## OFFICE OF COMPLIANCE

Hon ROBERT C. BYRD,
*President pro tempore, United States Senate, Washington, DC, November 13, 2001.*

DEAR SENATOR BYRD: Pursuant to section 4(c)(4) of the Veterans Employment Opportunities Act of 1998 (''VEOA'') (2 U.S.C. §1316a(4)) and section 304(b) of the Congressional Accountability Act of 1995 (2 U.S.C. §1384(b)), I am submitting on behalf of the Office of Compliance, U.S. Congress, this notice of proposed rulemaking for publication in the Congressional Record. This notice seeks comment on substantive regulations being proposed to implement section 4(c) of VEOA, which affords to covered employees of the legislative branch the rights and protections of selected provisions of veterans' preference law.

Very truly yours,

SUSAN S. ROBFOGEL,
*Chair of the Board.*

OFFICE OF COMPLIANCE

The Veterans Employment Opportunities Act of 1998: Extension of Rights and Protections Relating to Veterans' Preference Under Title 5, United States Code, to Covered Employees of the Legislative Branch

NOTICE OF PROPOSED RULEMAKING

*Summary:* The Board of Directors of the Office of Compliance (''Board'') is publishing proposed regulations to implement section 4(c)(4) of the Veterans Employment Opportunities Act of 1998 (''VEOA''), Pub. L. 105–339, 112 Stat. 3186, codified at 2 USC §1316a, as applied to covered employees of the House of Representatives, the Senate, and certain Congressional instrumentalities.

The VEOA applies to the legislative branch the rights and protections pertaining to veterans' preference established under section 2108, sections 3309 through 3312, and subchapter I of chapter 35, of title 5, United States Code (''USC'').

This Notice proposes that identical regulations be adopted for the Senate, the House of Representatives, and the six Congressional instrumentalities and for their covered employees. Accordingly:

(1) *Senate*. It is proposed that regulations as described in this Notice be included in the body of regulations that shall apply to the Senate and employees of the Senate, and this proposal regarding the Senate and its employees is recommended by the Office of Compliance's Deputy Executive Director for the Senate.

(2) *House of Representatives*. It is further proposed that regulations as described in this Notice be included in the body of regulations that shall apply to the House of Representatives and employees of the House of Representatives, and this proposal regarding the House of Representatives and its employees is recommneded by the Office of Compliance's Deputy Executive Director for the House of Representatives.

(3) *Certain Congressional instrumentalities*. It is further proposed that regulations as described in this Notice be included in the body of regulations that shall apply to the Capitol Guide Service, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, and the Office of Compliance, and their employees; and this proposal regarding these six Congressional instrumentalities is recommended by the Office of Compliance's Executive Director.

*Dates:* Interested parties may submit comments within 30 days after the date of publication of this Notice of Proposed Rulemaking in the Congressional Record.

*Addresses:* Submit written comments (an original and 10 copies) to the Chair of the Board of Directors, Office of Compliance, Room LA 200, John Adams Building, 110 Second Street, S.E., Washington, DC 20540–1999. Those wishing to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. Comments may also be transmitted by facsimile machine to (202) 426–1913. This is not a toll-free call. Copies of comments submitted by the public will be available for review at the Law Library Reading Room, Room LM–201, Law Library of Congress, James Madison Memorial Building, Washington, DC, Monday through Friday, between the hours of 9:30 a.m. and 4:00 p.m.

*For Further Information Contact:* Executive Director, Office of Compliance at (202) 724–9250. This notice is also available in the following formats: large print, Braille, audiotape, and electronic file on computer disk. Requests for this notice in an alternative format should be made to the Director, Central Operations Department, Office of the Senate Sergeant at Arms, (202) 224–2705.

*Supplementary Information:*

*Background*

The Veterans Employment Opportunities Act of 1998[1] ''strengthen[s] and broadens''[2] the rights and remedies available to military veterans who are entitled, under the Veterans' Preference Act of 1944[3] (and its amendments), to preferred consideration in appointment to the Federal civil service of the executive branch and in retention during reductions in force (''RIFs''). In addition, and most relevant to this NPR, VEOA affords to ''covered employees'' of the legislative branch (as defined by section 101 of the Congressional Accountability Act (''CAA'') (2 USC §1301)) the rights and protections of selected provisions of veterans' preference law. VEOA §4(c)(2). The selected statutory sections made applicable to such legislative branch employees by VEOA may be summarized as follows.

A definitional section prescribes the categories of military veterans who are entitled to preference (''preference eligible''). 5 USC §2108. Generally, a veteran must be disabled or have served on active duty in the Armed Forces during certain specified time periods or in specified military campaigns to be entitled to preference. In addition, certain family members (mainly spouses, widow[er]s, and mothers) of preference eligible veterans are entitled to the same rights and protections.

In the appointment process, a preference eligible individual who is tested or otherwise numerically evaluated for a position in the competitive service is entitled to have either 5 or 10 points added to his/her score, depending on his or her military service, or disabling condition. 5 USC §3309. Where experience is a qualifying element for a job in the competitive service, a preference eligible individual is entitled to credit for having relevant experience in the military or in various civic activities. 5 USC §3311. Where physical requirements (age, height, weight) are a qualifying element for a position in the competitive service, preference eligible individuals (including those who are disabled) may obtain a waiver of such requirements in certain circumstances. 5 USC §3312. For certain positions in the competitive service (guards, elevator operators, messengers, custodians), only preference eligible individuals can be considered for hiring so long as such individuals are available. 5 USC §3310.

Finally, in prescribing retention rights during RIFs for positions in both the competitive and in the excepted service, the sections in subchapter I of chapter 35 of Title 5, USC, with a slightly modified definition of ''preference eligible,'' require that employing agencies give ''due effect'' to the following factors: (a) employment tenure (i.e., type of appointment); (b) veterans' preference; (c) length of service; and, (d) performance ratings. 5 USC §§3501, 3502. Such considerations also apply where RIFs occur in connection with a transfer of agency functions from one agency to another. 5 USC §3503. In addition, where physical requirements (age, height, weight) are a qualifying element for retention, preference eligible individuals (including those who are disabled) may obtain a waiver of such requirements in certain circumstances. 5 USC §3504.

On February 28, 2000, and March 9, 2000, an Advanced Notice of Proposed Rulemaking (''ANPR'') was published in the Congressional Record (144 Cong. Rec. S862 (daily ed., Feb. 28, 2000), H916 (daily ed., Mar. 9, 2000)). The ANPR identified a number of interpretative issues on which the Board sought public comment in order to assist it in proposing the substantive regulations mandated under section 4(c)(4) of VEOA. The Board had sought to obtain an array of information regarding the employment policies and practices in the various employing offices affected by VEOA. In addition, the Board sought to gain any relevant information that might aid the Board in interpreting VEOA. In response to the ANPR, the Board received two written comments, one of which was from a local unit of a labor organization and the other of which was from the national office of the same labor organization. Both comments focused on the issue of whether the term *guard* in section 3310 of 5 USC, applied by VEOA, should be interpreted to included officers and other employees of the U.S. Capitol Police. The Board received no further public input to assist it in resolving the other issues outlined in the ANPR. Therefore, the Board upon its own further research and study has decided to propose substantive regulations implementing the relevant portions of VEOA. What follows is a discussion of how the Board, tentatively at least, proposes to address the thirteen interpretative issues identified in the ANPR.

*Discussion of interpretative issues*

*Interpretation of term ''competitive service'' and ''excepted service'' as applied to the legislative branch* [Issues (1)–(7)].

