

**Calendar No. 179**

111TH CONGRESS }  
*1st Session* }

SENATE

{ REPORT  
111-88

NON-FOREIGN AREA RETIREMENT EQUITY  
ASSURANCE ACT OF 2009

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R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 507

TO PROVIDE FOR RETIREMENT EQUITY FOR FEDERAL EMPLOYEES IN NON-FOREIGN AREAS OUTSIDE THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA, AND FOR OTHER PURPOSES



OCTOBER 14, 2009.—Ordered to be printed

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Mr. LIEBERMAN, from the Committee on Homeland Security and  
Governmental Affairs, submitted the following

**R E P O R T**

[To accompany S. 507]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 507) to provide for retirement equity for federal employees in non-foreign areas outside the 48 contiguous States and the District of Columbia, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

Since 1948, federal employees stationed in Alaska, Hawaii and areas of U.S. sovereignty outside the continental United States—so called “non-foreign areas”—have received non-foreign cost of living allowance (non-foreign COLA) payments to ensure that their pay reflects the high cost of living in those areas compared to the

cost of living in Washington, DC.<sup>1</sup> Non-foreign COLA is not subject to federal income taxes, and it does not count as part of base pay for retirement purposes. For federal employees in the 48 contiguous states and the District of Columbia, Congress in 1990 sought to close the pay gap between federal employees and higher-paid private-sector employees by authorizing an annual comparability payment for federal employees that varies by locality.<sup>2</sup> Unlike non-foreign COLA, locality pay is taxed and is considered part of base pay, which is used to calculate an employee's retirement annuity.

Because locality pay counts towards employees' retirement whereas non-foreign COLA does not, federal workers in the non-foreign areas, who do not receive locality pay, are disadvantaged in their retirement compared to federal workers in the contiguous states. S. 507 would address this problem by phasing in locality pay for employees in non-foreign areas and phasing out non-foreign COLA.

## II. BACKGROUND

In the 1940s, military departments and federal agencies began paying differentials to U.S. citizens recruited for white-collar civilian positions in Alaska and areas outside the continental U.S. in order to facilitate the recruitment of personnel in those locations. In 1946, in response to widespread reports of a lack of uniformity in the payment of these differentials, President Harry S. Truman directed the Civil Service Commission and the Bureau of the Budget to prepare a report on pay differentials outside the U.S. Based on that report, President Truman issued an Executive Order in 1948, under which federal employees in the non-foreign areas became eligible to receive additional compensation under two separate programs: the non-foreign area COLA program, based on living costs, and the post differential program, based on undesirable conditions of environment.<sup>3</sup>

In that same year, 1948, Congress enacted the pay allowances for non-foreign area employees into statute,<sup>4</sup> now codified at 5 U.S.C. § 5941. Employees in non-foreign areas may receive either non-foreign COLA payments, if local living costs are substantially higher than those in the District of Columbia, or post differential allowances, if differences in conditions of environment warrant a recruitment incentive, or both, provided that the total may not exceed 25 percent of basic pay.

### *Non-foreign COLA*

Non-foreign COLA is designed to compensate for substantially higher living costs in the non-foreign areas relative to those in the Washington, DC, area. The government may pay non-foreign COLA to both local and non-local hires who are under the General Schedule (GS) system or other statutory pay systems. Like other similar

<sup>1</sup>Non-foreign areas include the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and U.S. territories and possessions, including American Samoa, Guam, Johnson Atoll, Wake Atoll, and the U.S. Virgin Islands.

<sup>2</sup>Federal Employees Pay Comparability Act (FEPCA), P.L. 101-509.

<sup>3</sup>E.O. 10,000, 13 Fed. Reg. 5453, 5455 (Sept. 18, 1948).

<sup>4</sup>Independent Officers Appropriation Act, 1949, ch. 219, sec. 207 (1948) and Supplemental Independent Offices Appropriation Act, 1949, ch. 775, sec. 104 (1948). See also P.L. 89-554, 5 U.S.C. § 5941.

allowances,<sup>5</sup> non-foreign COLA is not subject to federal income taxes and does not count toward an employee's retirement.

Due to an increase in the cost of living in Washington, DC, the differential in living costs between Washington, DC and non-foreign COLA areas has decreased in recent years. On December 3, 2008, Office of Personnel Management (OPM) regulations went into effect lowering non-foreign COLA rates for Anchorage, Fairbanks, and Juneau, Alaska, from 24 percent to 23 percent. OPM issued regulations on February 20, 2009, providing an interim adjustment from 13 percent to 14 percent for the non-foreign COLA rate in Puerto Rico based on a review of the Consumer Price Index in Puerto Rico.<sup>6</sup> However, OPM expects non-foreign COLA rates to decrease by one percent in all of the non-foreign COLA areas in late summer or fall of 2009.

The current non-foreign COLA rates are:

COLA Area	COLA Rate
Anchorage, AK .....	24%
Fairbanks, AK .....	24%
Juneau, AK .....	24%
Rest of Alaska .....	25%
City and County of Honolulu, HI .....	25%
Maui County, HI .....	25%
Kauai County, HI .....	25%
Hawaii, County HI .....	18%
Guam/Northern Mariana Islands .....	25%
U.S. Virgin Islands .....	23%
Puerto Rico .....	13%

### *Post differentials*

In addition to, or instead of, receiving a non-foreign COLA, certain federal employees in non-federal areas other than Hawaii and Alaska receive post differentials—recruitment incentives designed to encourage people to go to work for the federal government in a non-foreign area that has extraordinarily difficult living conditions, excessive physical hardships, or notably unhealthful conditions compared with the continental U.S. Because post differentials are intended to encourage potential employees to move to a non-foreign area, they are not paid to local hires. Like non-foreign COLA, post differentials do not count toward retirement, but, unlike non-foreign COLA, they are subject to federal income tax.

Post differentials are currently authorized for Guam, the Commonwealth of the Northern Mariana Islands (CNMI), American Samoa, and Johnston, Wake, and Midway Atolls. Non-locally hired employees in Guam are eligible for a post differential of up to 20 percent, while those in CNMI and the other areas are set at 25 percent. Guam and CNMI are the only areas in which payment of both a post differential and a non-foreign COLA is authorized. However, because the combined payment may not exceed 25 percent of base pay and employees in Guam and CNMI currently receive 25 per-

<sup>5</sup> Most payments received by U.S. government civilian employees for working abroad, including pay differentials, are taxable. However, certain foreign area allowances, cost of living allowances, and travel allowances are tax free. See IRS guidance entitled "Allowances, Differentials, and Other Special Pay," available at <http://www.irs.gov/businesses/small/international/article/0,,id=97187,00.html> (accessed September 8, 2009).

<sup>6</sup> 5 CFR Part 591, Federal Register Vol. 74, No. 33, Page 7777, Friday, February 20, 2009.

cent non-foreign COLA, those employees do not currently receive a post differential.

