is even more difficult for a dealer to determine and guarantee the source of the components included in products on the shelf. The difficulty in tracking the country of origin of components is a disincentive for firms to become defense contractors, limiting the ability of the Government to purchase products already in the commercial distribution systems. In today's globally integrated market, it is expensive for manufacturers to distinguish between foreign and domestic components. Requiring them to do so results in increased costs of procurements and impedes the ability to obtain the latest advances in commercial technology.

The rationale provided against waiver of the BAA as a whole is resolved by waiving only the component test of the BAA. The component test of the BAA has already been waived for all acquisitions subject to the World Trade Organization Government Procurement Agreement (WTO GPA). By waiving only the component test of the BAA for COTS items, but still requiring manufacture in the United States, the Government can preserve an incentive to encourage other countries to provide reciprocal access, while reducing the significant administrative burden on contractors and the associated increased cost to the Government.

A determination was made that a waiver of the components test would allow a COTS item to be treated as a domestic end product if it is manufactured in the U.S., without tracking the origin of the components. Waiving only the component test of the BAA for COTS items and still requiring the end product to be manufactured in the U.S., reduces significantly the administrative burden on contractors and the associated cost to the Government. The U.S. Trade Representative's Office was consulted and did not oppose the partial waiver of the BAA. The component test of the BAA was waived because it is in the best interest of the U.S. to do so.

The draft final rule modifies FAR Part 25 and associated clauses to implement waiver of the component test of the BAA:

• Indication of the new waiver at FAR 25.101 (Buy American Act—Supplies, General) and FAR 25.201, (Buy American Act—Construction Materials, Policy).

• Changes to the definition of ''domestic end product'' and ''domestic construction material'' at FAR 25.003 and in the associated clauses, to include COTS end products or construction materials manufactured in the United States for which the component test of the Buy American Act has been waived; and

• The following FAR provisions and clauses need only minor modifications, to incorporate the new definitions, make discussions of components applicable only to items other than COTS items, and clarify that now a United States end product that does not qualify as a domestic end product is an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product'':

• 52.225–1 Buy American Act—Supplies.

• 52.225–2 Buy American Act Certificate.

• 52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

• 52.225–4 Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

• 52.225–9 Buy American Act—Construction Materials.

• 52.225–10 Notice of Buy American Act Requirement—Construction Materials.

• 52.225–11 Buy American Act—Construction Materials under Trade Agreements, and Alternate I.

• 52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

Conforming changes are also required for—

• 52.212–3 Offeror Representations and Certifications—Commercial Items;

• 52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items; and

• 52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

b. Certification and Estimate of Percentage of Recovered Material (42 U.S.C. 6962 (c)(3)(A)). There were no specific comments supporting waiver of the Estimate of Percentage of Recovered Materials. However, ten respondents supported waiver as part of broad general support for the proposed rule. One respondent specifically opposed to waiver of 42 U.S.C. 6962(c)(3)(A), Estimate of Percentage of Recovered Material, because the respondent feels that it may preclude contractors from having to indicate on their products the percent of recycled materials contained therein. Information on the recovered material content is necessary in order for agencies to carry out the intent of the Resource Conservation and Recovery Act (RCRA) and Executive order (E.O.) 13101.

Response: Both the Environmental Protection Agency (EPA) and the Office of the Federal Environmental Executive (OFEE) agree that requiring pre-award certification from offerors and a written estimate of percentage of recovered materials from the contractor after contract completion are unnecessary requirements for COTS. These requirements are a paperwork exercise and are not consistent with buying COTS items from the commercial market place. The recycled content statement on the product packaging serves as the certification and the estimate. The Chief Acquisition Officer and Senior Procurement Executive at EPA and the OFEE were not opposed to waiving the requirement for certification and estimation for COTS items. This does not waive any of the other RCRA requirements. The Government will still acquire competitively, in a cost-effective manner, products that meet reasonable performance requirements and that are composed of the highest percentage of recovered materials practicable.

A determination was made that waiver of this law is in the best interest of the Government because the law's requirements are not consistent with the acquisition of COTS items in the commercial marketplace.

The only necessary changes to implement this waiver are—

i. Modification of the clause prescription at FAR 23.406 to exclude application to COTS items (as proposed); and

ii. Modification of FAR 52.212–5(b)(25)(i) and (ii), to indicate that FAR 52.223–9 is not applicable to the acquisition of COTS items.

2. Waiver still under consideration. Rights in Technical Data (41 U.S.C. § 418a and 10 U.S.C. § 2320).

Ten respondents supported waiver as part of broad general support for the proposed rule (Respondents No. 9, 11, 19, 20, 26, 28, 32, 34, 38, and 40). No respondents opposed the waiver. However, the Councils did not reach consensus on this waiver. The Department of the Treasury opposed waiver of this provision. The proposed waiver of the data rights statutes is based on the premise that, because COTS items are developed at private expense, there would be no Government rights in technical data associated therewith. The Councils do not agree entirely with this premise. For example, FAR 52.227–14 provides for unlimited rights in form, fit and function data; and in manuals and training materials necessary for installation, operation, maintenance, and repair; regardless of whether such data is developed at Government expense. The fact that items delivered under a contract are COTS does not diminish the Government's need to operate and repair them, and form, fit, and function data could be critical if a COTS item is integrated into a Government system and must subsequently be replaced.

The Councils agree that the relevant statutes do not focus only on data related to technologies developed exclusively at the Government's expense - they also cover development in whole or in part at private expense, including commercial item technologies (this is especially clear in the DoD statute, 10 U.S.C. 2320). Further, it is not accurate to conclude that the possibility of Government funding for (elements of) COTS technologies is always ''irrelevant.'' The statutory schemes have numerous elements that are designed to protect important rights and proprietary interests of contractors (and subcontractors), especially in cases of privately developed or commercial technologies.

For example, the Government is prohibited from requiring contractors to provide the Government with detailed design data, and from requiring the contractors to relinquish proprietary rights in data related to proprietary or commercial technologies, as a condition of contract award (see 418a(a), and 2320(a)(2)(F)). Additionally, the DoD scheme specifically and expressly addresses the rights in data related to technologies developed in whole or in part at private expense (2320(a)(2)(B) & (C)), and the civilian statutes requires the regulations to address these funding scenarios (418a(c)(1)). Both statutory schemes also recognize the special requirements under the Small Business Innovation Research (SBIR) program, which allow the small business to treat even 100 percent Government-funded technologies as proprietary for certain periods.

Similarly, the schemes identify and protect the interests of the Government in acquiring and using data for certain important purposes, such as operation and maintenance, or emergency repair and overhaul, of the item. These protections of interests, both for the contractors/subcontractors and the Government, are equally applicable to COTS items as for other commercial items or noncommercial items (as the Department of Treasury notes).

All of these considerations demonstrate that the statutory schemes

are designed to balance Government and private interests in all such acquisitions, and thus should not be waived in their entirety for COTS item acquisitions.

3. Laws already inapplicable or modified for the acquisition of commercial items. None of the respondents commented specifically on any of these laws that are already inapplicable or modified for the acquisition of commercial items, as identified in section C.3. of this notice.

4. Law not subject to waiver.

Limitation on appropriated funds to influence certain Federal contracting and financial transactions (31 U.S.C. 1352). After publication of the proposed rule, the Councils determined that this statute is not eligible for waiver because it provides for criminal or civil penalties.

5. Laws that will not be waived because it is not in the best interest of the Government.

a. Trade Agreements Act (TAA)(19 U.S.C. 2501 and 19 U.S.C. 2512). Many of the respondents (21) endorse waiver of the application of the trade agreements prohibitions to COTS.

On the other hand, 4 respondents (including the United States Trade Representative (USTR) and the Department of Commerce) opposed the waiver.