The ANPR observed that VEOA confers upon covered employees the statutory rights and protections of veterans' preference in appointments to the ''competitive service.'' The ANPR also explained that veterans'' preference rights in the context of a reduction in force, as provided in the application of subchapter I of chapter 35 of title 5, USC and under VEO, are, with one exception, applicable to both the competitive service and to the excepted service. Moreover, OPM's implementing regulations regarding reductions in force, set forth in 5 CFR part 351, are couched in terms that assume application to the ''competitive service'' and the ''excepted service.'' Thus the definitions of these two terms, as applied to the legislative branch by virtue of VEOA, are central to a determination of the substantive veterans' preference rights which now apply to covered employees.

The Board received no written comments in response to a series of questions exploring how to interpret these statutory categories of Federal service. In the absence of illuminating comment or contrary definitions in VEOA, the Board believes that it must define these terms in accordance with their meaning under derivative sections of title 5, USC, made applicable by VEOA. This conclusion is

[1] Pub. L. 105–339, 112 Stat. 3186 (Oct. 31, 1998).

[2] Sen. Rept. 105–340, 105 Cong., 2d Sess. at 19 (Sept. 21, 1998).

[3] Act of June 27, 1944, ch. 287, 58 Stat. 387, amended and codified in various provisions of Title 5, USC.

supported by a directive in VEOA to issue regulations that are consistent with section 225 of the CAA (2 USC §1361), one of whose subsections embraces a rule of construction that ''definitions and exemptions in the laws made applicable by this [Congressional Accountability] Act shall apply under this [Congressional Accountability] Act.'' This section enables the Board to flesh out the meaning and scope of the various federal employment laws made applicable under the CAA by referring to their respective definitions and exemptions even though they are not expressly cited in the CAA.[4]

Section 2102 of Title 5 USC, as applied under VEOA, presents a three-fold definition of the term ''competitive service'': First, the competitive service consists of ''all civil service positions in the *executive branch*,'' with exceptions for (a) positions specifically excepted from the competitive service by statute , (b) positions requiring Senate confirmation, and (c) positions in the Senior Executive Service.[5] 5 USC §2102(a)(1)(A)–(C) (emphasis added). Second, the competitive service includes ''civil positions not in the executive branch which are specifically included in the competitive service by statute.'' 5 USC §2102(a)(2). Third, the competitive service encompasses those ''positions in the government of the District of Columbia which are specifically included in the competitive service by statute.'' 5 USC §2102(a)(3).

Section 2103 of Title 5 further defines the ''excepted service'' to include all ''civil service positions which are not in the competitive or the Senior Executive Service.'' 5 U.S.C. §2103. And section 2101 of that Title defines the ''civil service'' to include ''all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services.'' 5 U.S.C. §2101(1).

As applied under VEOA, it would seem that section 225 requires the Board to issue regulations that take into account the definitions (and exemptions) accompanying the civil service laws from which the rights and protections of veterans' preference are derived. Accordingly, the Notice proposes a section, in the form of a proviso, requiring that the terms ''competitive service'' and ''excepted service'' in the proposed regulations be defined in reference to their statutory meaning in Title 5, USC. Where an applied regulation refers to the ''competitive service,'' such term shall have the meaning as provided in 5 USC §2102(a)(2). Where an applied regulation refers to the ''exempted service,'' such term shall have the meaning as provided in 5 USC §2103. Consistent with the definition under section 2103, it is the position of the Board that all ''covered employees''[6] holding civil service positions in the legislative branch are within the definition of excepted service, unless otherwise designated by statute as being competitive service or Senior Executive Service positions.[7]

The Board recognizes that the adoption of these definitions, consistent with the mandate of section 225, yields an unusual result in that no ''covered employee'' in the legislative branch currently satisfies the definition of ''competitive service.'' Moreover, as the substantive protections of veterans' preference in legislative branch appointment apply only to ''competitive service'' positions, the regulations which the Board proposes regarding preference in appointment would with one noted exception, currently apply to no one.[8] However, should Congress, by statute, hereinafter designate any civil service positions in the legislative branch as ''competitive service'' positions, then consistent with the second definition of section 2102(a)(2) and the parallel regulation proposed herein, the substantive regulations regarding veterans' preference in appointment would apply.

*Authority of Board to exercise powers and responsibilities similar to that of OPM in executing, administering, and enforcing the federal service system* [Issues (8)–(10)].

The ANPR contrasted the regulatory authority vested in OPM and in the Board of Directors of the Office of Compliance with respect to personnel management matters. Congress has established OPM as an independent agency in the executive branch and authorized it to exercise broad powers administering the civil service laws. See 5 U.S.C. §§1101, 1103–04, 1301–04.[9] It has a number of significant responsibilities, including the promulgating of rules and regulations that implement the various civil service laws and the classifying of positions in the executive branch for purposes of appointment, pay, and promotion. In addition, OPM exercises broad administrative powers over the competitive service, including the authority to develop and conduct examinations for the appointment of applicants into the competitive service and the authority to administer rules exempting positions from the competitive service.[10]

The ANPR concluded that VEOA does not vest the Board of Directors with authority comparable to that of OPM to execute, administer, and enforce a civil service system within the legislative branch. This is most clearly evident from the fact that VEOA did not make applicable to the Board the powers and responsibilities exercised by OPM under 5 U.S.C. §§1103–04, 1301–04, among other sections.

Insofar as the Board's authority under VEOA is not coextensive with that of OPM, the ANPR identified two legal implications. First, the Board's power to promulgate veterans' preference regulations that are the ''same as'' those of OPM may be circumscribed to some degree. To illustrate, if OPM has promulgated a regulation under the combined authority of two statutory sections, A and B, but the Board is given authority only under section A, any corresponding regulation proposed by the Board must be tailored to reflect only the standard, directive, or power of section A. Thus, some regulations of OPM may have to be adopted with modifications to reflect their narrower statutory basis. Other OPM regulations may not be adopted at all simply because the Board does not have the underlying statutory authority.

The second implication identified by the ANPR was that where the veterans' preference regulations contemplate a role by OPM,[11] the Board of Directors might not be empowered to exercise a comparable administrative role with respect to personnel matters in the legislative branch.

The Board received no written comments addressing these issues. Upon further study and reflection, the Board has concluded that the if the provisions of VEOA are to be given

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[4] *Compare* Notice of Proposed Rulemaking [Fair Labor Standards Act regulations under Congressional Accountability Act], 141 CONG. REC. S17603, S17604 (Daily Ed. Nov. 28, 1995)(in proposing the substantive regulations of the FLSA, 29 USC §201 *et seq.*, the Board cited section 225(f)(1) of the CAA as requiring the application of the FLSA definition of ''wages'' in 29 USC §203(m).

[5] These generally are high-level, managerial positions in the executive department whose appointment does not require Senate confirmation. *See* 5 USC §3123 (a)(2), which defines the term ''Senior Executive Service position.''

[6] The definition of ''covered employee'' under section VEO §4(c)(1) has the same meaning as the term under section 101 of the CAA, 2 USC §1302, which includes any employee of the House of Representatives, the Senate, the Capitol Guide Service, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, or the Office of Technology Assessment. Under VEO §4(c)(5), the following employees are excluded from the term ''covered employee'': (A) presidential appointees confirmed by the Senate, (B) employees appointed by a Member of Congress or by a committee or subcommittee of either House of Congress, and (C) employees holding positions the duties of which are equivalent to those in Senior Executive Service.