#### *Locality pay*

In the late 1980's, it became increasingly evident that a large gap existed between federal salaries and the higher private-sector salaries in various localities across the country. These pay disparities caused serious difficulties for federal agencies in recruiting and retaining highly qualified employees. The Government Accountability Office (GAO) reported in 1990 that 78.3 percent of federal managers and personnel officers surveyed said that low pay was the reason employees left the federal government.<sup>7</sup> The same GAO survey showed that 72.5 percent believed that job candidates declined job offers with the federal government because of the low pay offered.

To address these disparities, Congress in 1990 passed the Federal Employees Pay Comparability Act (FEPCA).<sup>8</sup> To keep up with annual increases in private-sector salaries, FEPCA provides that GS employees receive annual across-the-board pay adjustments, based on annual changes in the Employment Cost Index (ECI), which is a measure of private-sector wages and salaries published by the Bureau of Labor Statistics (BLS). In addition, in localities where non-federal salaries exceed federal salaries by more than five percent, FEPCA provides that GS employees receive an annual locality-based comparability adjustment. Under statute, the amount of the locality pay is designed to reduce pay disparities by making GS employees' pay rates nearly equal to those of non-federal workers in the same locality.

By statute, all GS federal employees in the contiguous U.S. where a pay disparity exists are entitled to receive locality pay. Moreover, the government has, by administrative action, extended the right to receive locality payments to employees in certain other pay systems, including employees in senior level, scientific and professional positions, administrative law judges, administrative appeals judges, and contract appeals board members. However, FEPCA explicitly provides that federal employees in Hawaii and Alaska and the other non-foreign areas may not receive locality pay.<sup>9</sup>

The amount of locality pay is based on empirical surveys and is established by a multi-step process. Non-federal pay levels are estimated by means of salary surveys conducted by the BLS under its National Compensation Survey program. OPM receives the BLS survey results, documents federal rates of pay in each of the pay areas, and compares non-federal and GS salaries by grade for each pay area. This data is then made available to the Federal Salary Council (a nine-member advisory body appointed by the President<sup>10</sup>) and to the President's Pay Agent (comprised, by Executive Order, of the Secretary of Labor, the Director of the Office of Management and Budget, and the Director of OPM). The Federal Sal-

<sup>7</sup> *Recruitment and Retention: Inadequate Federal Pay Cited as Primary Problem by Agency Officials*, (GAO/IGD-90-117) September 1990, at p. 4.

<sup>8</sup> P.L. 101-509, 5 U.S.C. §§ 5301-5304.

<sup>9</sup> 5 U.S.C. §§ 5304(f)(1)(A) and 5701(6).

<sup>10</sup> By statute, the Federal Salary Council is comprised of three experts in labor relations and pay policy and six representatives of Federal labor unions or other employee organizations. 5 U.S.C. § 5304(e)(1).

ary Council makes recommendations to the Pay Agent on the establishment of locality pay areas, the level of locality payments, and other matters regarding implementation of the locality pay system. Then the Pay Agent makes final decisions on the establishment of locality pay areas, and it submits recommendations to the President on the amount of locality pay needed in each pay area to reach FEPCA's target of federal pay rates that are five percent below non-federal rates. Finally, the amount of locality payments is fixed by the President. In practice, most years Congress has enacted a different pay rate, superseding the rate fixed by the President.

FEPCA has not been implemented as originally intended. FEPCA provides that a certain percentage of the gap between non-federal and federal salaries should be closed each year. During 1994, which was the first year of locality pay, 20 percent of the gap was closed. An additional 10 percent of the gap was then supposed to be closed each year until the five percent pay disparity was reached. However, in every year since 1995, the President has exercised his authority to fix (subject to Congress's power to set a different rate) a lower level of locality pay, relying on the "national emergency or serious economic condition" exception in 5 U.S.C. § 5304a, and, in most of those years, Congress enacted a pay adjustment that exceeded the one that would otherwise have been fixed by the President, but that still fell short of the adjustment called for under FEPCA. As a result, as of 2008, only 58.3 percent of the pay gap between federal salaries and those in the private sector has been eliminated.<sup>11</sup>

*Inequity, controversy, and litigation regarding the current system*

As mentioned, locality pay is included in calculating federal employees' retirement contributions and annuities, but non-foreign COLA is not. As a result, federal employees in Hawaii, Alaska, and the other non-foreign areas covered by non-foreign COLA see a smaller amount—one that does not reflect their actual pay—used to calculate their retirement annuities than the amount used to calculate annuities for similarly situated employees in the contiguous states who receive locality pay. Likewise, employees in non-foreign areas receive from their employing agencies lower matching contributions to their retirement accounts under the Thrift Savings Plan than do similarly-situated employees in the contiguous U.S.

Since FEPCA's enactment, the lack of locality pay for employees in Hawaii and Alaska and other non-foreign areas has influenced these employees' decisions about whether to move to the contiguous U.S. where locality pay is available.<sup>12</sup> Many employees who are near retirement in the non-foreign COLA areas seek employment in the contiguous U.S. where their "high 3" salaries—the average of their three consecutive, highest paid years and the amount on which their annuities are based—are boosted by locality pay.<sup>13</sup> As

<sup>11</sup> See Annual Report of the President's Pay Agent on Locality-Based Comparability Payments for the General Schedule, at 18 and 21, December 6, 2007.

<sup>12</sup> See *Matsuo v. United States*, 532 F. Supp. 2d 1238, 1243–44 (D. Haw. 2008).

<sup>13</sup> See Statement of Charles Grimes, Deputy Associate Director for Performance and Pay Systems, Office of Personnel Management, at hearing on "Non-Foreign COLA: Finding an Equitable Solution," before the Subcommittee on Oversight of Government Management, the Federal

a result of this disparity, federal agencies in the non-foreign areas face staffing problems, especially for employees near retirement.<sup>14</sup>

For over 25 years, the non-foreign COLA program has been the subject of extensive litigation. In 1981, employees claimed that the non-foreign COLA methodology used by OPM violates federal law by considering only price level differences and failing to consider differences in non-price factors affecting the cost of living, such as remoteness, isolation, and quantity or quality of goods and services needed or available.<sup>15</sup> In the early 1990s, the plaintiffs and the government agreed on a procedure for resolving those controversies concerning the non-foreign COLA program, and on June 20, 2000, they filed a joint stipulation for settlement that was approved by the District Court for the Virgin Islands. The settlement agreement provides for employee involvement with OPM in developing certain principles<sup>16</sup> to form the basis for changing the non-foreign COLA program and made a number of technical improvements to modernize the methodology by which the amount of non-foreign COLA is determined. Under the settlement, OPM cannot reduce non-foreign COLA rates by more than one percentage point per year, and the plaintiff class members received \$234 million for back pay, interest, attorneys' fees, and expenses.<sup>17</sup>

Then in 2005, federal employees in Hawaii and Alaska filed a new class action against the federal government, alleging that FEPCA's exclusion of federal employees who work and reside in Hawaii and Alaska violates their right to equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution. They also contend that federal employees have a property interest in their salary and that exclusion from locality pay violates their due process rights under the Fifth Amendment.<sup>18</sup> The lawsuit seeks locality pay for federal employees who work in those jurisdictions dating back to the implementation of FEPCA.