The proponents of waiver of the purchase restrictions of the Trade Agreements Act (TAA) contend that—

i. The TAA makes it increasingly difficult for U.S. companies to compete for Federal business. These laws are out of place in the contemporary international market for commercial items. Companies must source products globally in order to be competitive in the worldwide marketplace. Therefore, companies must choose between being competitive in the global market and being competitive in the Government market. The trade agreements procurement restriction usually does not influence COTS manufacturers because revenue derived from Government sales is typically a very small percentage of overall revenue for COTS.

• Therefore, Federal agencies are often denied access to the most productive, cost-effective technology.

• TAA restrictions may also hamper the Government's ability to fully implement Federal policies. It may hinder Government access to technology compliant with Section 508 of the Rehabilitation Act of 1973 (accessible to employees with disabilities) and the most energy-efficient products, as required by E.O. 13101 and 13123.

• Although most IT and electronics manufacturing now occurs in Asia, only 4 Asian countries have signed the GPA – Hong Kong, Japan, Singapore, and the Republic of Korea. Asian countries not signatories include China, Indonesia, Malaysia, the Philippines, and Taiwan.

ii. The Government-unique requirement to track where products are being manufactured imposes a severe administrative burden. It requires contractors to establish and maintain costly and labor intensive management systems. TAA compliance is a major procurement requirement that adds complexity and cost to the delivery of goods to the Government. The increased cost of ensuring compliance with the TAA keeps some firms out of the market completely.

iii. Application of the regulations relating to trade agreements is very complex and difficult. It is often difficult to determine ''substantial transformation'' for purposes of the TAA. The certification requirements potentially expose manufacturers to civil False Claims and other legal sanctions, even when they have taken extraordinary steps to comply with the TAA.

iv. Congress mandates the elimination, where possible, of barriers to the Government's ability to procure commercial items.

v. Barring access to the U.S. Government market has not provided the leverage to open foreign government markets that U.S. trade negotiators may have envisioned when the TAA was passed. Several commenters state that of the 145 WTO member countries, only 28 countries have signed the GPA in 25 years, 23 of the signatories being original signatories.

vi. The restrictions of the TAA are not required by any treaty of international agreement, including the GPA. The commenters believe that the U.S. is the only GPA signatory to enact such market restrictions.

vii. It is difficult and causes delay to try to obtain case-by-case waivers of the trade agreements.

The opponents of waiver of the purchase restrictions of the TAA contend that—

i. A permanent waiver would significantly disadvantage U.S. suppliers, especially small businesses, without providing reciprocal market access for them. China, Malaysia, and the Philippines have not joined the GPA or provided benefits in a bilateral agreement.

ii. USTR's ability to waive the TAA purchasing restriction on a case-by-case basis has been a key element in its ability to negotiate reciprocal market access for U.S. suppliers in the government procurement markets of foreign countries, through bilateral FTAs, as well as accession to the GPA. In recent years, USTR has concluded new FTAs with Chile, Australia, Morocco, and more agreements are pending. A permanent waiver for COTS would severely undermine leverage that is critical to USTR's ability to negotiate such agreements.

iii. There is no need for a permanent waiver, because waivers can be granted on a case-by-case basis when in the national interest.

Response: The TAA essentially outlines a process for approval of trade agreements, and the relationship of trade agreements to U.S. law. A determination was made that a waiver of the prohibition on acquisitions of products from countries that have not entered into trade agreements with the United States would put U.S. suppliers, especially small businesses, at a significant disadvantage without providing reciprocal market access for them. China, Malaysia, and the Philippines have not joined the GPA or provided benefits in a bilateral agreement. USTR's ability to waive the TAA purchasing restriction on a case-by-case basis has been a key element in its ability to negotiate reciprocal market access for U.S. suppliers in the government procurement markets of foreign countries, through bilateral Free Trade Agreements (FTA), as well as consent to the GPA. In recent years, USTR has concluded new FTAs with Chile, Australia, Morocco, Bahrain, Dominican Republic-Central America, and more agreements are pending. Therefore, a permanent waiver is not in the best interests of the Government because it would severely undermine leverage that is critical to USTR's ability to negotiate such agreements. USTR can grant waivers on a case-by-case basis when in the national interest.

b. Restrictions on Advance Payments (31 U.S.C. 3324). The Councils received 10 comments that supported waiver as part of broad general support for the proposed rule and two comments specifically supporting the waiver of the restriction on advance payments, whereas one respondent specifically opposed the waiver of the restriction on advance payments.

One respondent supported waiving the restriction on the basis that it would permit the Government to follow the common business practice of ''payment due upon receipt.'' Another respondent supported waiving the restriction because it also believes that it is common business practice to make payment for IT support packages at the beginning of the term. The respondent that opposed the waiver of the statute

was concerned that contracting officers will be faced with demands for advance payments for routine COTS purchases.

Response: In addition to permitting invoicing upon delivery to the ''point of first receipt by the Government,'' the proposed rule would also have allowed invoicing upon delivery of supplies to a post office or common carrier. Consequently, the Government might be obligated to make payment before receipt.

This statute prohibits, except in certain circumstances, payment in excess of the value of supplies or services already delivered or provided. 31 U.S.C. 3324(b) provides that an advance of public money may be made only if it is authorized by a specific appropriation or other law or as authorized by the President in some circumstances. 41 U.S.C. 255(f) and 10 U.S.C. 2307(f) provide some authority for advance payments for commercial items, but treat this as Government financing and require the Government to obtain adequate security. It was determined that a permanent waiver is not necessary because 41 U.S.C. § 255(f) (as implemented by FAR 32.2, Commercial Item Purchase Financing, specifically FAR 32.202–4(a)(2)) already authorizes advance payments for commercial item acquisitions, and agencies have the authority to waive, if it is in the best of the Government.

c. Employment Reports for Veterans (38 U.S.C. 4212(d)(l)). The Councils received one comment specifically in favor of waiving the statute and 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils also received 2 responses specifically opposed to the waiver.

The respondents who favored waiver contended that waiving the statute only affects the submission of a report and data gathering. By waiving the statute, an administrative function would be eliminated but the intent to continue with the regulations to promote veteran employment would remain unchanged.

Respondents who objected to waiver of the statute feared that veteran programs would be impacted.

Response: This statute requires that each contractor that enters into a contract in excess of $100,000 for personal property and non-personal services, including construction, provide an annual report to the Secretary of Labor that includes specific information about their contractor workforce. The report requires Federal contractors and subcontractors to ''take affirmative action'' to hire and promote qualified special disabled veterans, veterans of the Vietnam-era and any veteran who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. Congress has taken a keen interest in the VETS 100 Report, as evidenced by Section 1354 of Public Law 105–339, Veterans Employment Opportunities Act of 1998, which supports this reporting requirement. A determination was made not to waive the requirement for contractors to file employment reports because it is not in the best interest of the Government to do so.

d. Validation of Proprietary Data Restrictions (41 U.S.C. 253d and 10 U.S.C. 2321). 10 respondents supported waiver as part of broad general support for the proposed rule. No respondents opposed the waiver.

Response: This statute provides an extensive procedure for due process for a Government contractor when the Government has a suspicion that technical data the contractor is claiming to be proprietary was, in fact, produced under a Government contract and was not produced at private expense. The validation scheme is also carefully structured to balance the interest of all parties, and create a uniform mechanism to determine the appropriate allocation of rights in the data. These statutes establish procedures, rights, and legal remedies regarding the validation of the asserted proprietary restrictions. A determination was made that these statutes should be available to balance the interest of all parties involved in an acquisition, including COTS.

e. Prohibition on Limiting Subcontractor Direct Sales (41 U.S.C. 253g and 10 U.S.C. 2402). Nine respondents supported waiver as part of broad general support for the proposed rule. One respondent opposed the waiver.This respondent stated that this exemption has some potential for harming small business and the Federal Government itself.