[7] In the ANPR the Board had initially suggested that no ''covered employees'', as defined by VEOA, fall within the meaning of ''excepted service.'' Upon further review of the governing statutes, the Board herein submits that many ''covered employees'' within the legislative branch are encompassed by the term ''excepted service'' as discussed above. The definition of ''covered employee'' under section VEO §4(c)(1) has the same meaning as the term under section 101 of the CAA, 2 USC §1302, which includes any employee of the House of Representatives, the Senate, the Capitol Guide Service, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, or the Office of Technology Assessment. Under VEO §4(c)(5), the following employees are excluded from the term ''covered employee'': (A) presidential appointees confirmed by the Senate, (B) employees appointed by a Member of Congress or by a committee or subcommittee of either House of Congress, and (C) employees holding positions the duties of which are equivalent to those in Senior Executive Service. Consistent with the definition at section 2103 of title 5, USC, any covered employee within the legislative branch who holds a civil service position which is not in the Senior Executive Service and which is not in the competitive service is encompassed within the definition of ''excepted service.'' The regulations which the Board here proposes reflect this interpretation of the governing statutes.

[8] The Board proposes the potential application of the substantive regulations regarding veterans' preference in the appointment process insofar as the Office of the Architect of the Capital, pursuant to the Architect of the Capital Human Resources Act, has established a personnel management system with features analogous to the ''competitive service'' as defined in §2102(a)(2) of Title 5, USC. See Section 1.106 *infra*.

[9] *See also* 5 CFR §5.1, issued by the President, which states that the ''Director, Office of Personnel Management, shall promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act and the Veterans' Preference Act, as reenacted in Title 5, United States Code, the Civil Services Rules, and all other statutes and Executive orders imposing responsibilities on the Office.''

[10] The following summary explains in part the role of the OPM in the appointment of employees to competitive service positions in executive branch agencies:

''An employee typically becomes a member of the ''competitive service'' by taking an examination administered by the Office of Personnel Management (''OPM''). See 5 U.S.C. §3304 (1976 & Supp. V 1981). An applicant who meets the minimum requirements for entrance to an examination, and who receives a rating of 70 or more on the examination, is known as an ''eligible.'' 5 C.F.R. §§210.102(b)(5), 337.101(a) (1983). OPM is required to enter on a civil service ''register'' the names of all eligibles in accordance with their numerical rankings. 5 C.F.R. §332.401 (1983).

''An agency seeking to hire an employee must submit a request to OPM for a ''certificate'' of eligibles. When OPM receives a request for certification of eligibles, it prepares a certificate by selecting names from the head of the appropriate register. This certificate consists of a sufficient number of names to permit the agency to consider three eligibles for each vacancy, 5 C.F.R. §332.402 (1983), the so-called ''rule-of-three.'' A hiring official from the agency, known as the ''appointing officer,'' 5 C.F.R. §210.102(b)(1) (1983), is obliged to fill each vacancy ''with sole regard to merit and fitness'' from the three eligibles ranking highest on the certificate who are available for appointment. 5 C.F.R. §332.404 (1983).'' *Hondros* v. *Unites States Civil Service Commission*, 720 F.2d 278, 280–82 (3d Cir. 1983) (footnotes omitted).

[11] *See, e.g.*, 5 CFR §§330.401 (OPM's role in competitive examination in restricted positions), 330.403 (OPM's role in filling restricted positions by noncompetitive action of a nonpreference eligible), 332.401 (OPM's responsibility to maintain registers of eligibles), 337.101 (OPM's role in rating applicants).

their plain meaning, the Board must propose only those OPM regulations, modified as necessary, that can be linked to those statutory sections whose rights and protections have been made applicable to covered employees in the legislative branch. The Board further concludes that VEOA does not vest the Board of Directors of the Office of Compliance with the broad-ranging authority to execute, administer, and enforce a civil service system in the legislative branch.[12] Accordingly, in certain of the proposed regulations the references to OPM have been deleted. To the extent that the executive branch regulations directed OPM to exercise certain responsibilities, including setting of standards, exercising review of agency determinations, and engaging in oversight, those duties have been eliminated in the proposed regulations.

*Interpretation of provision restricting certain positions, including guards, to preference eligibles* [Issue (11)].

With respect to ''competitive service'' positions restricted to preference eligible individuals under 5 USC §3310, as applied by VEOA, namely guards, elevator operators, messengers, and custodians, the Board sought information and comment on a series of issues, including the identity, in the legislative branch, of guard, elevator operator, messenger, and custodian positions within the meaning of these statutory terms. A specific question was posed whether police officers and other employees of the United State Capitol Police should be considered ''guards.'' As noted previously, the only two written comments received in response to the ANPR addressed this latter issue.

Both comments argued that the term ''guard'' should not be interpreted to include officers of the U.S. Capitol Police. One comment contrasted the use of key terms within chapter 33 of Title 5, USC, which governs the examination, selection, and placement of personnel in the competitive service and from which selected provisions made applicable under VEOA to the legislative branch are drawn. Section 3310, which is made applicable by VEOA, uses the term ''guard.'' In contrast, section 3307, which addresses maximum-age requirements in the competitive service and which is not made applicable under VEOA, refers to ''law enforcement officer.'' Because of this differentiation within the same chapter of the U.S. Code, the commenter suggests that Congress could not have intended to treat a ''guard'' under section 3310 as analogous to a ''law enforcement officer.'' Since U.S. Capitol police officers have the authority of law enforcement officers (see 40 USC §§212–212a), they are not ''guards'' for purposes of section 3310 as applied.

The other comment makes a similar distinction between guards and law enforcement officers, relying upon the interpretations of OPM, which is responsible for administering the Federal government's occupation classification system. The commenter cites to two OPM publications, *Grade Evaluation Guide for Police and Security Guard Positions, GS–0083/GS–0085* and *Digest of Significant Classification Decisions and Opinions*, No. 8, April 1986. Together, these publications establish a distinction between police officers and guards in the executive branch.

The Board finds that the comments make a persuasive case for not equating officers of the U.S. Capitol Police with ''guards'' under section 3310 as applied by VEOA. The proposed rule includes a provision that explicitly excludes law enforcement officer positions of the U.S. Capitol Police from the substantive regulations implementing section 3310 as applied by VEOA.

*Executive branch regulations that either should not be adopted or should be adopted with modification* [Issues (12)–(13)].

The Board received no written comments addressing the questions posed in the ANPR as to which substantive regulations should not be adopted because they are based on statutory provisions that have not been made applicable under VEOA. Similarly, no comments were received on what modifications should be adopted to make the regulations more effective for the implementation of the rights and protections made applicable under VEOA.

Nevertheless, as explained above in the discussion concerning its authority to exercise powers comparable to OPM's, the Board has concluded that it may not propose regulations that are not based on statutory rights and protections made applicable under VEOA. Conversely, the Board believes that the regulations proposed in this Notice most appropriately fulfill the statutory mandate to adopt regulations that are the ''same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions'' of VEOA. To the extent that modifications are being proposed, the Board believes that they are warranted to reflect the more limited statutory authority which VEOA vests in the Board.