On January 30, 2008, the U.S. District Court in Hawaii granted the government's motion for summary judgment. The Court observed that "Congress may have discharged its legislative responsibilities imperfectly," creating "inequities resulting from Plaintiffs' exclusion from the locality pay system."<sup>19</sup> However, the Court held for the government, reasoning that "[w]hen FEPCA was enacted, Congress rationally could have concluded the two pay supplements [COLA and locality pay] were roughly parallel, even if it has turned out, in practice, that FEPCA's exclusion has worked to the disadvantage of Hawaii and Alaska employees with respect to their retirement benefits."<sup>20</sup> Being unable to provide relief, the Court urged that "Congress should correct the incongruity made so evident by this case."<sup>21</sup> On February 29, 2008, the plaintiffs filed an appeal, which is still pending.

Workforce, and the District of Columbia of the Senate Committee on Homeland Security and Governmental Affairs, May 29, 2008, at pp. 3–4.

<sup>14</sup> See *Matsuo v. United States*, 532 F. Supp. 2d at 1244–45.

<sup>15</sup> See *Alaniz v. Office of Personnel Management*, 728 F.2d 1460 (Fed. Cir. 1984); *Karamatsu v. United States*, No. 224–85C (Cl. Ct.); *Arana v. United States*, No. 389–86C (Cl. Ct.).

<sup>16</sup> These were called "Safe Harbor Principles" because the settlement process was intended to provide the government a "safe harbor" against future litigation.

<sup>17</sup> See *Caraballo et al. v. United States, et al.*, No. 1997–0027 (D.V.I.), Stipulation for Settlement, June 20, 2000.

<sup>18</sup> See *Matsuo v. United States*, 532 F. Supp. 2d at 1242.

<sup>19</sup> *Id.* at 1253–54.

<sup>20</sup> *Id.* at 1254.

<sup>21</sup> *Id.* at 1253.



*OPM's proposal*

In an effort to address the retirement inequity and to resolve the pending litigation, President George W. Bush announced in his fiscal year 2008 Budget a proposal to extend locality pay to federal employees in the non-foreign areas. On May 30, 2007, then-Director of OPM Linda Springer submitted a legislative proposal to Congress. Under the OPM proposal, non-foreign COLA rates in effect on December 31, 2007, would be locked in place and OPM would no longer conduct non-foreign COLA surveys. Beginning in January 2008, locality pay would begin to be phased in for federal employees in the non-foreign areas while non-foreign COLA would be phased out over seven years. Under the proposal, the locality pay rate in the first year for the "Rest of the U.S." (*i.e.*, the rate that applies outside of the metropolitan areas where specific rates are established) would be applied to all parts of the non-foreign areas in order to provide time to determine the pay rates for each non-foreign locality. Employees in the non-foreign areas would continue to receive a portion of non-foreign COLA until the applicable locality pay rate exceeds the locked-in non-foreign COLA rate.

Under this proposal, the Federal Salary Council would have the authority to recommend locality rates in all the non-foreign areas, including areas authorized for post differentials. As noted above, only in Guam and CNMI are employees currently authorized to be paid both non-foreign COLA and a post differential, but those employees do not actually receive a post differential because of the 25 percent cap on the total of the non-foreign COLA and post differential. Absent OPM making any regulatory change, they would begin receiving the authorized post differential when the reduction of non-foreign COLA begins under the proposal. When non-foreign COLA is completely phased-out in Guam and CNMI, the post differential paid to non-local hires would be 20 percent in Guam and 25 percent in CNMI. OPM last reviewed the amount of, and need for, post differentials in 1995 and does not plan to review post differential rates at this time.<sup>22</sup>

OPM proposed that non-foreign COLA be phased out at a rate lower than the rate at which locality pay is phased in, because employees' taxes and retirement contributions will increase with locality pay. Under the OPM proposal, the conversion to locality pay would be offset by an 85 percent reduction in non-foreign COLA. Thus, for every dollar of locality pay received, an employee's non-foreign COLA would be reduced by 85 cents. After the initial seven-year phase in period, when 100 percent of locality pay would be provided, some fraction of the non-foreign COLA rate could also continue to be paid until the locality pay rises high enough that subtraction of 85 percent would reduce the non-foreign COLA payment to zero. According to OPM, this formula would protect the take-home pay of federal workers at the GS-7 step 3 level and

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<sup>22</sup> See Responses from OPM provided in 2007 to Senator Akaka's Frequently Asked Questions on the Administration's Proposal to Convert Non Foreign COLA to Locality Pay, *available at*: [http://akaka.senate.gov/public/index.cfm?FuseAction=Issues.Home&issue=Non-Foreign%20COLA%20Update&content\\_id=33#Non-Foreign%20COLA%20Update](http://akaka.senate.gov/public/index.cfm?FuseAction=Issues.Home&issue=Non-Foreign%20COLA%20Update&content_id=33#Non-Foreign%20COLA%20Update) (accessed September 8, 2009).

below.<sup>23</sup> Approximately 50 percent of the federal workers in Alaska and Hawaii are at or below this level.<sup>24</sup>

Non-foreign COLA and locality pay are treated differently for Postal Service employees than for GS employees. Postal employees generally do not receive locality pay. Only Postal Inspectors and employees of the Postal Service Office of Inspector General receive locality pay. However, postal employees in the non-contiguous areas are eligible to receive non-foreign COLA, which the Postal Service calls Territorial COLA (T-COLA). Because there is no locality pay, there is no retirement inequity among postal employees like the inequity suffered by other federal employees in non-foreign COLA areas. Therefore, under OPM's proposal, postal employees who receive T-COLA would not receive locality pay, but would instead continue to receive T-COLA at the locked-in non-foreign COLA rates.

*Subcommittee fact-finding regarding OPM's proposal*

In July 2007, this Committee's Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia conducted fact-finding meetings on the OPM proposal on the islands of Oahu and Maui in Hawaii. Subcommittee staff met with nearly 1,000 federal employees from more than 20 agencies. The questions and concerns raised by the federal workers can be broken down into several themes:

First, employees were concerned about the impact on their take-home pay due to the conversion to locality pay. Given the current economic climate, many federal workers stressed the importance of not reducing their take-home pay, and they believed that the 85 percent offset in the 2007 Administration proposal did not go far enough. Some employees expressed a preference for retaining the non-foreign COLA versus converting to locality pay under OPM's proposal because of the expected reduction in many employees' take-home pay.