Response: This statute was enacted as part of Pub. L. 98–577, which was intended by Congress as a comprehensive solution to ''$600 toilet seats and $400 hammers.'' This provision answered the practice of major defense contractors prohibiting their subcontractors from selling directly to the Government. In the past, when the prime contractor wanted to be the source to the Government, they would charge at least a material overhead to any cost or price from the subcontractor/supplier. Waiving this Act would allow prime contractors to restrict their subcontractors from selling directly to the Government and limit opportunities for small businesses, including women-owned and minority-owned businesses. A determination was made not to waive this Act so as to ensure competition is preserved for all sectors of the economy.

f. Cargo Preference, 10 U.S.C. 2631(a) and 46 U.S.C. 1241(b). The Councils did not receive any comments specifically supporting waiver of the cargo preference laws for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule. 14 respondents specifically opposed a waiver of Cargo Preference laws for COTS, including the following Government agencies:

• U.S. Maritime Administration (MARAD)(Department of Transportation)

• MARAD, Division of Maritime Programs

• Under Secretary of Defense (Acquisition, Technology, and Logistics)

• United States Transportation Command (Department of Defense)

Opponents of the waiver of Cargo Preference laws when acquiring COTS items present the following rationale:

i. The Cargo Preference laws are vital to maintaining a viable merchant marine, including both vessels and mariners.

ii. The proposed waiver is contrary to the Government's maritime policy. The Secretary of Transportation stated in March 2004 that ''cargo preference laws are essential elements of America's national maritime policy.''

iii. Many respondents state that the COTS category represents the vast preponderance of cargo that is carried for or sponsored by the U.S. Government. The MARAD Administrator states that waiver could result in the potential loss of nearly $1.2 billion in revenue to U.S. flag vessel operators and further loss to the economy through job loss. The American Maritime Congress believes that finalization of this waiver will eventually result in more than 100 U.S.-flag vessels in the international trades leaving the U.S. flag, and points out further adverse impact on foreign exchange, and reduced Federal tax revenues.

iv. Weakening of the U.S. maritime industry will adversely impact our country's ability to respond to international crises. We need U.S.-flag vessels to transport troops, machinery, and medical and other critical supplies throughout the world during contingencies or war.

v. The waiver will put at risk two DoD programs (the Voluntary Intermodal Sealift Agreement and the Maritime Security Program) that are essential to U.S. security interests. Through these

programs, DoD has immediate access to reliable commercial maritime assets at a fraction of the cost it would incur if it had to replicate those assets (Transportation Institute). Shippers cannot dedicate valuable assets to the defense and other governmental needs of the United States unless they can rely on a steady flow of cargoes.

vi. DoD needs a viable merchant marine to provide a pool of trained mariners from which DoD crews Defense reserve ships.

vii. U.S.-flag commercial vessels are forced to operate in an international shipping arena that is dominated by state owned and controlled merchant fleets. They are financially disadvantaged due to higher labor costs, vessel standards, and tax disadvantages. Therefore, the U.S.-flag vessels require the help of the U.S. Government to compete.

viii. Waiving the Cargo Preference laws at this time would be inequitable, because shipping companies have relied upon the present laws to take irrevocable business actions.

ix. The American Shipbuilding Association is further concerned that this waiver would adversely impact the defense shipbuilding industry, which in turn, will threaten America's ability to build a Navy and impact the national security of the United States.

x. The FAR Council already made the determination that waiver of Cargo Preference laws for all commercial subcontracts was not in the best interest of the Government. 41 U.S.C. 430 requires that provisions of law described in 41 U.S.C. 430(c) shall be included on the list of inapplicable provisions of law to subcontracts for the procurement of commercial items unless the FAR Council makes a written determination that such exemption would not be in the best interest of the Government. On May 1, 1996, the Administrator of OFPP signed a memorandum stating the policy that the waiver of Cargo preference for commercial subcontracts ''is not intended to waive compliance with the Cargo Preference Laws for ocean cargos clearly destined for eventual military or Government use.'' This memorandum was the result of extensive negotiations between representatives from the national Economic Council, OFPP, DoD, MARAD, and the maritime industry. In 2002, a formal determination was signed by all members of the FAR Council that it would be in the best interest of the Government to limit the waiver of the Cargo preference laws, in accordance with the OFPP memorandum, dated May 1, 1996, as implemented in the FAR through FAR Case 1999–024.

Response: 10 U.S.C. 2631(a), Transportation of Supplies by Sea (The Cargo Preference Act of 1904), requires the use of only U.S.-flag vessels for ocean transportation of supplies owned by, or destined for use by for the Army, Navy, Air Force, or Marine Corps unless those vessels are not available at fair and reasonable rates. 46 U.S.C. 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (The Cargo Preference Act of 1954), requires that Government agencies acquiring, either within or outside the United States, supplies that may require ocean transportation shall ensure that at least 50 percent of the gross tonnage of these supplies (computed separately for dry bulk carriers, dry cargo liners, and tankers) is transported on privately owned U.S.-flag commercial vessels to the extent that such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels. The Cargo Preference laws are vital to maintaining a viable merchant marine, including both vessels and mariners and are essential elements of America's national maritime policy. Therefore, a determination was made that it is not in the best interest of the Government to waive this Act.

g. Affirmative Action for Workers with Disabilities, 29 U.S.C. 793. The Councils did not receive any specific comments in favor of waiving the statute. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 2 responses specifically opposed to waiver, *i.e.*—

•Department of Veterans Affairs

• U.S. Department of Labor

ANALYSIS: The Department of Veterans Affairs (VA) objected to waiver on the grounds that, in meeting its mission to support veterans, including those who with service related disabilities, the VA purchases mostly COTS items and would consider it unfair for the VA to purchase supplies from companies that would not be required to comply with the statute.

The Department of Labor stated that ''The relatively minor burdens imposed on contractors by Section 503 of the Rehabilitation Act of 1973, (29 U.S.C. § 793) are justified by the significant benefits the law provides for disabled job applicants and workers. The Census Bureau estimates that approximately 18.6 million American workers have disabilities. Section 503 requires, for example, that contractors recruit qualified applicants with disabilities for job openings, develop anti-disability harassment policies, and refrain from discriminating against qualified individuals with disabilities. Reducing protections for qualified job applicants and workers with disabilities would not be consistent with the President's *New Freedom Initiative*, designed to ensure that Americans with disabilities have the opportunity to learn and develop skills and to engage in productive work.''

Response: A determination was made that the requirements of the affirmative action provision are justified by the significant benefits the law provides for disabled job applicants and workers. Reducing protections for qualified job applicants and workers with disabilities would not be consistent with the President's New Freedom Initiative.

h. Equal opportunity for Special Disabled Veterans, 38 U.S.C. 4212. The Councils did not receive any specific comments in favor of waiving the statute. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 3 responses specifically opposed to waiver, including—

• Department of Veterans Affairs

• U.S. Department of Labor

The Department of Veterans Affairs raised objections to waiver on the grounds that, in meeting its mission to support veterans, including those with service related disabilities, the VA purchases mostly COTS items and would consider it unfair for the VA to purchase supplies from companies that would not be required to comply with the statute.

The Department of Labor objects to waiving the statute on the basis that the relatively minor burdens imposed by the affirmative action provision are justified by the significant direct benefits for individual protected veterans. Waiving the law would reduce possible job opportunities for veterans.

Another respondent stated that ''At a time when our nation is at war and our veterans are returning home…every effort should be made to ensure their employment rather than limit their opportunities''.

Response : It was determined that the affirmative action provision is justified by the significant direct benefits for individual protected veterans, and we must make every effort to ensure their employment.

i. Examination of records by the Comptroller General, 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c). The Councils did not receive any comments specifically supporting waiver of the examination of records by the Comptroller General for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule.

The Councils received comments from 2 respondents opposed the waiver.

One respondent objected to waiver of the examination of records by the Comptroller General because this is the last remaining general contractual audit authority applicable to commercial items. If this authority is removed, the Government will have no routine audit authority. The respondent cites legislative history that Congress did not intend to eliminate this authority.