*Special provision for coverage of Architect of the Capitol*

While drafting the proposed regulations following the receipt of written comments to the ANPR, it came to the attention of the Board that the Office of the Architect of the Capitol has been under a special statutory mandate with respect to managing and supervising its human resources. Because AOC is part of the legislative branch, it has not generally been subject to many of the statutes that regulate personnel policy for Federal agencies. As a consequence, the General Accounting Office reported in 1994 that AOC's personnel system was deficient in many respects. GAO, ''Federal Personnel: Architect of the Capitol's System Needs Improvement,'' B–256160 (April 29, 1994). Congress responded by enacting the Architect of the Capitol Human Resources Act (AOCHRA). P.L. 103–283, 108 Stat. 1444 (July 22, 1994), codified at 40 U.S.C. §166b–7. This law did not directly bring the AOC within the purview of the various Federal personnel laws. Rather, the AOC was directed to establish its own personnel management system. As stated in AOCHRA, Congress found that the Architect should ''develop human resources management programs that are consistent with the practices common among other Federal and private sector organizations,'' and to that end, the Architect was directed ''to establish and maintain a personnel management system that incorporates fundamental principles that exist in other modern personnel systems.'' 40 U.S.C. §166b–7(b)(1),(2). The law then sets out in broad terms eight subject areas that a model personnel management system must address, leaving it to the Architect to develop a detailed plan for implementing these model policy goals no later than fifteen months after enactment. 40 U.S.C. §166b–7(c)(2)(A)–(H), (d)(1)(B),(C). Among these objectives is the requirement that the personnel management system ''ensure[] that applicants for employment and employees of the Architect of the Capitol are appointed, promoted, and assigned on the basis of *merit* and fitness after fair and equitable consideration of all applicants and employees through *open competition*.'' 40 U.S.C. §166b–7(c)(2)(A) (emphasis added).

The notion of merit selection based on open competition, of course, is a bedrock principle of the federal civil service system, particularly its competitive service component, as described in the ANPR, 146 Cong. Rec. S864 (Daily ed. February 29, 2000)(ANPR). Thus, instead of formally placing the job positions of the Architect's Office within the federal competitive service, which is contemplated under 5 U.S.C. §2101(a)(2),[13] Congress authorized the Architect's Office to devise its own personnel system independent of the competitive service (and of the oversight responsibilities of the Office of Personnel Management) but consistent with its animating principles.

AOCHRA did not specifically mandate that the Architect's Office incorporate veterans' preference principles into its merit selection system. And there is nothing in the public record to indicate that the AOC in practice affords qualified veterans some form of preference in the selection process. However, it seems equally true that there is nothing in AOCHRA to preclude the Architect from taking veterans' preference into account in making appointments, promotions, and assignments, the same way that an executive branch agency must afford veterans' preference to appointments to positions in the competitive service. Thus, the issue arises whether VEOA may be read *in pari materia* with AOCHRA, so as to make the substantive VEOA regulations concerning appointments applicable to AOC's merit selection system notwithstanding the fact that job positions subject to that system are not technically part of the ''competitive service.''

As noted above, the Board has tentatively concluded that it must limit the application of the substantive, veterans' preference appointment regulations to those legislative branch positions that are within the ''competitive service,'' as the latter term is defined in 5 U.S.C. §2102. As a practical matter, this may significantly limit the group of ''covered employees'' who will benefit from VEOA, since it appears that the vast majority of ''covered employees'' hold civil service positions in the legislative branch, including those in the Office of AOC, that are within the definition of excepted service.

However, the congressional policy declared in the enactment of AOCHRA may warrant the promulgation of a special regulation tailoring the application of the VEOA appointment regulations to positions in Office of the AOC, for it is a general rule of statutory construction that statutes on the same subject matter are to be construed together.[14] In this case, the specific obligations under VEOA to afford veterans' preference in connection with merit appointments would be interpreted in conjunction with the preexisting, general obligations under AOCHRA to establish a merit selection personnel system. If read together, the two statutes would seem to authorize the application of substantive VEOA regulations, at least those governing appointments, insofar as AOCHRA imposes obligations on the Office of the Architect of the Capitol to establish a personnel management system which at a minimum provides

[12] *Compare* Notice of Proposed Rulemaking [Fair Labor Standards Act regulations under Congressional Accountability Act], 141 Cong. Rec. S17603, S17604 (Daily Ed. Nov. 28, 1995)(explaining that because the CAA did not incorporate the notice posting and recordkeeping requirements of section 11 of the FLSA, 29 USC §211, the Board determined that it may not impose by substantive regulations such requirements on employing offices).

[13] ''The 'competitive service' consists of—. . .''(2) civil service positions not in the executive branch which are specifically included in the competitive service by statute;''

[14] N. Singer, Statutes and Statutory Construction §51.02, at 176–178 (6th ed. 2000). See, e.g., *United States* v. *Stewart*, 311 U.S. 60 (1940) (''It is clear that 'all acts in pari materia are to be taken together, as if they were one law.' '').

for appointment, promotion and assignment on the basis of merit and fitness after fair and equitable consideration of all applicants and employees through open competition.[15]

The Board has made no final determination on the soundness of this interpretation, in part due the fact that this has insufficient information on the elements of the merit selection system which the AOC has established under AOCHRA. The Board therefore believes that it is appropriate to solicit comments on what are the elements of the AOC's current merit selection system established under 40 U.S.C. §166b–7(c)(2)(A), and on whether in particular the AOC has a policy of giving preference to qualified veterans. Aside from the factual issue, the Board believes that comments should be solicited on the legal issue whether VEOA may be interpreted *in pari materia* with AOCHRA. In addition, the Board invites comments on the related question of how substantive regulations promulgated under VEOA may be applied to AOC's personnel management system, even assuming that it currently does not include a veterans' preference component, being mindful that the Board is authorized under VEOA to propose modifications for the more effective implementation of the rights and protections under VEOA. 2 U.S.C. §1316a(c)(4)(B).

In order to frame the issues for comment, the Board has decided to include in this NPR a proposed new section §1.106, which would apply the appointment regulations governing veterans' preference to appointments made pursuant to the merit selection system under AOCHRA. This section would apply the proposed regulations notwithstanding the fact that the job positions within the AOCHRA merit selection system are not technically within the ''competitive service.'' Insofar as AOCHRA imposes obligations on the Office of the Architect of the Capitol to establish a personnel management system which at a minimum provides for appointment, promotion and assignment on the basis of merit and fitness after fair and equitable consideration of all applicants and employees through open competition, the Architect of the Capitol would be required to afford to a covered employee, including an applicant veterans' preference, in a manner and to the extent consistent with these proposed regulations.

*Recommended Method of Approval*

The Board recommends that (1) the version of the proposed regulations that shall apply to the Senate and employees of the Senate be approved by the Senate by resolution; (2) the version of the proposed regulations that shall apply to the House of Representatives and employees of the House of Representatives be approved by the House of Representatives by resolution; and (3) the version of the proposed regulations that shall apply to other covered employees and employing offices be approved by the Congress by concurrent resolution.

Signed at Washington, D.C., on this 13th day of November, 2001.

SUSAN S. ROBFOGEL,
*Chair of the Board,*
*Office of Compliance.*

[15] CF. *United States* v. *Jefferson Electric Mfg. Co.*, 291 U.S. 386, 396 (1934) (''As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and the carried into effect comformably to it, excepting as a different purpose is plainly shown.'').

EXTENSION OF RIGHTS AND PROTECTIONS RELATING TO VETERANS' PREFERENCE UNDER TITLE 5, UNITED STATES CODE, TO COVERED EMPLOYEES OF THE LEGISLATIVE BRANCH (SECTION 4(C) OF THE VETERANS EMPLOYMENT OPPORTUNITIES ACT OF 1998)

*PART 1—MATTERS OF GENERAL APPLICABILITY TO ALL REGULATIONS PROMULGATED UNDER SECTION 4 OF THE VETERANS EMPLOYMENT OPPORTUNITIES ACT OF 1998*

Sec.
1.101 Purpose and scope
1.102 Definitions
1.103 Exclusion
1.104 Adoption of regulations
1.105 Coordination with Section 225 of Congressional Accountability Act
1.106 Application of regulations to certain positions of the Office of the Architect of the Capitol

**§ 1.101. Purpose and scope**

(a) *Section 4(c) of the VEOA.* The Veterans Employment Opportunities Act (VEOA) applies the rights and protections of sections 2108, 3309 through 3312, and subchapter I of chapter 35 of title 5 USC, to covered employees within the legislative branch.