Second, many employees expressed concern over the seven-year phase-in period, noting that they would have to work an 10 additional years in order to take full advantage of locality pay. The long proposed phase-in period was particularly troubling because an estimated 59.3 percent of federal workers in Hawaii and 62.1 percent in Alaska will be eligible to retire in six years or less.<sup>25</sup> Several employees proposed an immediate conversion with no phase in period, or a two year phase in with the first year using the "Rest of the U.S." locality rate.

Third, many employees raised concerns over the scope of the proposal. This included questions about which employees would be covered by the proposal and how the proposal would work in unique personnel systems such as the National Security Personnel System (NSPS) at the Department of Defense (DoD) and the system at the Postal Service. Additionally, some employees asked how the proposal would treat employees receiving special rates (*i.e.*, rates of basic pay higher than those ordinarily authorized, which OPM may establish to address specific recruitment or retention problems), since, under current law, federal employees in the non-

<sup>23</sup> Information provided to Committee staff at a staff briefing by OPM, June 4, 2007.

<sup>24</sup> Information provided to Committee staff by OPM, April 1, 2008.

<sup>25</sup> Information provided to Committee staff by OPM, May 1, 2008.

foreign areas may receive both non-foreign COLA and special rates, but employees in the contiguous U.S. receive only the higher of special rates or locality pay.

*The proposed legislation*

After considering and taking account of the questions and concerns from employees and comments from federal agencies, Senators Akaka, Stevens, Inouye, and Murkowski introduced the Non-Foreign Area Retirement Equity Assurance Act of 2008, or the Non-Foreign AREA Act (S. 3013), on May 13, 2008. As described more fully in the Legislative History section of this report (below), this Committee held a hearing on the bill and reported it to the full Senate, and the bill passed the Senate on October 2, 2008, but failed to move through the House before the 110th Congress adjourned *sine die*. On March 2, 2009, Senators Akaka, Murkowski, Inouye, and Begich reintroduced the legislation as the Non-Foreign Area Retirement Equity Assurance Act of 2009 (S. 507).

The legislation would apply to federal employees in all of the non-foreign areas, including Alaska, Hawaii, the Virgin Islands, Puerto Rico, Guam, CNMI, American Samoa, and Johnston, Wake, and Midway Atolls. For these employees, S. 507 is nearly identical to S. 3013 as passed by the Senate and is similar in many respects to OPM's proposal, in that it would lock in current non-foreign COLA rates and phase in locality pay as non-foreign COLA is phased out.

However, S. 507 differs from the OPM proposal in several important ways. The bill would phase in locality pay over a period of three years and would offset the locality pay by subtracting 65 percent of that pay from the COLA, rather than 85 percent as OPM had proposed. The 65 percent offset is designed to better protect employees' take-home pay.

S. 507 would also ensure that employees who now receive both special rates and non-foreign COLA will not be unfairly harmed by the transition to locality pay, because the bill provides that their special rates will increase in the same way as locality pay during the conversion period. In addition, the bill includes a provision expressing the sense of Congress that an employee's take-home pay should not decrease as a result of the bill.

In addition to having a shorter phase-in period than the OPM proposal, S. 507 allows an employee who retires within the three-year phase-in period to elect to treat any amount of non-foreign COLA received during that period as part of base pay (as if it were locality pay) for purposes of establishing the amount of annuity, up to the full amount of locality pay in place for that area. The employee would be required to pay additional retirement contributions on the additional amounts that he or she elects to treat as part of their base pay.

The shorter phase-in period and ability of certain employees to treat non-foreign COLA as base pay will help address concerns, which are noted above, with the high percentage of employees in Hawaii and Alaska nearing retirement, and will mitigate pressure on federal employees in the non-foreign areas to seek employment in the contiguous U.S. late in their careers to enhance their retirement annuities. Additionally, the three-year phase-in period will help those who are planning to retire within the next few years or

who will retire because of mandatory retirement laws. Although OPM testified that agencies have strategies in place to address the impending retirement wave and the unique staffing problems facing federal agencies in the non-foreign areas,<sup>26</sup> the Committee believes that the three-year phase-in and the ability to treat non-foreign COLA as base pay for employees close to retirement are preferable to OPM's proposal.

The legislation also states that it is the sense of Congress that BLS should conduct surveys to determine the extent of pay disparities in the new locality-pay areas. The Federal Salary Council and the President's Pay Agent have recommended that the number of locality pay areas should remain at 32 for 2009, noting, among other things, that BLS would need more funding to expand its current National Compensation Survey program to more areas.<sup>27</sup> However, the Committee intends that upon enactment of this Act, the number of locality pay areas should be increased by two—one covering the entire State of Alaska and one covering the entire State of Hawaii—and, because of the high cost of living in those areas, BLS surveys of these and other new locality-pay areas will therefore be necessary.

S. 507 also provides that all current and future employees in the non-foreign areas to whom the Government is authorized to pay non-foreign COLA are covered by this legislation, whether or not they are actually paid non-foreign COLA or whether they instead receive some other kind of pay adjustment. This includes GS employees, administrative law judges, members of the Senior Executive Service (SES), senior level and senior technical (SL/ST) employees, administratively determined employees, GS employees in the non-foreign areas that do not receive non-foreign COLA, and employees in agencies with unique personnel systems such as the Transportation Security Administration, DoD, the Federal Aviation Administration, the Department of Veterans Affairs (with respect to employees under title 38 of the U.S. Code), and those agencies covered by the Financial Institution, Reform, Recovery and Enforcement Act.<sup>28</sup> To ensure that SES and other senior level employees do not suffer a decrease in salary as non-foreign COLA is phased out, the legislation provides that these employees, who are eligible for non-foreign COLA, will become eligible for locality pay under the bill. Moreover, with respect to employees who are eligible for non-foreign COLA but now receive other kinds of pay adjustments instead, the bill grants regulatory authority to OPM (or other agencies, if appropriate) to phase out those alternative pay adjustments as locality pay phases in under the legislation.

According to DoD, it already has broad flexibility with regard to setting and changing pay rates for non-appropriated fund (NAF) employees. Therefore, a representative of DoD testified that, should non-foreign COLA be phased out and locality pay phased in, DoD would increase pay rates for those NAF employees who currently receive the non-foreign COLA in order to offset the loss of non-foreign COLA.<sup>29</sup>

<sup>26</sup> Responsive testimony of Mr. Grimes at hearing, *supra* note 14.

<sup>27</sup> See Federal Salary Council Memorandum for January 2009, page 6.

<sup>28</sup> P.L. 101-73.

<sup>29</sup> Statement of Mr. Bradley Bunn, Program Executive Officer, National Security Personnel System, Department of Defense, at hearing, *supra* note 14; responsive testimony of Mr. Bunn at the hearing.

To any agency offering special pay rates, S. 507 provides authority to modify those rates as appropriate to implement the Act. The measure was modified during Committee consideration to ensure that agencies have the regulatory authority to carry out such actions. The bill also extends coverage of this statute to employees under alternative hiring authorities, such as Department of Veterans Affairs employees whose pay is authorized under title 38 of the U.S. Code, who currently receive a non-foreign COLA, but who might otherwise be ineligible to receive locality pay.