Another respondent also strongly objects to waiver of this authority, stating that removal would improperly restrict the authority of the Comptroller General's ability to review and examine contractor records related to the expenditure of public funds.

Response: This is the only general contractual audit authority applicable to commercial items. Thus it was determined that although access to contractor records will not generally be necessary because of the protection provided by competitive procedures of the marketplace, the Comptroller General should have the ability to examine records if the need arises.

j. Fly American Act, 49 U.S.C. 40118. The Councils did not receive any comments specifically supporting waiver of the cargo preference laws for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 2 responses specifically opposed to the waiver of the Fly American Act for acquisition of COTS, *i.e.*—

• United States Transportation Command

• Under Secretary of Defense (Acquisition, Technology, and Logistics)

Opponents of the waiver of the Fly American Act when acquiring COTS items present the following rationale:

i. The Fly American Act is vital to maintaining a viable U.S. air carrier industry, which is heavily relied on by DoD during contingencies or war.

ii. Weakening of the U.S. air industry will adversely impact our country's ability to move forces and equipment during contingencies or war.

Response: The Fly American Act is not applicable to subcontracts for the acquisition of commercial items. The requirement for use of a clause is not applicable to prime contracts for the acquisition of commercial items, but the requirements of the Act still apply. A determination was made that the Fly American Act is vital for maintaining a viable U.S. air carrier industry, which is heavily relied upon by DoD during contingencies or war.

F. Other public comments.

1. Recommend an Alternate I to proposed clause 52.212–XX, for paperless writing systems. DoD uses a process called Automatic Clause Selection, rather than having the contracting officer check off applicable clauses from the list.

Response: The final rule will not include the new clause 52.212–XX, but will continue to use FAR clause 52.212–5. Furthermore, DoD already has a deviation in place for this clause that meets the needs of a paperless system.

2. Limit the imposition of non-commercial terms and conditions. Multiple respondents were concerned about the proliferation of Government-unique clauses in contracts for the acquisition of COTS items, and want limitations imposed on the authority of the contracting officer to include clauses that are not commonly used with COTS items being procured in the marketplace.

Response: This suggestion is outside the scope of the case.

3. DFARS 212.504 still applies for DoD procurements. This respondent wants to ensure that for DoD COTS procurement, 10 U.S.C. 2320 and 2321 (dealing with technical data rights), which are listed at DFARS 212.504, are still waived.

Response: This is outside the scope of this case.

4. Use of ''et seq.''. Several respondents were concerned that in some cases the statutory references followed by ''*et seq.*'' were too broad.

Response: This issue has been resolved in the final rule. The term ''*et seq.*'' is not used in the statutory references for laws to be waived in the final rule.

5. Significant rule. Several respondents were concerned that the proposed rule would satisfy the economic impact threshold for a major rule and clearly meets the threshold requirements to be classified as a significant rule.

Response: The statutes that were of particular concern to these respondents (Cargo Preference) have not been waived. Therefore, the comments are no longer relevant.

6. Comments no longer applicable. There are several comments not specifically addressed in this **Federal Register** notice, because they are no longer applicable, due to other changes in the final rule.

7. E-verify. The councils note that the FAR 2.101 definition of ''Commercially available off the shelf (COTS) item'' differs from the COTS definition in 22.1801. Pursuant to the FAR treatment of definitions, the COTS definition is 22.1801 is solely applicable to issues arising under Subpart 22.18 and associated clause (FAR case 2007–013).

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

G. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule relieves burdens rather than imposes burdens. Only 2 laws have been waived, and the relief to small business is not considered to be of significant economic impact.

H. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies because the final rule will result in reduced burdens under OMB Control number 9000–0024 (52.225–2), 9000–0130 (52.225–4), 9000–0134 (52.223–9), and 9000–0141 (52.225–9 and 52.225–11). The Councils anticipate the following reductions:

OMB Control No.	Current respondents	Current responses	Current hours	Revised respondents	Revised responses	Revised hours
9000–0024	3,707 x 15 =	55,605 x 0.109 =	6,061	3,521 x 15	52,815 x .109	5,757 hrs
9000–0130	1,140 x 5 =	5,700 x .117 =	667	1083 x 5 =	5415 x .117 =	634 hrs
9000–0134	64,350 x 1 =	64,350 x .325 =	20,913	64 x 1	64 x .325	21 hrs
9000–0141	500 x 2 =	1,000 x 2.5 =	2,500	450 x 2 =	900 x 2.5 =	2,250 hrs

A Paperwork Burden Act Change to pertinent existing burdens has been submitted to the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 2, 3, 12, 23, 25, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 3, 12, 23, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 3, 12, 23, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Commercially available off-the-shelf (COTS) item (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition in this section);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 3. Revise section 3.503–2 to read as follows:

3.503–2 Contract clause.

The contracting officer shall insert the clause at 52.203–6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold, except when contracts are for the acquisition of commercially available off-the-shelf items. For the acquisition of commercial items, the contracting officer shall use the clause with its Alternate I.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Add section 12.103 to read as follows:

12.103 Commercially available off-the-shelf (COTS) items.

COTS items are defined in 2.101. Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS. Section 12.505 lists the laws that are not applicable to COTS (in addition to 12.503 and 12.504); the components test of the Buy American Act, and the two recovered materials certifications in Subpart 23.4, do not apply to COTS.

12.301 [Amended]

■ 5. Amend section 12.301 in the first sentence of paragraph (b)(4) by removing ''executive orders'' and adding ''Executive orders'' in its place;

■ 6. Revise the heading of Subpart 12.5 to read as follows.

Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items

■ 7. Revise section 12.500 to read as follows:

12.500 Scope of subpart.

(a) As required by sections 34 and 35 of the Office of Federal Procurement Policy Act (41 U.S.C. 430 and 431), this subpart lists provisions of law that are not applicable to—

(1) Contracts for the acquisition of commercial items;

(2) Subcontracts, at any tier, for the acquisition of commercial items; and

(3) Contracts and subcontracts, at any tier, for the acquisition of COTS items.

(b) This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

■ 8. Amend section 12.502 by adding paragraph (c) to read as follows:

12.502 Procedures.

* * * * *

(c) The FAR prescription for the provision or clause for each of the laws listed in 12.505 has been revised in the appropriate part to reflect its proper application to contracts and subcontracts for the acquisition of COTS items.

■ 9. Add section 12.505 to read as follows:

12.505 Applicability of certain laws to contracts for the acquisition of COTS items.

COTS items are a subset of commercial items. Therefore, any laws listed in sections 12.503 and 12.504 are also inapplicable or modified in their applicability to contracts or subcontracts for the acquisition of COTS items. In addition, the following laws are not applicable to contracts for the acquisition of COTS items:

(a)(1) 41 U.S.C. 10a, portion of first sentence that reads ''substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States,'' Buy American Act—Supplies, component test (see 52.225–1 and 52.225–3).

(2) 41 U.S.C. 10b, portion of first sentence that reads ''substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States,'' Buy American Act—Construction Materials, component test (see 52.225–9 and 52.225–11).

(b) 42 U.S.C. 6962(c)(3)(A), Certification and Estimate of Percentage of Recovered Material.

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 10. Amend section 23.406 by revising the introductory text of paragraph (c); and removing from paragraph (d) ''Insert'' and adding ''Except for the acquisition of commercially available off-the-shelf items, insert'', in its place. The revised text reads as follows:

23.406 Solicitation provisions and contract clauses.

* * * * *

(c) Except for the acquisition of commercially available off-the-shelf items, insert the provision at 52.223–4, Recovered Material Certification, in solicitations that—

* * * * *

PART 25—FOREIGN ACQUISITION

■ 11. Amend section 25.003 by revising the definitions ''Domestic construction material'' and ''Domestic end product'' to read as follows:

25.003 Definitions.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

Domestic end product means—

(1) An unmanufactured end product mined or produced in the United States;

(2) An end product manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(ii) The end product is a COTS item.