(b) *Purpose and scope of regulations.* The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated pursuant to section 4(c)(4) of VEOA, in accordance with the rulemaking procedure set forth in section 304 of the CAA.

**§ 1.102. Definitions**

Except as otherwise provided in these regulations, as used in these regulations:

(a) *Act* or *CAA* means the Congressional Accountability Act of 1995 (Pub. L. 104–1, 109 Stat. 3, 2 U.S.C. §§1301–1438).

(b) *VEOA* means the Veterans Employment Opportunities Act of 1998 (Pub. L. 105–339, 112 Stat. 3182).

(c) Except as provided by §1.103, the term *covered employee* means any employee of (1) the House of Representatives; (2) the Senate; (3) the Capitol Guide Service; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; and (8) the Office of Compliance.

(d) The term *employee* includes an applicant for employment and a former employee.

(e) The term *employee of the Office of the Architect of the Capitol* includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.

(f) The term *employee of the Capitol Police* includes any member or officer of the Capitol Police.

(g) The term *employee of the House of Representatives* includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (8) of paragraph (c) above.

(h) The term *employee of the Senate* includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (8) of paragraph (c) above.

(i) The term *employing office* means: (1) the personal office of a Member of the House of Representatives or the Senate or a joint committee; (2) a committee of the House of Representatives or the Senate or a joint committee; (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or (4) the Capitol Guide Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, and the Office of Compliance.

(j) *Board* means the Board of Directors of the Office of Compliance.

(k) *Office* means the Office of Compliance.

(l) *General Counsel* means the General Counsel of the Office of Compliance.

(m) The term *agency* means employing office as defined by subsection (i).

**§ 1.103. Exclusions from definition of covered employee**

The term *covered employee* does not include an employee

(a) whose appointment is made by the President with the advice and consent of the Senate;

(b) whose appointment is made by a Member of Congress or by a committee or subcommittee of either House of Congress; or,

(c) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code).

**§ 1.104. Authority of the Board**

(a) *Adoption of regulations.* Section 4(c)(4)(A) of VEOA generally authorizes the Board to issue regulations to implement section 4(c). In addition, 4(c)(4)(B) of VEOA directs the Board to promulgate regulations that are ''the same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions referred to in paragraph (2)'' of section 4(c) of VEOA. Those statutory provisions are section 2108, sections 3309 through 3312, and subchapter I of chapter 35, of title 5, United States Code. The regulations issued by the Board herein are on all matters for which section 4(c)(4)(B) of VEOA requires a regulation to be issued. Specifically, it is the Board's considered judgment based on the information available to it at the time of promulgation of these regulations, that, with the exception of the regulations adopted and set forth herein, there are no other ''substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions referred to in paragraph (2)'' of section 4(c) of VEOA that need be adopted.

(b) *Technical and nomenclature changes.* In promulgating these regulations, the Board has made certain technical and nomenclature changes to the regulations as promulgated by the executive branch. Such changes are intended to make the provisions adopted accord more naturally to situations in the Legislative Branch. However, by making these changes, the Board does not intend a substantive difference between these regulations and those of the executive branch from which they are derived except to the extent that a modification is necessary to more effectively implement the rights and protections made applicable under VEOA.

(c) *Modification of substantive regulations.* As a qualification of the statutory obligation to issue regulations that are ''the same as the most substantive regulations (applicable with respect to the executive branch),'' section 4(c)(4)(B) of VEOA authorizes the Board to ''determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under'' section 4(c) of VEOA. In examining the relevant regulations of the executive branch, which were

promulgated by the Office of Personnel Management, the Board has concluded that a number of sections were issued under a combination of statutory authorities, some of which were made applicable under section 4(c)(2) of VEOA and some of which were not made applicable under that section. The Board has accordingly determined that given the selective application of statutory provisions, some regulations of the executive branch are not applicable to the legislative branch and some regulations must be modified in order to be made applicable.

(d) *Retention of section numbering*. Except for the sections in Part 1, the regulations adopted herein are numbered to correspond with the section numbering of the substantive regulations of the executive branch as they appear in title 5 of the Code of Federal Regulations (CFR) on which they are based.

**§ 1.105. Coordination with Section 225 of Congressional Accountability Act**

(a) *Statutory directive*. Section 4(c)(4)(D) of the VEOA requires that regulations promulgated must be consistent with section 225 of the CAA. Among the relevant provisions of section 225 are subsection (f)(1), which prescribes as a rule of construction that definitions and exemptions in the laws made applicable by the CAA shall apply under the CAA, and subsection (f)(3), which states that the CAA shall not be construed to authorize enforcement of the CAA by the executive branch.

(b) *Provisos necessary to satisfy statutory directive*. The Board determines that in order for certain regulations applied under VEOA to be consistent with subsections (f)(1) and (f)(3) of section 225 of the CAA, the such regulations shall be subject to the following provisos:

(1) Where an applied regulation refers to the ''competitive service,'' such term shall have the meaning as provided in 5 USC § 2102(a)(2). Where an applied regulation refers to the ''exempted service,'' such term shall have the meaning as provided in 5 USC § 2103.

(2) Where an applied regulation refers to the ''excepted service,'' such term shall have the meaning as provided in 5 USC § 2103. Consistent with the definition provided by section 2103, the Board determines that ''excepted service'' encompasses all civil service positions within the legislative branch which are neither in the ''competitive service'' nor have duties that are equivalent to the Senior Executive Service as those terms are defined in Title 5, USC.

**§ 1.106. Application of regulations to certain positions of the Office of the Architect of the Capitol**

(a) The Office of the Architect of the Capitol, pursuant to the provisions of the Architect of the Capitol Human Resources Act (AOCHRA), P.L. 103–283, 108 Stat. 1444 (July 22, 1994), as codified and amended in 40 USC § 166b–7, is required to establish a personnel management system that in part ''ensures that applicants for employment and employees of the Architect of the Capitol are appointed, promoted, and assigned on the basis of merit and fitness after fair and equitable consideration of all applicants and employees through open competition.'' 40 USC § 166b–7(c)(2)(A).

(b) Insofar as AOCHRA imposes obligations on the Office of the Architect of the Capitol to establish a personnel management system which at a minimum provides for appointment, promotion and assignment on the basis of merit and fitness after fair and equitable consideration of all applicants and employees through open competition, the Architect of the Capitol shall provide veterans' preference to a covered employee, including an applicant, in a manner and to the extent consistent with these regulations.

*PART 211—VETERAN PREFERENCE*

Sec.
211.101 Purpose
211.102 Definitions
211.103 Administration of preference

**§ 211.101. Purpose**

The purpose of this part is to define veterans' preference and the administration of preference in Federal employment in the legislative branch. (5 U.S.C. 2108, as applied by VEOA)

**§ 211.102. Definitions**

For purposes of preference in Federal employment the following definitions apply:

(a) Veteran means a person who was separated with an honorable discharge or under honorable conditions from active duty in the armed forces performed—

(1) In a war; or,

(2) In a campaign or expedition for which a campaign badge has been authorized; or

(3) During the period beginning April 28, 1952, and ending July 1, 1955; or,

(4) For more than 180 consecutive days, other than for training, any part of which occurred during the period beginning February 1, 1955, and ending October 14, 1976.

(b) Disabled veteran means a person who was separated under honorable conditions from active duty in the armed forces performed at any time and who has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pensions because of a public statute administered by the Department of Veterans Affairs or a military department.