Many postal employees in the non-foreign areas expressed concern over how they would be treated under OPM's proposal, under which they would continue to receive T-COLA payments. Many of these employees expressed a desire to receive locality pay like all other workers in the non-foreign areas, as they were concerned about being the only group of employees receiving non-foreign COLA. S. 3013 as introduced in May of 2008 would have allowed postal employees to transition from T-COLA to Territorial Pay, which would have been similar to locality pay, in the same manner that GS workers were converting from non-foreign COLA to locality pay. The Postal Service expressed opposition to these provisions because of the cost, which was estimated to be \$12.5 million per year, and because the payment of an allowance similar to locality pay to some postal employees could be seen as setting a precedent for other postal workers.<sup>30</sup> To reconcile these competing concerns, S. 3013 as amended by this Committee, and S. 507 as introduced, would allow Postal Inspectors and employees of the Postal Service Office Inspector General in the non-foreign areas to transition to locality pay like other federal employees in the non-foreign areas, because these classes of postal employees in the contiguous U.S. now receive locality pay. Other postal employees in the non-foreign areas would continue to receive T-COLA. However, the 25 percent cap would be lifted for these employees, and they would receive the greater of the locked-in T-COLA rate in effect for the area or an amount equal to the locality pay rate in effect for the area. Consistent with current law, the T-COLA rates would not be subject to collective bargaining.

### III. LEGISLATIVE HISTORY

On May 13, 2008, Senators Akaka, Stevens, Inouye, and Murkowski introduced the Non-Foreign Area Retirement Equity Assurance Act of 2008, or the Non-Foreign AREA Act (S. 3013). On May 29, 2008, the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the Committee on Homeland Security and Governmental Affairs held a field hearing at the Oahu Veterans Center in Honolulu, Hawaii, to consider S. 3013 and OPM's proposal.<sup>31</sup> Witnesses included Mr. Charles D. Grimes, Deputy Associate Director, Strategic Human Resources Policy Division, OPM; Mr. Bradley Bunn, Program Executive Officer, NSPS, DoD; Ms. Jo Ann Mitchell, Manager, Account-

<sup>30</sup> Letter to Senator Akaka from Marie Therese Dominguez, Vice President, Government Relations and Public Policy, May 16, 2008.

<sup>31</sup> "Non-Foreign COLA: Finding an Equitable Solution," Hearing before the Oversight of Government Management, the Federal Workforce, and the District of Columbia Subcommittee of the Senate Committee on Homeland Security and Governmental Affairs, S. Hrg. 110-657 (May 29, 2008).

ing Services, United States Postal Service; Ms. Joyce Matsuo, President, Oahu COLA Defense Committee, Inc.; Ms. Sharon Warren, President, COLA Defense Committee of Anchorage, Inc.; Mr. Manuel Q. Cruz, President, COLA Defense Committee of Guam; Mr. Michael Fitzgerald, President, Chapter 187, Naval Facilities Engineering Command Hawaii, Federal Managers Association; and Ms. Terry Kaolulo, President, Hawaii State Association of Letter Carriers. On June 25, 2008, this Committee ordered S. 3013 reported favorably with amendments,<sup>32</sup> and on October 2, 2008 the bill passed the Senate by unanimous consent with a further amendment. However, S. 3013 failed to move through the House before the 110th Congress adjourned *sine die*.

S. 507 was introduced by Senators Akaka, Murkowski, Inouye, and Begich on March 2, 2009, and was referred to this Committee and further referred to the Subcommittee. On March 31, 2009, the Subcommittee favorably polled out S. 507, and the Committee considered the bill on April 1, 2009. Senator Akaka offered an amendment that made technical corrections to ensure that the bill covers Senior Level Scientific and Technical professionals and to provide agencies the authority to make pay adjustments through regulations to comply with the provisions of this Act. The amendment was accepted and the bill, as amended, was ordered reported favorably by voice vote. Members present were Chairman Lieberman; Senators Akaka, Carper, Pryor, Tester, Burris, and Bennet; Ranking Minority Member Collins; and Senators Coburn, and Voinovich.

#### IV. SECTION-BY-SECTION ANALYSIS

##### *Section 1. Short title*

This section states that the legislation may be cited as the “Non-Foreign Area Retirement Equity Assurance Act of 2009” or the “Non-Foreign AREA Act of 2009.”

##### *Section 2. Extension of locality pay*

*Subsection (a), Locality-Based Comparability Payments.* This subsection amends section 5304 of title 5, United States Code, to include the non-foreign areas in the list of areas where locality pay is paid to federal employees, and to clarify that members of the Senior Executive Service (SES), including those in the Drug Enforcement Administration and Federal Bureau of Investigation, and senior level scientific and technical professionals in the non-foreign areas are eligible to receive locality pay regardless of whether their agencies are participating in an OPM-certified performance appraisal system.

*Subsection (b), Allowances Based on Living Costs and Conditions of Environment.* This subsection amends section 5941 of title 5 to retain a cost-of-living allowance (COLA) that is phased out as locality pay is phased in. Paragraph (1) freezes the non-foreign COLA rates that are in effect on the date of enactment. Paragraphs (2) and (3) establish a transition period beginning January 1, 2010, and adjust non-foreign COLA rates downward as locality pay is phased in. This downward adjustment is governed by a formula under which, for every dollar of locality pay that the employee re-

<sup>32</sup>S. Rep. 110-456 (Sept. 11, 2008).

ceives, the employee will give up 65 cents of the frozen non-foreign COLA, helping to mitigate the cost burdens from federal income taxes and additional retirement contributions due on locality pay.

*Section 3. Adjustment of special rates*

*Subsection (a), In General; Subsection (b), Agencies with Statutory Authority.* These subsections state that employees in the non-foreign areas who receive special rates under 5 U.S.C. § 5305 or similar authority will not receive locality pay. Instead, their special rates will be increased by the same amount as locality pay increases for other federal employees in the non-foreign areas who do not receive special rates. These increases continue until the employees' non-foreign COLA rates have been completely phased out. (Special rates are rates of basic pay higher than those ordinarily authorized, which OPM may establish to address specific recruitment or retention problems.)

*Subsection (c), Temporary Adjustment.* The Director of OPM and the heads of other agencies may raise statutory limitations otherwise applicable to special rates until the end of the transition period, at which time any special rate pay in excess of those limitations will be converted to a "retained rate" to which the affected employees would remain eligible under section 5363 of title 5.

*Section 4. Transition schedule for locality-based comparability payments*

This section states that non-foreign COLA will be phased out and that locality pay will be phased in over a period of three years starting the first pay period beginning on or after January 1, 2010. During 2010, the amount of locality pay phased in will be one-third of the locality pay percentage for the "rest of the U.S." locality pay area. In 2011, the phased-in amount will be two-thirds of the applicable comparability payment approved by the President for each non-foreign area. In the third year, 2012, and each subsequent year, the full amount of the applicable comparability payment for each non-foreign area will be used.