* * * * *

■ 12. Revise section 25.100 to read as follows:

25.100 Scope of subpart.

(a) This subpart implements—

(1) The Buy American Act (41 U.S.C. 10a - 10d);

(2) Executive Order 10582, December 17, 1954; and

(3) Waiver of the component test of the Buy American Act for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C 431.

(b) It applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if—

(1) The supply contract exceeds the micro-purchase threshold; or

(2) The supply portion of a contract for services that involves the furnishing of supplies (*e.g.*, lease) exceeds the micro-purchase threshold.

■ 13. Amend section 25.101 by revising paragraph (a)(2) to read as follows:

25.101 General.

(a) * * *

(2) The cost of domestic components must exceed 50 percent of the cost of all the components. In accordance with 41 U.S.C. 431, this component test of the Buy American Act has been waived for acquisitions of COTS items (see 12.505(a)).

* * * * *

■ 14. Revise section 25.200 to read as follows:

25.200 Scope of subpart.

(a) This subpart implements—

(1) The Buy American Act (41 U.S.C. 10a - 10d);

(2) Executive Order 10582, December 17, 1954; and

(3) Waiver of the component test of the Buy American Act for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 431.

(b) It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 15. Amend section 52.212–3 by—

■ a. Revising the date of clause;

■ b. Revising paragraph (f)(1); and

■ c. Revising paragraph (g)(1)(i) and the last sentence of paragraph (g)(1)(iii).

The revised text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(f) * * *

(1) The offeror certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.'' The terms ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Supplies.''

* * * * *

(g)(1) * * *

(i) The offeror certifies that each end product, except those listed in paragraph (g)(1)(ii) or (g)(1)(iii) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The terms ''Bahrainian or Moroccan end product,'' ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' ''Free Trade Agreement country,'' ''Free Trade Agreement country end product,'' ''Israeli end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act-Free Trade Agreements-Israeli Trade Act.''

* * * * *

(iii) * * * The offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.''

* * * * *

(End of provision)

■ 16. Amend section 52.212–5 by revising the date of the clause and paragraph (b)(27); by removing from paragraph (b)(30) ''(June 2003)'' and adding ''(FEB 2009)'' in its place; and by removing from paragraph (b)(31)(i) ''(Aug 2007)'' and adding ''(FEB 2009)'' in its place. The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

____ (b)(27)(i) 52.223–9, Estimate of Percentage of Recovered Material Content for EPA-Designated Items (May 2008) (42 U.S.C. 6962(c)(3)(A)(ii)). (Not applicable to the acquisition of commercially available off-the-shelf items.)

____ (ii) Alternate I (May 2008) of 52.223–9 (42 U.S.C. 6962(i)(2)(C)). (Not applicable to the acquisition of commercially available off-the-shelf items.)

* * * * *

(End of clause)

52.213–4 [Amended]

■ 17. Amend section 52.213–4 by removing from the clause heading ''(Dec 2008)'' and adding ''(FEB 2009)'' in its place; and by removing from paragraph (b)(1)(ix) ''(June 2003)'' and adding ''(FEB 2009)'' in its place.

■ 18. Amend section 52.225–1 by revising the date of the clause; by adding in paragraph (a), in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic end product''; and by revising paragraph (b) to read as follows:

52.225–1 Buy American Act—Supplies.

* * * * *

BUY AMERICAN ACT—SUPPLIES (FEB 2009)

(a) *Definitions.* * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic end product means—

(1) An unmanufactured end product mined or produced in the United States;

(2) An end product manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(ii) The end product is a COTS item.

* * * * *

(b) The Buy American Act (41 U.S.C. 10a - 10d) provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)).

* * * * *

(End of clause)

■ 19. Amend section 52.225–2 by revising the date of the provision and paragraph (a) to read as follows:

52.225–2 Buy American Act Certificate.

* * * * *

BUY AMERICAN ACT CERTIFICATE (FEB 2009)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products, *i.e.,* an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.'' The terms ''commercially available off-the-shelf (COTS) item, '' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Supplies.''

* * * * *

(End of provision)

■ 20. Amend section 52.225–3 by revising the date of the clause; in paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic end product''; and by revising paragraph (c) to read as follows:

52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

* * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT (FEB 2009)

(a) *Definitions.* * * *

* * * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic end product means—

(1) An unmanufactured end product mined or produced in the United States;

(2) An end product manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(ii) The end product is a COTS item.

* * * * *

(c) *Delivery of end products.* The Buy American Act (41 U.S.C. 10a - 10d) provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)). In addition, the Contracting Officer has determined that FTAs (except the Bahrain and Morocco FTAs) and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled ''Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.'' If the Contractor specified in its offer that the Contractor would supply a Free Trade Agreement country end product (other than a Bahrainian or Moroccan end product) or an Israeli end product, then the Contractor shall supply a Free Trade Agreement country end product (other than a Bahrainian or Moroccan end product), an Israeli end product or, at the Contractor's option, a domestic end product.

* * * * *

(End of clause)

■ 21. Amend section 52.225–4 by revising the date of the provision and paragraphs (a) and (c) to read as follows:

52.225–4 Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

* * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT CERTIFICATE (FEB 2009)

(a) The offeror certifies that each end product, except those listed in paragraph (b) or (c) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The terms ''Bahrainian or Moroccan end product,'' ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' ''Free Trade Agreement country,'' ''Free Trade Agreement country end product,'' ''Israeli end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Free Trade Agreements—Israeli Trade Act.''

* * * * *

(c) The offeror shall list those supplies that are foreign end products (other than those listed in paragraph (b) of this provision) as defined in the clause of this solicitation entitled ''Buy American Act—Free Trade Agreements—Israeli Trade Act.'' The offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products, *i.e.,* an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.''

Other Foreign End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

_____ _____

_____ _____

_____

[List as necessary]

* * * * *

(End of provision)

■ 22. Amend section 52.225–9 by revising the date of the clause; in paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic construction material''; and by revising paragraph (b)(1) to read as follows:

52.225–9 Buy American Act—Construction Materials.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS (FEB 2009)

(a) *Definitions.* * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Domestic preference.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

* * * * *

(End of clause)

■ 23. Amend section 52.225–10 by revising the date of the provision and paragraph (a) to read as follows:

52.225–10 Notice of Buy American Act Requirement—Construction Materials.

* * * * *

NOTICE OF BUY AMERICAN ACT REQUIREMENT—CONSTRUCTION MATERIALS (FEB 2009)

(a) *Definitions.* ''Commercially available off-the-shelf (COTS) item,'' ''construction material,'' ''domestic construction material,'' and ''foreign construction material,'' as used in this provision, are defined in the clause of this solicitation entitled ''Buy American Act—Construction Materials'' (Federal Acquisition Regulation (FAR) clause 52.225–9).

* * * * *

(End of provision)

■ 24. Amend section 52.225–11 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic construction material'';

■ c. Revising paragraph (b)(1); and

■ d. Revising the date of Alternate I and in paragraph (b)(1) adding a new second sentence to read as follows:

52.225–11 Buy American Act—Construction Materials Under Trade Agreements.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2009)

(a) *Definitions.* * * *

* * * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States;

(2) A construction material manufactured in the United States, if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American Act restrictions are waived for designated county construction materials.

* * * * *

Alternate I (FEB 2009). * * *

* * * * *

(b) *Construction materials.* (1) * * * In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). * * *

* * * * *

■ 25. Amend section 52.225–12 by revising the date of the provision and revising paragraph (a) to read as follows:

52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

* * * * *

NOTICE OF BUY AMERICAN ACT REQUIREMENT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2009)

(a) *Definitions.* ''Commercially available off-the-shelf (COTS) item,'' ''construction material,'' ''designated country construction material,'' ''domestic construction material,'' and ''foreign construction material,'' as used in this provision, are defined in the clause of this solicitation entitled ''Buy American Act—Construction Materials Under Trade Agreements'' (Federal Acquisition Regulation (FAR) clause 52.225–11).