(c) Preference eligible means veterans, spouses, widows, or mothers who meet the definition of ''preference eligible'' in 5 U.S.C. 2108. Preference eligibles in the competitive service are entitled to have 5 or 10 points added to their earned score on a civil service examination (see 5 U.S.C. 3309). They are also accorded a higher retention standing in the event of a reduction in force in positions in either the competitive service or in the excepted service (see 5 U.S.C. 3502). Preference does not apply, however, to inservice placement actions such as promotions.

(d) Armed forces means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard.

(e) Uniformed services means the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

(f) Active duty or active military duty means full-time duty with military pay and allowances in the armed forces, except for training or for determining physical fitness and except for service in the Reserves or National Guard.

(g) Separated under honorable conditions means either an honorable or a general discharge from the armed forces. The Department of Defense is responsible for administering and defining military discharges.

**§ 211.103. Administration of preference**

Agencies are responsible for making all preference determinations.

*PART 330—RECRUITMENT, SELECTION, AND PLACEMENT (GENERAL) IN THE COMPETITIVE SERVICE*

Sec.
330.401 Competitive examination
330.402 Direct recruitment

*Subpart D—Positions Restricted to Preference Eligibles*

**§ 330.401. Competitive examination**

In each entrance examination for the positions of custodian, elevator operator, guard, and messenger in the competitive service (referred to hereinafter in this subpart as restricted positions), competition shall be restricted to preference eligibles as long as preference eligibles are available. For purposes of this part, the term *guard* does not include law enforcement officer positions of the U.S. Capitol Police Board.

**§ 330.402. Direct recruitment**

In direct recruitment by an agency under delegated authority, the agency shall fill each restricted position by the appointment of a preference eligible as long as preference eligibles are available.

*PART 332—RECRUITMENT AND SELECTION IN THE COMPETITIVE SERVICE THROUGH COMPETITIVE EXAMINATION*

Sec.
332.401 Order on registers

**Subpart D—Consideration for Appointment**

**§ 332.401. Order on registers**

Subject to apportionment, residence, and other requirements of law, the names of eligibles shall be entered on the appropriate register in accordance with their numerical ratings, except that the names of:

(a) Preference eligibles shall be entered in accordance with their augmented ratings and ahead of others having the same rating; and

(b) Preference eligibles who have a compensable service-connected disability of 10 percent or more shall be entered at the top of the register in the order of their ratings unless the register is for professional or scientific positions in pay positions comparable to GS–9 and above and in comparable pay levels under other pay-fixing authorities.

*PART 337—EXAMINING SYSTEM FOR THE COMPETITIVE SERVICE*

Sec.
Sec. 337.101 Rating applicants

**Subpart A—General Provisions**

**§ 337.101. Rating applicants**

(a) The relative weights shall be given subjects in an examination, and shall assign numerical ratings on a scale of 100. Each applicant who meets the minimum requirements for entrance to an examination and is rated 70 or more in the examination is eligible for appointment.

(b) There shall be added to the earned numerical ratings of applicants who make a passing grade:

(1) Five points for applicants who are preference eligibles under section 2108(3)(A) and (B) of title 5, United States Code; as applied by VEOA and

(2) Ten points for applicants who are preference eligibles under section 2108(3)(C)–(G) of that title, as applied by VEOA.

(c) When experience is a factor in determining eligibility, a preference eligible shall be credited with:

(1) Time spent in the military service (i) as an extension of time spent in the position in which he was employed immediately before his entrance into the military service, or (ii) on the basis of actual duties performed in the military service, or (iii) as a combination of both methods. Time spent in the military service shall be credited according to the method that will be of most benefit to the preference eligible.

(2) All valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether pay was received therefor.

*PART 339—MEDICAL QUALIFICATION DETERMINATIONS IN THE COMPETITIVE SERVICE*

Sec.
Sec. 339.204 Waiver of standards and requirements

**Subpart B—Physical and Medical Qualifications**

**§ 339.204. Waiver of standards and requirements**

Agencies must waive a medical standard or physical requirement when there is sufficient evidence that an applicant or employee, with or without reasonable accommodation, can perform the essential duties of the position without endangering the health and safety of the individual or others.

*PART 351—REDUCTION IN FORCE IN THE COMPETITIVE SERVICE AND THE EXCEPTED SERVICE*

Sec.
351.201 Use of regulations
351.202 Coverage
351.203 Definitions
351.204 Responsibility of agency
351.301 Applicability
351.302 Transfer of employees
351.303 Identification of positions with a transferring function
351.401 Determining retention standing
351.402 Competitive area
351.403 Competitive level
351.404 Retention register
351.405 Demoted employees
351.501 Order of retention—competitive service
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351.503 Length of service
351.504 Credit for performance
351.505 Records
351.506 Effective date of retention standing
351.601 Order of release from competitive level
351.602 Prohibitions
351.603 Actions subsequent to release from competitive level
351.604 Use of furlough
351.605 Liquidation provisions
351.606 Mandatory exceptions
351.607 Permissive continuing exceptions
351.608 Permissive temporary exceptions
351.701 Assignment involving displacement
351.702 Qualifications for assignment
351.703 Exception to qualifications
351.704 Rights and prohibitions
351.705 Administrative assignment
351.801 Notice period
351.802 Content of notice
351.803 Notice of eligibility for reemployment and other placement assistance
351.804 Expiration of notice
351.805 New notice required
351.806 Status during notice period
351.807 Certification of Expected Separation
351.902 Correction by agency

*Subpart B—General Provisions*

**§ 351.201. Use of regulations**

(a)(1) Each agency is responsible for determining the categories within which positions are required, where they are to be located, and when they are to be filled, abolished, or vacated. This includes determining when there is a surplus of employees at a particular location in a particular line of work.

(2) Each agency shall follow this part when it releases a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling; reorganization; the exercise of reemployment rights or restoration rights; or reclassification of an employee's position due to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days.

(b) This part does not require an agency to fill a vacant position. However, when an agency, at its discretion, chooses to fill a vacancy by an employee who has been reached for release from a competitive level for one of the reasons in paragraph (a)(2) of this section, this part shall be followed.

(c) Each agency is responsible for assuring that the provisions in this part are uniformly and consistently applied in any one reduction in force.

**§ 351.202. Coverage**

(a) *Employees covered.* Except as provided in paragraph (b) of this section, this part applies to covered employees as defined by section 1.102(c) of these Regulations.

(b) *Employees excluded.* This part does not apply to an employee who is within the exclusion set forth in section 1.103 of these Regulations.

(c) *Actions excluded.* This part does not apply to:

(1) The termination of a temporary or term promotion or the return of an employee to the position held before the temporary or term promotion or to one of equivalent grade and pay.

(2) A change to lower grade based on the reclassification of an employee's position due to the application of new classification standards or the correction of a classification error.

(3) A change to lower grade based on reclassification of an employee's position due to erosion of duties, except that this exclusion does not apply to such reclassification actions that will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days. This exception ends at the completion of the reduction in force.

(4) Placement of an employee serving on an intermittent, part-time, on-call, or seasonal basis in a nonpay and nonduty status in accordance with conditions established at time of appointment.

(5) A change in an employee's work schedule from other-than-full-time to full-time. (A change from full-time to other than full-time for a reason covered in Sec. 351.201(a)(2) is covered by this part.)

**§ 351.203. Definitions**

In this part:

*Competing employee* means an employee in tenure group I, II, or III.

*Current rating of record* is the rating of record for the most recently completed appraisal period as provided in Sec. 351.504(b)(3).

*Days* means calendar days.

*Function* means all or a clearly identifiable segment of an agency's mission (including all integral parts of that mission), regardless of how it is performed.