*Section 5. Savings provision*

*Subsection (a), Sense of Congress.* This subsection expresses the sense of Congress that the application of the Act should not result in a decrease in the take-home pay of any employee and that no employee should receive less than the "rest of U.S." locality pay rate after the phase-in period. It also states that it is Congress's sense that the Bureau of Labor Statistics should conduct surveys in all of the non-foreign areas to determine if there are pay disparities, and the President's Pay Agent should take necessary steps to address any pay disparity discovered. Furthermore, it expresses the sense of the Congress that the President's Pay Agent will establish one new locality area for the State of Hawaii and one new locality area for the State of Alaska.

*Subsection (b), Savings Provision.* This subsection states that employees who currently receive a special rate and continue to be stationed in a non-foreign area will receive an increase in the special rate consistent with increases in the special rate schedule. The minimum step rate for any grade of a special rate will be increased at the time of an increase in the applicable locality rate percentage

for the area by not less than the dollar increase in the locality payment for a non-special rate employee. In addition, this section states that if an employee currently receives non-foreign COLA, and if the amount of locality pay under this bill plus the amount of employee's basic pay would exceed the cap on basic pay plus locality pay established under section 5304(g) of title 5, the employee would continue to receive the non-foreign COLA rate in effect for the area until the employee either leaves the allowance area or is eligible to receive a basic pay plus locality pay at a higher rate.

*Section 6. Application to other eligible employees*

*Subsection (a), In General.* This subsection defines who is an employee covered by this Act. Covered employees include current and future employees to whom the Government is authorized to pay non-foreign COLA, whether or not they are actually paid it. This includes employees at the Transportation Security Administration, intelligence community employees, Veterans' Administration, and postal employees. Employees who receive locality pay as a result of this Act will not be permitted to bargain over the amount of locality pay they receive and will not have any amount of locality pay provided under this Act withheld on the basis of employee performance. Further, except for postal employees, covered employees will receive locality pay whether or not they are eligible for locality pay under current law, including Department of Veterans Affairs employees whose pay is authorized under title 38 of the United States Code.

*Subsection (b), Postal Employees in Non-Foreign Areas.* This subsection states that the provisions of this Act converting Territorial COLA to locality pay will apply to Postal Inspectors and employees of the Postal Service Office of Inspector General, but not to other postal employees such as mail handlers, letter carriers, and postal supervisors. Those postal employees in the non-foreign areas will continue to receive T-COLA. However, the method for calculating the T-COLA rate will change, and the cap on the amount of T-COLA an employee may receive will be lifted. Under the Act, current and future postal employees will receive a T-COLA rate that is the greater of the frozen T-COLA rate on December 31, 2009, or the applicable locality pay percentage for the area.

*Section 7. Election of additional basic pay for annuity computation by employees*

This section states that employees who retire from federal service between January 1, 2010, and December 31, 2012, may file an election with OPM to count a certain amount of non-foreign COLA they receive during that time period as if it were locality pay for purposes of computing their retirement annuity. The limit on the amount of non-foreign COLA an employee may count as locality pay is the amount of locality pay that would be in effect for that area if not for the phase in provisions in section 4 of this Act. An employee who files an election must pay into the Civil Service Retirement and Disability Retirement Fund additional funds to cover the amount they would have paid if they had been in a locality-pay area during that period, plus any interest prescribed under 5 U.S.C. 8334(e). The employing agency shall also pay an amount for applicable agency contributions.



### *Section 8. Regulations*

This section states that the Director of OPM will issue regulations to carry out this Act, including rules for special rate employees, employees who are not entitled to receive locality pay, and for setting and adjusting retained rates. In addition, the administrator of a pay system not administered by OPM and not required to pay locality adjustments to its employees will prescribe regulations consistent with OPM's regulations and with the concurrence of the Director of OPM.

### *Section 9. Effective dates*

This section makes the date of enactment the effective date of this Act, except for the phase-in periods starting January 1, 2010, as specified in sections 2 and 4 of the Act.

## V. ESTIMATED COST OF LEGISLATION

### *S. 507—Non-Foreign AREA Act of 2009*

Summary: S. 507 would phase in the use of locality-based comparability payments ("locality pay") to replace cost-of-living allowances (COLAs) for federal employees in certain areas of the United States (Alaska, Hawaii, and the U.S. Territories).

The bill would affect the amount of pay received by certain federal employees and the amount of future retirement benefits those employees receive. By increasing some salaries, S. 507 would result in additional agency payments for employees' retirement benefits and payroll taxes. In total, CBO estimates that discretionary spending would increase by \$2.5 billion through 2019, assuming appropriation of the necessary amounts. The legislation also would increase the amount of pay included in the calculation of retirement and Social Security benefits, thereby increasing direct spending by an estimated \$276 million over the 2010–2019 period. Furthermore, including additional pay in the calculation of retirement benefits would increase revenues—from higher employee contributions towards those benefits and from additional tax receipts—totaling an estimated \$979 million over the 2010–2019 period.

S. 507 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no cost on state, local, or tribal governments.

Estimated Cost to the Federal Government: The estimated budgetary impact of S. 507 is shown in the following table. The direct spending impacts of the bill fall within budget functions 600 (income security) and 650 (Social Security); the discretionary costs fall within many other budget functions.

	By fiscal year, in millions of dollars—											
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2010-2014	2010-2019
<b>CHANGES IN SPENDING SUBJECT TO APPROPRIATION (On-Budget)</b>												
<b>Salary payments and other discretionary spending:</b>												
Estimated authorization level .....	37	119	197	197	200	202	203	207	212	217	750	1,791
Estimated outlays .....	37	119	197	197	200	202	203	207	212	217	750	1,791
<b>Employer contributions:<sup>1</sup></b>												
Estimated authorization level .....	17	50	77	77	78	79	80	81	83	86	299	708
Estimated outlays .....	17	50	77	77	78	79	80	81	83	86	299	708
<b>Total changes in spending subject to appropriation:</b>												
Estimated authorization level .....	55	169	273	274	278	281	283	289	295	303	1,049	2,500
Estimated outlays .....	55	169	273	274	278	281	283	289	295	303	1,049	2,500
<b>CHANGES IN DIRECT SPENDING (OUTLAYS)</b>												
Total changes in direct spending: .....	2	6	12	20	26	32	38	43	46	50	67	276
On-budget revenues .....	2	6	12	20	26	31	37	42	45	48	66	269
Off-budget revenues .....	0	*	*	*	*	1	1	1	2	2	*	7
<b>CHANGES IN REVENUES</b>												
Total changes in revenues: .....	26	70	105	104	107	109	110	113	116	120	412	979
On-budget revenues .....	20	54	81	80	82	83	84	86	89	91	317	751
Off-budget revenues .....	5	16	24	24	25	25	26	27	27	28	95	229
<b>Memorandum:</b>												
Total intragovernmental collection from employer contributions: <sup>1</sup> .....	-17	-50	-77	-77	-78	-79	-80	-81	-83	-86	-299	-708
On-budget .....	-12	-34	-52	-52	-53	-54	-54	-55	-56	-57	-204	-480
Off-budget .....	-5	-16	-24	-24	-25	-25	-26	-27	-27	-28	-95	-229

<sup>1</sup> Employer contributions are intragovernmental transactions that do not affect the deficit.  
 Sources: Congressional Budget Office and Joint Committee on Taxation.  
 Notes: Components may not sum to totals because of rounding. \* = costs of less than \$500,000.