* * * * *

(End of provision)

[FR Doc. E9–551 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 17, 22, and 52

[FAC 2005–30; FAR Case 2001–004; Item III; Docket 2007–0001, Sequence 6]

RIN 9000–AK82

Federal Acquisition Regulation; FAR Case 2001–004, Exemption of Certain Service Contracts from the Service Contract Act (SCA)

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with changes, the interim rule which amended the Federal Acquisition Regulation (FAR) to revise the current SCA exemption and to add an SCA exemption for contracts for certain

Notice of Revised Nationwide Waiver of Section 1605 (Buy American Requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) Based on Public Interest for de minimis Incidental Components of Projects Financed Through the Clean or Drinking Water State Revolving Funds Using Assistance Provided Under ARRA

PDF Version (2 pp, 63K, About PDF)

[Federal Register: August 10, 2009 (Volume 74, Number 152)]
[Notices]
[Page 39959-39960]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr10au09-35]

ENVIRONMENTAL PROTECTION AGENCY
[FRL-8939-1]

Notice of Revised Nationwide Waiver of Section 1605 (Buy American Requirement) of American Recovery and Reinvestment Act of 2009 (ARRA) Based on Public Interest for de minimis Incidental Components of Projects Financed Through the Clean or Drinking Water State Revolving Funds Using Assistance Provided Under ARRA

AGENCY: Environmental Protection Agency (EPA).
ACTION: Notice.

SUMMARY: The EPA is hereby granting a nationwide waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(1) (public interest waiver) for de minimis incidental components of eligible water infrastructure projects funded by ARRA This action revises the terms under which incidental components qualify for coverage under the public interest de minimis waiver signed and effective on May 22, 2009, and permits the use of non-domestic iron, steel, and manufactured goods when they occur in de minimis incidental

components of such projects funded by ARRA that may otherwise be prohibited under section 1605(a).

DATES: Effective Date: July 24, 2009.

FOR FURTHER INFORMATION CONTACT: Jordan Dorfman, Attorney-Advisor, Office of Wastewater Management, (202) 564-0614, or Philip Metzger, Attorney Advisor, Office of Ground Water and Drinking Water, (202) 564-3776, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a nationwide waiver of the requirements of section 1605(a) of Public Law 111-5, Buy American requirements, based on the public interest authority of section 1605(b)(1), to allow the use of non-domestic iron, steel, and manufactured goods when they occur in de minimis incidental components of eligible projects for which a Clean or Drinking Water State Revolving Fund (SRF) has concluded or will conclude an assistance agreement using ARRA funds where such components cumulatively comprise no more than a total of 5 percent of the total cost of the materials used in and incorporated into a project.

Among the General Provisions of the American Recovery and Reinvestment Act of 2009 (ARRA), Section 1605(a) requires that ``all of the iron, steel, and manufactured goods used in'' a public works project built with ARRA funds must be produced in the United States, unless the head of the respective Federal department or agency determines it necessary to waive this requirement based on findings set forth in Section 1605(b). In addition, expeditious construction of SRF projects is made a high priority by a provision in the ARRA Title VII appropriations heading for the SRFs, which states ``[t]hat the Administrator shall reallocate funds * * * where projects are not under contract or construction within 12 months of'' ARRA enactment (February 17, 2010). The finding relevant to this waiver is that ``applying [ARRA's Buy American requirement] would be inconsistent with the public interest'' (1605(b)(1)).

EPA originally issued this waiver on May 22, 2009. This notice revises the terms under which that waiver may be applied, and, in accordance with the requirements of Section 1605(c) that all waivers granted must include a ``detailed written justification'', adds new information and repeats relevant information that continues to justify this revised waiver.

In implementing ARRA section 1605, EPA must ensure that the section's requirements are applied consistent with congressional intent in adopting this section and in the broader context of the purposes, objectives, and other provisions of ARRA applicable to projects funded under the Clean Drinking Water State Revolving Funds (SRF), particularly considering the SRFs' 12 month ``contract or construction'' requirement. Further, in the context of ARRA's SRF ``contract or construction'' deadline, Congress' overarching directive to

[t]he President and the heads of Federal departments and agencies [is that they] shall manage and expend the funds made available in this Act so as to achieve the purposes [of this Act], including commencing expenditures and activities as quickly as possible

consistent with prudent management. [ARRA Section 3(b)]

Water infrastructure projects typically contain a relatively small number of high-cost components incorporated into the project that are iron, steel, and manufactured goods, such as pipe, tanks, pumps, motors, instrumentation and control equipment, treatment process equipment, and relevant materials to build structures for such facilities as treatment plants, pumping stations, pipe networks, etc. In bid solicitations for a project, these high-cost components are generally described in detail via project specific technical specifications. For these major components, utility owners and their contractors are generally familiar with the conditions of availability, the potential alternatives for each detailed specification, the approximate cost, and the country of manufacture of the available components.

Every water infrastructure project also involves the use of literally thousands of miscellaneous, generally low-cost components that are essential for, but incidental to, the construction and are incorporated into the physical structure of the project, such as nuts, bolts, other fasteners, tubing, gaskets, etc. For many of these incidental components, the country of manufacture and the availability of alternatives is not always readily or reasonably identifiable prior to procurement in the normal course of business; for other incidental components, the country of manufacture may be known but the miscellaneous character in conjunction with the low cost, individually and (in total) as typically procured in bulk, mark them as properly incidental.

EPA undertook multiple inquiries to identify the approximate scope of these de minimis incidental components within water infrastructure projects. EPA consulted informally with many major associations representing equipment manufacturers and suppliers, construction contractors, consulting engineers, and water and wastewater utilities, and a contractor performed targeted interviews with several well-established water infrastructure contractors and firms who work in a variety of project sizes, and regional and demographic settings. The contractor asked the following questions:

--What percentage of total project costs were consumables or incidental costs?
--What percentage of materials costs were consumables or incidental costs?
--Did these percentages vary by type of project (drinking water vs. wastewater treatment plant vs. pipe)?

The responses were consistent across the variety of settings and project types, and indicated that the percentage of

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total costs for drinking water or wastewater infrastructure projects represented by these incidental components is generally not in excess of 5 percent of the total cost of the materials used in and incorporated into a project. In drafting this waiver, EPA has considered the de minimis proportion of project costs generally represented by each individual type of these incidental components within the hundreds or thousands of types of such components comprising those percentages, the fact that these types of incidental components are obtained by contractors in many different ways from many different

sources, and the disproportionate cost and delay that would be imposed on projects if EPA did not issue this waiver.

Subsequent to the issuance of the original public interest de minimis waiver on May 22, 2009, EPA has received many, similar waiver requests from numerous assistance recipients (located in a few States that have issued a substantial number of SRF assistance agreements funded by ARRA) on a variety of low-cost components whose national origin can be identified. Even as typically procured in bulk (several dozen for small projects), the total cost of these components is much less than 5 percent of the total materials cost of these projects. These types of components would properly be considered subject to the previous nationwide public interest de minimis waiver but for the requirement in that waiver that the national origin of these low-cost, miscellaneous components ``not [be] readily or reasonably identifiable prior to procurement in the normal course of business.'' It also appears that when EPA inquired of various parties to develop the percentage limit on the waiver, the percentages were identified with the inclusion of these types of components in mind.