*Furlough* under this part means the placement of an employee in a temporary nonduty and nonpay status for more than 30 consecutive calendar days, or more than 22 workdays if done on a discontinuous basis, but not more than 1 year.

*Local commuting area* means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

*Modal rating* is the summary rating level assigned most frequently among the actual ratings of record that are:

(1) Assigned under the summary level pattern that applies to the employee's position of record on the date of the reduction in force;

(2) Given within the same competitive area, or at the agency's option within a larger subdivision of the agency or agencywide; and

(3) On record for the most recently completed appraisal period prior to the date of issuance of reduction in force notices or the cutoff date the agency specifies prior to the issuance of reduction in force notices after which no new ratings will be put on record.

*Rating of record* means the officially designated performance rating, as provided for in the agency's appraisal system.

*Reorganization* means the planned elimination, addition, or redistribution of functions or duties in an organization.

*Representative rate* means the fourth step of the grade for a position subject to the General Schedule, the prevailing rate for a position under a wage-board or similar wage-determining procedure, and for other positions, the rate designated by the agency as representative of the position.

*Transfer of function* means the transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas, except when the function involved is virtually identical to functions already being performed in the other competitive area(s) affected; or the movement of the competitive area in which the function is performed to another commuting area.

*Undue interruption* means a degree of interruption that would prevent the completion of required work by the employee 90 days after the employee has been placed in a different position under this part. The 90-day standard should be considered within the allowable limits of time and quality, taking into account the pressures of priorities, deadlines, and other demands. However, a work program would generally not be unduly interrupted even if an employee needed more than 90 days after the reduction in force to perform the optimum quality or quantity of work. The 90-day standard may be extended if placement is made under this part to a low priority program or to a vacant position.

**§ 351.204. Responsibility of agency**

Each agency covered by this part is responsible for following and applying the regulations in this part when the agency determines that a reduction force is necessary.

*Subpart C—Transfer of Function*

**§ 351.301. Applicability**

(a) This subpart is applicable when the work of one or more employees is moved from one competitive area to another as a transfer of function regardless of whether or not the movement is made under authority of a statute, reorganization plan, or other authority.

(b) In a transfer of function, the function must cease in the losing competitive area and continue in an identical form in the gaining competitive area (i.e., in the gaining competitive area, the function continues to be carried out by competing employees rather than by noncompeting employees).

**§ 351.302. Transfer of employees**

(a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

(b) An employee whose position is transferred under this subpart solely for liquidation, and who is not identified with an operating function specifically authorized at the time of transfer to continue in operation more than 60 days, is not a competing employee for other positions in the competitive area gaining the function.

(c) Regardless of an employee's personal preference, an employee has no right to

transfer with his or her function, unless the alternative in the competitive area losing the function is separation or demotion.

(d) Except as permitted in paragraph (e) of this section, the losing competitive area must use the adverse action procedures found in 5 CFR part 752 if it chooses to separate an employee who declines to transfer from his or her function.

(e) The losing competitive area may, at its discretion, include employees who decline to transfer with their function as part of a concurrent reduction in force.

(f) An agency may not separate an employee who declines to transfer with the function any sooner than it transfers employees who chose to transfer with the function to the gaining competitive area.

(g) Agencies may ask employees in a canvass letter whether the employee wishes to transfer with the function when the function transfers to a different local commuting area. The canvass letter must give the employee information concerning entitlements available to the employee if the employee accepts the offer to transfer, and if the employee declines the offer to transfer. An employee may later change and initial acceptance offer without penalty. However, an employee may not later change an initial declination of the offer to transfer.

**§ 351.303. Identification of positions with a transferring function**

(a) The competitive area losing the function is responsible for identifying the positions of competing employees with the transferring function. A competing employee is identified with the transferring function on the basis of the employee's official position. Two methods are provided to identify employees with the transferring function:

(1) Identification Method One; and

(2) Identification Method Two.

(b) Identification Method One must be used to identify each position to which it is applicable. Identification Method Two is used only to identify positions to which Identification Method One is not applicable.

(c) Under Identification Method One, a competing employee is identified with a transferring function if—

(1) The employee performs the function during at least half of his or her work time; or

(2) Regardless of the amount of time the employee performs the function during his or her work time, the function performed by the employee includes the duties controlling his or her grade or rate of pay.

(3) In determining what percentage of time an employee performs a function in the employee's official position, the agency may supplement the employee's official position description by the use of appropriate records (e.g., work reports, organizational time logs, work schedules, etc.).

(d) Identification Method Two is applicable to employees who perform the function during less than half of their work time and are not otherwise covered by Identification Method One. Under Identification Method Two, the losing competitive area must identify the number of positions it needed to perform the transferring function. To determine which employees are identified for transfer, the losing competitive area must establish a retention register in accordance with this part that includes the name of each competing employee who performed the function. Competing employees listed on the retention register are identified for transfer in the inverse order of their retention standing. If for any retention register this procedure would result in the separation or demotion by reduction in force at the losing competitive area of any employee with higher retention standing, the losing competitive area must identify competing employees on that register for transfer in the order of their retention standing.

(e)(1) The competitive area losing the function may permit other employees to volunteer for transfer with the function in place of employees identified under Identification Method One or Identification Method Two. However, the competitive area may permit these other employees to volunteer for transfer only if no competing employee who is identified for transfer under Identification Method One or Identification Method Two is separated or demoted solely because a volunteer transferred in place of him or her to the competitive area that is gaining the function.

(2) If the total number of employees who volunteer for transfer exceeds the total number of employees required to perform the function in the competitive area that is gaining the function, the losing competitive area may give preference to the volunteers with the highest retention standing, or make selections based on other appropriate criteria.

*Subpart D—Scope of Competition*

**§ 351.401. Determining retention standing**

Each agency shall determine the retention standing of each competing employee on the basis of the factors in this subpart and in subpart E of this part.

**§ 351.402. Competitive area**

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) A competitive area must be defined solely in terms of the agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined. A competitive area may consist of all or part of an agency. The minimum competitive area is a subdivision of the agency under separate administration within the local commuting area.

**§ 351.403. Competitive level**

(a)(1) Each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade (or occupational level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption.

(2) Competitive level determinations are based on each employee's official position, not the employee's personal qualifications.

(b) Each agency shall establish separate competitive levels according to the following categories:

(1) *By service*. Separate levels shall be established for positions in the competitive service and in the excepted service.

(2) *By appointment authority*. Separate levels shall be established for excepted service positions filled under different appointment authorities.

(3) *By pay schedule*. Separate levels shall be established for positions under different pay schedules.

(4) *By work schedule*. Separate levels shall be established for positions filled on a full-time, part-time, intermittent, seasonal, or on-call basis. No distinction may be made among employees in the competitive level on the basis of the number of hours or weeks scheduled to be worked.

(5) *By trainee status*. Separate levels shall be established for positions filled by an employee in a formally designated trainee or developmental program having all of the characteristics covered in Sec. 351.702(e)(1) through (e)(4) of this part.

(c) An agency may not establish a competitive level based solely upon:

(1) A difference in the number of hours or weeks scheduled to be worked by other-than-full-time employees who would otherwise be in the same competitive level;

(2) A requirement to work changing shifts;

(3) The grade promotion potential of the position; or

(4) A difference in the local wage areas in which wage grade positions are located.

**§ 351.404. Retention register**

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level. The retention register is prepared from the current retention records of employees. Upon displacing another employee under this part, an employee retains the same status and tenure in the new position. Except for an employee on military duty with a restoration right, the agency shall enter on the retention register, in the order of retention standing, the name of each competing employee who is:

(1) In the competitive level;

(2) Temporarily promoted from the competitive level by temporary or term promotion.