Basis of estimate: For this estimate, CBO assumes that S. 507 will be enacted near the end of fiscal year 2009 and that the necessary amounts will be appropriated for each year beginning in 2010. The bill would affect over 50,000 federal employees working in Alaska, Hawaii, Puerto Rico, the U.S. Virgin Island, Guam, and the Northern Mariana Islands.

Currently, federal employees in those areas receive a COLA to offset higher costs of living in those areas. (In contrast, federal employees in the contiguous 48 states receive locality pay under the General Schedule to narrow the pay gap between comparable federal and nonfederal positions.) S. 507 would phase in the use of locality pay for employees in the specified areas over three years and would phase out the COLA, in most cases, over a longer period of time. Such changes would affect the federal budget because, while the COLA is not subject to federal income or payroll taxes and is not used to calculate federal retirement benefits, locality pay is both taxable and creditable for retirement benefits.

*Spending subject to appropriations*

S. 507 would increase discretionary spending by \$2.5 billion over the 2010–2019 period, assuming the appropriation of necessary amounts, primarily for increased salary payments and agencies' payments for retirement benefits and payroll taxes.

*Salary payments and other spending.* The conversion to locality pay for eligible current and future federal employees in the designated jurisdictions would increase salaries by \$1.8 billion over the next 10 years. For those employees, a provision in S. 507 provides for a phase-out of COLAs over time, intended to preserve the take-home salaries of those employees as their nontaxable COLA pay is replaced with taxable locality pay. As a result, salaries would increase to maintain the take-home pay of affected employees.

A small amount of savings—\$2 million over 10 years—would result from discontinuing the surveys currently used by Office of Personnel Management to calculate the COLA adjustments for nonforeign areas.

*Employer contributions.* Similar to the rise in employees' contributions due to the transition to locality pay (which is creditable towards retirement), federal agencies' costs for payroll taxes and retirement contribution also would increase. Assuming appropriation of the necessary amounts, CBO estimates that spending for those contributions would increase by \$708 million through 2019. Those payments are intragovernmental transactions that are recorded as offsetting receipts elsewhere in the budget.

*Direct spending*

Increased retirement benefits (a product of increases in salaries) would accrue to approximately 13,000 federal employees anticipated to retire between 2010 and 2019. As a result, CBO estimates that direct spending would increase by a total of \$276 million over 10 years—\$269 million for additional retirement benefits and \$7 million for higher Social Security benefits.

Under S. 507, an estimated 8,300 employees of the U.S. Postal Service (USPS) would not convert to locality pay and would continue to receive COLAs, but a provision of the bill would adjust the

COLA calculation. If enacted, future calculations of COLAs for those employees would equal the greater of either the COLA in effect upon enactment of S. 507, or the locality pay applicable to other federal employees (that is, those who converted to locality pay under this bill) for that year and jurisdiction. CBO estimates that the provision could increase gross spending of about \$50 million (off-budget) over the 2010–2019 period. However, CBO assumes that any increase would be offset by additional receipts from postage rates charged by the USPS over the same period, and would have no net effect on the budget.

#### *Revenues*

S. 507 would increase the portion of salary on which employees must pay taxes and would increase the amount of pay used to calculate employees' contributions for federal retirement benefits. Accordingly, the legislation would increase revenues by a total of \$979 million over the next 10 years from additional income and payroll tax collections and from additional retirement contributions from employees, CBO and the Joint Committee on Taxation estimate. That total revenue change represents both on- and off-budget activity. Additional on-budget revenues would total \$751 million, including \$708 million from Medicare payroll taxes and income tax collections and \$43 million from higher contributions from employees toward retirement benefits. The increase in off-budget revenues would total \$229 million from additional Social Security tax receipts.

Intergovernmental and private-sector impact: S. 507 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no cost on state, local, or tribal governments.

Estimate prepared by: Federal Spending: Retirement—Amber G. Marcelino, Social Security—Sheila M. Dacey; Impact on Federal Revenues: Zachary Epstein; Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## VI. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. CBO states that there are no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and no costs on state, local, or tribal governments. The legislation contains no other regulatory impact.

## VII. CHANGES IN EXISTING LAW

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

**TITLE 5, UNITED STATES CODE: GOVERNMENT ORGANIZATION AND EMPLOYEES**

**PART III—EMPLOYEES**

**CHAPTER 53—PAY RATES AND SYSTEMS**

**Subchapter I—Pay Comparability System**

**SEC. 5304. LOCALITY-BASED COMPARABILITY PAYMENTS.**

\* \* \* \* \*

(f)(1) The pay agent may provide for such pay localities as the pay agent considers appropriate, except that—

【(A) each General Schedule position (excluding any outside the continental United States, as defined in section 5701(6)) shall be included with a pay locality;】

*(A) each General Schedule position in the United States, as defined under section 5921(4), and its territories and possessions, including the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands, shall be included within a pay locality; and*

(B) the boundaries of pay localities shall be determined based on appropriate factors which may include local labor market patterns, commuting patterns, and practices of other employers.

(2)(A) The establishment or modification of any such boundaries shall be effected by regulations which, notwithstanding subsection (a)(2) of section 553, shall be promulgated in accordance with the notice and comment requirements of such section.

(B) Judicial review of any regulation under this subsection shall be limited to whether or not it was promulgated in accordance with the requirements referred to in subparagraph (A).

(g)(1) Except as provided in paragraph (2), comparability payments may not be paid at a rate which, when added to the rate of basic pay otherwise payable to the employee involved, would cause the total to exceed the rate of basic pay payable for level IV of the Executive Schedule.