Due to the diverse characteristics of the specific configurations of these individually low-cost components, the analysis and consideration of waiver requests for them--and particularly of ascertaining whether U.S.-made products exist or can be made to meet these diverse configurations--is already becoming a demanding and time-consuming task far out of proportion to the percentage of total project materials cost they comprise. As a rapidly increasing number of States begin to issue numerous assistance agreements, EPA recognizes the prospect of considering dozens of differently framed waivers in most if not all States for each of these types of components, in addition to those for major components that are most appropriately the focus of the waiver process set forth in Section 1605. Because the established practices of specification and use of these low-cost components appear to be widely varied by Region and to some extent by State and individual recipient, it is unlikely to be practicable to formulate categorical waivers for such components, even if justified. If this pattern of waiver requests is allowed to expand to a national scale, the resources and capacities of the waiver program, for EPA and assistance recipients alike, will be so consumed by necessary analysis of the minute variations in circumstances among these low-cost items that this will become a serious obstacle to ensuring that all recipients will be able to sign construction contracts by February 17, 2010.

Assistance recipients who do not have their compliance with respect to section 1605 clarified may in many cases be unable to sign contracts by the February 17, 2010 date, causing these communities to lose their ARRA assistance and requiring EPA to reallocate to other States all ARRA funds not under contract by that date. This in turn will lead to further delay in placing the reallotted funds into other projects, which is inconsistent with the public interest and the intent and purpose of ARRA. It would be further inconsistent with ARRA to deprive of ARRA assistance these States and communities whose funds are reallocated due to a waiver process that would have become backlogged under the complexity of investigating waiver requests for incidental components costing a fraction of the 5 percent of the materials cost of a project.

Under these circumstances, EPA must place the highest priority on enabling States and their assistance recipients to meet this February

17, 2010 deadline set by Congress for the SRFs specifically. As the situations described above would be effectively addressed by a more comprehensive application of the de minimis waiver, EPA has found that it would be inconsistent with the public interest--and particularly with ARRA's directives to ensure expeditious SRF construction consistent with prudent management, as cited above--to apply the Buy American requirement to incidental components when they in total comprise no more than 5 percent of the total cost of the materials used in and incorporated into a project. Accordingly, EPA is hereby issuing a national waiver from the requirements of ARRA Section 1605(a) for any components described above as incidental that comprise in total a de minimis amount of the project, that is, for any such incidental components up to a limit of no more than 5 percent of the total cost of the materials used in and incorporated into a project.

Assistance recipients who wish to use this waiver should in consultation with their contractors determine the items to be covered by this waiver, must retain relevant documentation as to those items in their project files, and must summarize in reports to the State the types and/or categories of items to which this waiver is applied, the total cost of incidental components covered by the waiver for each type or category, and the calculations by which they determined the total cost of materials used in and incorporated into the project.

In using this waiver, assistance recipients should consider that all SRF-funded construction projects by definition require the expenditure of a certain amount of project funds on the literal ``nuts and bolts''-type components whose origins cannot readily be identified prior to procurement. As described above, EPA has determined the 5 percent limit based on research and informed professional judgment as to the maximum total amount of incidental goods used in most water and wastewater projects. In a few, exceptional cases, assistance recipients using this waiver may have multiple types of low-cost components which, when combined and in conjunction with those literal ``nuts and bolts''-type components, may total more than 5 percent. Assistance recipients in such cases will have to choose which of these incidental components will be covered by the waiver and which will not, and will include the type and amount of such items covered in the reports to the State as required above. Components which the recipient is unable to include within the 5 percent limit of this waiver must comply with the requirements of section 1605 by appropriate means other than coverage under this waiver.

Therefore, for the foregoing reasons, imposing ARRA's Buy American requirements for the category of de minimis incidental components described herein is not in the public interest. This supplementary information constitutes the ``detailed written justification'' required by Section 1605(c) for waivers ``based on a finding under subsection (b).''

Authority: Public Law 111-5, section 1605.

Dated: July 24, 2009.

Michael H. Shapiro,

Acting Assistant Administrator for Water.

[FR Doc. E9-19069 Filed 8-7-09; 8:45 am]

BILLING CODE 6560-50-P

Notices For 2009 2008 2007 2006 2005 2004 2003 2002

GovTrack.us

Congress will next meet on Sep 8, 2009.

Congress > Legislation

S. 924: CLEAN-UP Act

111th Congress
2009-2010

A bill to ensure efficient performance of agency functions.

Overview

Sponsor: Sen. Barbara Mikulski [D-MD] **show cosponsors (12)**

Text: Summary | Full Text

Status:

Introduced	Apr 29, 2009
Referred to Committee	View Committee Assignments
Reported by Committee	...
Senate Vote	...
House Vote	...
Signed by President	...

This bill is in the first step in the legislative process. Introduced bills and resolutions first go to committees that deliberate, investigate, and revise them before they go to general debate. The majority of bills and resolutions never make it out of committee. [Last Updated: Jul 13, 2009 6:11AM]

Last Action: Apr 29, 2009: Read twice and referred to the Committee on Homeland Security and Governmental Affairs.

Other Titles: -- Correction of Long-Standing Errors in Agencies' Unsustainable Procurements Act of 2009

Related: See the Related Legislation page for other bills related to this one and a list of subject terms that have been applied to this bill. Sometimes the text of one bill or resolution is incorporated into another, and in those cases the original bill or resolution, as it would appear here, would seem to be abandoned.

Question & Answer

Have a question about this bill? Submit a short fact-oriented question and see if it will be answered by other visitors.

Sources of Influence

MAPLight.org reports that the following organizations have taken a stance on this bill:

Support	Oppose
American Federation of Government Employees	Professional Services Council
National Treasury Employees Union	Reason Foundation

Follow the link to MAPLight.org to see if campaign contributions from employees of these organizations are correlated with how Members of Congress voted on this bill.

Because the U.S. Congress posts most legislative information online one legislative day after events occur, GovTrack is usually one legislative day behind. For more information about where this data comes from, see About GovTrack.us.

To cite this information, click a citation format for a suggestion: APA | MLA | Wikipedia Template.

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Public Comments on the Presidential Memorandum on Government Contracting

Wednesday July 15, 2009

The American Federation of Government Employees, AFL-CIO (AFGE), which represents more than 600,000 federal employees throughout the United States and overseas, welcomes the opportunity to provide comments to the Obama administration and the Office of Management and Budget (OMB) about the President's efforts to establish a framework for improving the federal acquisition system and managing the federal workforce. Our full statement will be available on our website, www.afge.org, and at www.regulations.gov.

AFGE supports President Obama's pledge to restore the American people's faith in the public sector and curb the drive to privatize government services. Our members understand that cleaning up the federal contracting problems left behind by the Bush administration will take a significant amount of work. That's why AFGE is pushing on a number of fronts to reform the contracting system and begin the process of returning certain functions to the federal government.

APOLITICAL PROCUREMENT

The time has come when action can finally be taken to improve the lives of federal contractor employees. However, it is imperative in doing so that we don't politicize the procurement process. Significant or repeat violators of workplace laws should not receive federal contracts, and federal contractors generally should be required to meet clear standards for pay, health care, and retirement benefits for their employees. If such standards are applied across the board, then there is no need to use preferences or set-asides to steer contracts to contractors who have better labor records but who are also more expensive.

It may be tempting to look at small business preferences as a precedent for giving a new preference to federal contractors with better labor records. However, such an explicitly political preference, although well-intentioned, would be the first of its kind and would open up the procurement process to additional political preferences which would undermine the integrity of the procurement process.

We are still cleaning up the mess left behind by the previous Administration which used the procurement process as a tool to reward friends, thus becoming ensnared in scandal after scandal. Even with noble intentions, it is imperative that we don't repeat those mistakes by trying to use the procurement process to reward a different set of friends.

OMB CIRCULAR A-76

Impose an A-76 Moratorium
AFGE is asking the Obama administration to suspend the use of the A-76 process until much-needed reforms have been implemented and cancel ongoing A-76 studies. A 2006 DoD Inspector General report and two 2008 Government Accountability Office (GAO) reports detail how poor guidance from the Bush Administration OMB on the A-76 process resulted in systematically overstated savings and understated costs as well as a disproportionately adverse impact on older, female, and African-American civil servants.

Reform the A-76 Process
AFGE urges the Obama Administration to work with representatives of federal employees to reform the A-76 circular to make the process more accountable to taxpayers and fairer to federal employees. See specific recommendations in our full statement.

Alternatives to the A-76 Process.
Agencies should be encouraged to use Business Process Reengineering (BPR) in lieu of OMB Circular A-76 privatization reviews to achieve improvements in the delivery of services. Given the success of federal employees in OMB Circular A-76 privatization reviews, agencies should avoid incurring the costs and controversies of A-76 studies.

INHERENTLY GOVERNMENTAL FUNCTIONS

Due to federal hiring restrictions, increasing requirements, and the indiscriminate privatization of the Bush Administration, the federal government has contracted out to the private sector functions that are inherently governmental, closely related to inherently government functions, or mission-essential and should never have been performed by the private sector.

Overriding Concerns

- *Technical Expertise/Institutional Memory* . Agencies must develop and retain the technical expertise and institutional memory needed to manage and provide all functions necessary to meet their missions, now and in the future.

- *Risk* . No function should be contracted out if it poses too great a risk of creating a contractor monopoly or interfering with an agency's ability to perform its mission.
- *Transparency and Accountability* . No function should be contracted out if contractor performance could cause confusion to the public about whether or not the government is acting. In order to determine what the government is doing, the public must be able to discern when the government is or is not acting.
- *Decision-making*. Agencies must maintain sufficient in-house capability to be thoroughly in control of the policy and management of the agency. For too long, important functions performed by rank-and-file federal employees have been considered to be commercial because their work is ultimately signed off on by a federal employee manager, even though that federal employee manager spot-checks only a small number of the judgments and recommendations made by rank-and-file federal employees.
- *Development and Maintenance of the Federal Workforce* .
- Human resources must be treated as a critical business function, not just an administrative process to be bundled and outsourced. Agencies must place great importance on acquiring, developing, and retaining employees with the knowledge, skills, abilities, and experience needed to meet agencies' missions.
- Personnel ceilings must be removed in order to develop and maintain an adequate federal workforce.
- The prohibition on personal services contracts should be enforced.
- Any government function that must be performed for long or indefinite periods of time should be performed by federal employees.
- *Contractor Oversight* . Agencies must ensure that they have the ability to oversee contracts, including the ability to specify the work assignments, products, tasks, and responsibilities of the contractor; monitor the work of the contractor; and evaluate the work of the contractor. In addition, agencies must maintain an in-house workforce in every function in case of contractor failure and to provide a useful benchmark for evaluating contractor performance.
- *Integration with Inherently Governmental Functions* . Some functions, while perhaps considered to be commercial in the abstract, are so integrated with inherently governmental functions that they cannot be separated.
- *Specific Training/Experience/Expertise Needed* . Many functions needed by the government require unique training, experience and/or expertise that can only be acquired by performing the function.
- *Particular Circumstances* . No function should be contracted out until the agency examines the particular circumstances in which the function is performed and whether segregating that function will negatively impact agency flexibility and efficiency.

Recommendations
In order to encourage agencies to re-establish the boundary between functions that are commercial and functions that are inherently governmental or closely associated with inherently governmental functions, AFGE recommends the following:

- Stop compiling directories of inherently governmental jobs.
- Do commercial inventories over – but without OMB pressures.
- Use inventories to find in-house staffing shortages.

Functions in need of Particular Attention
See our full statement for a list of some specific functions currently performed by contractors (or deemed appropriate for contractor performance) that we find particularly troubling.

DIRECT CONVERSIONS

AFGE urges the Obama administration to enforce the prohibitions against giving work last performed by federal employees to contractors without first conducting a full and fair public-private competition. Despite the extensive use of the A-76 privatization process and the resulting proof of the superiority of in-house workforces, much work is contracted out without any public-private competition, i.e., without any proof that giving work to contractors is better for taxpayers or better serves those Americans who depend on the federal government for important work.

Federal employees represented by AFGE have experienced several direct conversions in recent years. In some of these situations, contracts have been awarded by an agency during a "surge" with the understanding that they would be short-term. But over time the contracts have expanded, with agencies bringing in contract employees to work side by side with government workers, without even an attempt at a public-private competition to determine if the contracting is more efficient for the agency and for taxpayers. Congress, on a bipartisan basis, has, repeatedly, prohibited agencies from perpetrating such conversions.

INSOURCING

AFGE is pleased that Congress and the Obama administration have approved and implemented laws to encourage federal agencies to bring contracted work back into government. We believe that the public interest is best served when functions that are inherently governmental, closely related to inherently governmental functions, or mission-essential are performed by government employees within a defined chain of command and subject to vigorous oversight. To properly insource federal jobs, AFGE recommends that the Obama administration continue the practice of creating a reliable and systematic inventory of federal tasks and reviewing it regularly. Insourcing simply cannot occur without a true inventory of jobs, along the lines already laid down by the Department of the Army, being performed in federal agencies by federal employees and contractors. The government must provide federal employees with full and fair opportunities to compete for new work as well as outsourced work.

CONCLUSION

AFGE is ready to assist the Obama administration and OMB in establishing a new framework for improving the federal acquisition system and managing – and nurturing - the federal workforce. The first step towards meaningful reform should be passage and enactment of The CLEAN UP (Correction of Longstanding Errors in Agencies Unsustainable Procurements) Act (S. 924, H.R. 2736), legislation introduced recently by Senator Barbara Mikulski (D-MD) and Representative John Sarbanes (D-MD).
As AFGE National President John Gage declared, "The CLEAN UP Act is vital to any serious effort to save taxpayer dollars and restore integrity to the federal sourcing process."

Return to Privatization

Executive Order [13494] -- Economy in Government Contracting

For Immediate Release January 30, 2009

EXECUTIVE ORDER

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ECONOMY IN GOVERNMENT CONTRACTING

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., it is hereby ordered that:

Section 1. To promote economy and efficiency in Government contracting, certain costs that are not directly related to the contractors' provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures. This order is also consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors. This order does not restrict the manner in which recipients of Federal funds may expend those funds.

Sec. 2. It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration of Government contracts, contracting departments and agencies, when they enter into, receive proposals for, or make disbursements pursuant to a contract as to which certain costs are treated as unallowable, shall treat as unallowable the costs of any activities undertaken to persuade employees -- whether employees of the recipient of the Federal disbursements or of any other entity -- to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing. Such unallowable costs shall be excluded from any billing, claim, proposal, or disbursement applicable to any such Federal Government contract.

Sec. 3. Notwithstanding section 2 of this order, contracting departments and agencies shall treat as allowable costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of labor-management committees, employee publications (other than those undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively), and other related activities. See 48 C.F.R. 31.205-21.

Sec. 4. Examples of costs unallowable under section 2 of this order include the costs of the following activities, when they are undertaken to persuade employees to exercise or not to exercise, or concern the manner of exercising, rights to organize and bargain collectively:

(a) preparing and distributing materials;

(b) hiring or consulting legal counsel or consultants;

(c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and

(d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

Sec. 5. Within 150 days of the effective date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order. Such rules, regulations, and orders shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement.

Sec. 6. Each contracting department or agency shall cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order.

Sec. 7. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 8. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council under section 5 of this order.

BARACK OBAMA

THE WHITE HOUSE,
January 30, 2009.

ACC Extras

Supplemental resources available on www.acc.com

Federal Contracts: Termination For Convenience.
QuickCounsel. August 2009
http://www.acc.com/legalresources/quickcounsel/fctfc.cfm?

Model Short-Form Association Independent Contractor Agreement (for Corporations).
Sample Form & Policy. January 2009
http://www.acc.com/legalresources/resource.cfm?show=129520

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.