(2) The applicable maximum under this subsection shall be level III of the Executive Schedule for—

(A) positions under subparagraphs (A)–(C) of subsection (h)(1); **【and】**

(B) any positions under subsection (h)(1)(D) which the President may determine; *and*

*(C) positions under subsection (h)(1)(C) not covered by appraisal systems certified under section 5382; and*

(3) *The applicable maximum under this subsection shall be level II of the Executive Schedule for positions under subsection (h)(1)(C) covered by appraisal systems certified under section 5307(d).*

(h)(1) For the purpose of this subsection, the term “position” means—

(A) a position to which section 5376 applies (relating to certain senior-level positions);

(B) a position to which section 5372 applies (relating to administrative law judges appointed under section 3105); **[and]**

(C) a *Senior Executive Service* position under section 3132 or 3151 or a senior level position under section 5376 stationed within the United States, but outside the 48 contiguous States and the District of Columbia in which the incumbent the day before the date of enactment of the *Non-Foreign Area Retirement Equity Assurance Act of 2008* was eligible to receive a cost-of-living allowance under section 5941; and

(D) a position within an Executive agency not covered under the General Schedule or any of the preceding subparagraphs, the rate of basic pay for which is (or, but for this section, would be) no more than the rate payable for level IV of the Executive Schedule;

but does not include—

(i) a position to which subchapter IV applies (relating to prevailing rate systems);

(ii) a position as to which a rate of pay is authorized under section 5377 (relating to critical positions);

(iii) a position to which subchapter II applies (relating to the Executive Schedule);

(iv) a *Senior Executive Service* position under section 3132, *except for members covered by subparagraph C*;

(v) a position in the Federal Bureau of Investigation and Drug Enforcement Administration *Senior Executive Service* under section 3151, *except for members covered by subparagraph C*; or

(vi) a position in a system equivalent to the system in clause (iv), as determined by the President's Pay Agent designated under subsection (d).

(2)(A) Notwithstanding subsection (c)(4) or any other provision of this section, but subject to subparagraph (B) and paragraph (3), upon the request of the head of an Executive agency with respect to 1 or more categories of positions, the President may provide that each employee of such agency who holds a position within such category, and within the particular locality involved, shall be entitled to receive comparability payments.

(B) A request by an agency head or exercise of authority by the President under subparagraph (A) shall cover—

(i) with respect to the positions under subparagraphs (A) through (C) of paragraph (1), all positions described in the subparagraph or subparagraphs involved (excluding any under clause (i), (ii), (iii), (iv), (v), or (vi) of such paragraph); and

(ii) with respect to positions under paragraph (1)(D), such positions as may be considered appropriate (excluding any under clause (i), (ii), (iii), (iv), (v), or (vi) of paragraph (1)).

(C) Notwithstanding subsection (c)(4) or any other provision of law, but subject to paragraph (3), in the case of a category with positions that are in more than 1 Executive agency, the President may, on his own initiative, provide that each employee who holds a position within such category, and in the locality involved, shall be entitled to receive comparability payments. No later than 30 days before an employee receives comparability payments under this subparagraph, the President or the President's designee shall submit a detailed report to the Congress justifying the reasons for

the extension, including consideration of recruitment and retention rates and the expense of extending locality pay.

(3) Comparability payments under this subsection—

(A) may be paid only in any calendar year in which comparability payments under the preceding provisions of this section are payable with respect to General Schedule positions within the same locality;

(B) shall take effect, within the locality involved, on the first day of the first applicable pay period commencing on or after such date as the President designates (except that no date may be designated which would require any retroactive payments), and shall remain in effect through the last day of the last applicable pay period commencing during that calendar year;

(C) shall be computed using the same percentage as is applicable, for the calendar year involved, with respect to General Schedule positions within the same locality; and

(D) shall be subject to the applicable limitation under subsection (g).

## CHAPTER 59—ALLOWANCES

### Subchapter IV—Miscellaneous Allowances

#### SEC. 5941. ALLOWANCES BASED ON LIVING COSTS AND CONDITIONS OF ENVIRONMENT; EMPLOYEES STATIONED OUTSIDE CONTINENTAL UNITED STATES OR ALASKA

(a) Appropriations or funds available to an Executive agency, except a Government controlled corporation, for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances to these employees. The allowance is based on—

(1) living costs substantially higher than in the District of Columbia;

(2) conditions of environment which differ substantially from conditions of environment in the continental United States and warrant an allowance as a recruitment incentive; or

(3) both of these factors.

The allowance may not exceed 25 percent of the rate of basic pay. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies. *Notwithstanding any preceding provision of this subsection, the cost-of-living allowance rate based on paragraph (1) of this subsection shall be the cost-of-living allowance rate in effect on the date of enactment of the Non-Foreign Area Retirement Equity Assurance Act of 2009, except as adjusted under subsection (c).*

*(b) This section shall apply only to areas that are designated as cost-of-living allowance areas as in effect on December 31, 2009.*

*(c)(1) The cost-of-living allowance rate payable under this section shall be adjusted on the first day of the first applicable pay period beginning on or after—*

*(A) January 1, 2010; and*

*(B) on January 1 of each calendar year in which a locality-based comparability adjustment takes effect under section 4(2)*

and (3) of the Non-Foreign Area Retirement Equity Assurance Act of 2009.

(2)(A) In this paragraph, the term “applicable locality-based comparability pay percentage” means, with respect to calendar year 2010 and each calendar year thereafter, the applicable percentage under section 4(1), (2), or (3) of the Non-Foreign Area Retirement Equity Assurance Act of 2009.

(B) Each adjusted cost-of-living allowance rate under paragraph (1) shall be computed by—

(i) subtracting 65 percent of the applicable locality-based comparability pay percentage from the cost-of-living allowance percentage rate in effect on December 31, 2009; and

(ii) dividing the resulting percentage determined under clause (i) by the sum of—

(I) one; and

(II) the applicable locality-based comparability payment percentage expressed as a numeral.

(3) No allowance rate computed under paragraph (2) may be less than zero.

(4) Each allowance rate computed under paragraph (2) shall be paid as a percentage of basic pay (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law).

[(b)] (d) An employee entitled to a cost-of-living allowance under section 5924 of this title may not be paid an allowance under subsection (a) of this section based on living costs substantially higher than in the District of Columbia.

## TITLE 39, UNITED STATES CODE: POSTAL SERVICE

### PART III—PERSONNEL

#### CHAPTER 10—EMPLOYMENT WITHIN THE POSTAL SERVICE

##### Subchapter I—Pay Comparability System

#### SEC. 1005. APPLICABILITY OF LAWS RELATING TO FEDERAL EMPLOYEES.

\* \* \* \* \*

(b)(1) [Section 5941] *Except as provided under paragraph (2), section 5941 of title 5 shall apply to the Postal Service. [For purposes of such section,] Except as provided under paragraph (2), for purposes of section 5941 of that title, the pay of officers and employees of the Postal Service shall be considered to be fixed by statute, and the basic pay of an employee shall be the pay (but not any allowance or benefit) of that officer or employee established in accordance with the provisions of this title.*

(2) *On and after the date of enactment of the Non-Foreign Area Retirement Equity Assurance Act of 2009—*



*(A) the provisions of that Act and section 5941 of title 5 shall apply to officers and employees covered by section 1003(b) and (c) whose duty station is in a nonforeign area; and*

*(B) with respect to officers and employees of the Postal Service (other than those officers and employees described under subparagraph (A)) section 6(b)(2) of that Act shall apply.*