(b)(1) The name of each employee serving under a time limited appointment or promotion to a position in a competitive level shall be entered on a list apart from the retention register for that competitive level, along with the expiration date of the action.

(2) The agency shall list, at the bottom of the list prepared under paragraph b(1) of this section, the name of each employee in the competitive level with a written decision of removal under part 432 or 752 in this chapter.

**§ 351.405. Demoted employees**

An employee who has received a written decision under part 432 or 752 of this chapter to demote him or her competes under this part from the position to which he or she will be or has been demoted.

*Subpart E—Retention Standing*

**§ 351.501. Order of retention—competitive service**

(a) Competing employees shall be classified on a retention register on the basis of their tenure of employment, veteran preference, length of service, and performance in descending order as follows:

(1) By tenure group I, group II, group III; and

(2) Within each group by veteran preference subgroup AD, subgroup A, subgroup B; and

(3) Within each subgroup by years of service as augmented by credit for performance under Sec. 351.504, beginning with the earliest service date.

(b) Groups are defined as follows:

(1) Group I includes each career employee who is not serving a probationary period. An employee who acquires competitive status and satisfies the service requirement for career tenure when the employee's position is brought into the competitive service is in group I as soon as the employee completes any required probationary period for initial appointment.

(2) Group II includes each career-conditional employee, and each employee serving a probationary period.

(3) Group III includes all employees serving under indefinite appointments, temporary appointments pending establishment of a register, status quo appointments, term appointments, and any other nonstatus nontemporary appointments which meet the definition of provisional appointments.

(c) Subgroups are defined as follows:

(1) Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.

(2) Subgroup A includes each preference eligible employee not included in subgroup AD.

(3) Subgroup B includes each nonpreference eligible employee.

(d) A retired member of a uniformed service is considered a preference eligible under this part only if the member meets at least one of the conditions of the following paragraphs (d)(1), (2), or (3) of this section, except as limited by paragraph (d)(4) or (d)(5):

(1) The employee's military retirement is based on disability that either:

(i) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(ii) Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee's retired pay from a uniformed service is not based upon 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training.

(3) The employee has been continuously employed in a position covered by this part since November 30, 1964, without a break in service of more than 30 days.

(4) An employee retired at the rank of major or above (or equivalent) is considered a preference eligible under this part if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code, as applied by VEOA, and meets one of the conditions covered in paragraph (d)(1), (2), or (3) of this section.

(5) An employee who is eligible for retired pay under chapter 67 of title 10, United States Code, and who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part at age 60, only if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code, as applied by VEOA.

**§ 351.502. Order of retention—excepted service**

(a) Competing employees shall be classified on a retention register in tenure groups on the basis of their tenure of employment, veteran preference, length of service, and performance in descending order as set forth under Sec. 351.501(a) for competing employees in the competitive service.

(b) Groups are defined as follows:

(1) Group I includes each permanent employee whose appointment carries no restriction or condition such as conditional, indefinite, specific time limit, or trial period.

(2) Group II includes each employee:

(i) Serving a trial period; or

(ii) Whose tenure is equivalent to a career-conditional appointment in the competitive service in agencies having such excepted appointments.

(3) Group III includes each employee:

(i) Whose tenure is indefinite (i.e., without specific time limit), but not actually or potentially permanent;

(ii) Whose appointment has a specific time limitation of more than 1 year; or

(iii) Who is currently employed under a temporary appointment limited to 1 year or less, but who has completed 1 year of current continuous service under a temporary appointment with no break in service of 1 workday or more.

**§ 351.503. Length of service**

(a) Each agency shall establish a service date for each competing employee.

(b) An employee's service date is whichever of the following dates reflects the employee's creditable service:

(1) The date the employee entered on duty, when he or she has no previous creditable service;

(2) The date obtained by subtracting the employee's total creditable previous service from the date he or she last entered on duty; or

(3) The date obtained by subtracting from the date in paragraph (b)(1) or (b)(2) of this section, the service equivalent allowed for performance ratings under Sec. 351.504.

(c) An employee who is a retired member of a uniformed service is entitled to credit under this part for:

(1) The length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(2) The total length of time in active service in the armed forces if the employee is considered a preference eligible under Sec. 351.501(d) of this part.

(d) Each agency shall adjust the service date for each employee to withhold credit for noncreditable time.

**§ 351.504. Credit for performance**

(a) *Ratings used.* Only ratings of record as defined in Sec. 351.203 shall be used as the basis for granting additional retention service credit in a reduction in force.

(b)(1) An employee's entitlement to additional retention service credit for performance under this subpart shall be based on the employee's three most recent ratings of record received during the 4–year period prior to the date of issuance of reduction in force notices, except as otherwise provided in paragraphs (b)(2) and (c) of this section.

(2) To provide adequate time to determine employee retention standing, an agency may provide for a cutoff date, a specified number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart. When a cutoff date is used, an employee will receive performance credit for the three most recent ratings of record received during the 4–year period prior to the cutoff date.

(3) To be creditable for purposes of this subpart, a rating of record must have been issued to the employee, with all appropriate reviews and signatures, and must also be on record (i.e., the rating of record is available for use by the office responsible for establishing retention registers).

(4) The awarding of additional retention service credit based on performance for purposes of this subpart must be uniformly and consistently applied within a competitive area, and must be consistent with the agency's appropriate issuance(s) that implement these policies. Each agency must specify in its appropriate issuance(s):

(i) The conditions under which a rating of record is considered to have been received for purposes of determining whether it is within the 4–year period prior to either the date the agency issues reduction in force notices or the agency-established cutoff date for ratings of record, as appropriate; and

(ii) If the agency elects to use a cutoff date, the number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart.

(c) *Missing ratings.* Additional retention service credit for employees who do not have three actual ratings of record during the 4–year period prior to the date of issuance of reduction in force notices or the 4–year period prior to the agency-established cutoff date for ratings of record permitted in paragraph (b)(2) of this section shall be determined as appropriate, and as follows:

(1) An employee who has not received any rating of record during the 4–year period shall receive credit for performance based on the modal rating for the summary level pattern that applies to the employee's official position of record at the time of the reduction in force.

(2) An employee who has received at least one but fewer than three previous ratings of record during the 4–year period shall receive credit for performance on the basis of the value of the actual rating(s) of record divided by the number of actual ratings received. If an employee has received only two actual ratings of record during the period, the value of the ratings is added together and divided by two (and rounded in the case of a fraction to the next higher whole number) to determine the amount of additional retention service credit. If an employee has received only one actual rating of record during the period, its value is the amount of additional retention service credit provided.

**§ 351.505. Records**

Each agency shall maintain the current correct records needed to determine the retention standing of its competing employees. The agency shall allow the inspection of its retention registers and related records by an employee of the agency to the extent that the registers and records have a bearing on a specific action taken, or to be taken, against the employee. The agency shall preserve intact all registers and records relating to an employee for at least 1 year from the date the employee is issued a specific notice.

**§ 351.506. Effective date of retention standing**

Except for applying the performance factor as provided in Sec. 351.504:

(a) The retention standing of each employee released from a competitive level in the order prescribed in Sec. 351.601 is determined as of the date the employee is so released.

(b) The retention standing of each employee retained in a competitive level as an exception under Sec. 351.606(b), Sec. 351.607, or Sec. 351.608, is determined as of the date the employee would have been released had the exception not been used. The retention standing of each employee retained under any of these provisions remains fixed until completion of the reduction in force action which resulted in the temporary retention.

(c) When an agency discovers an error in the determination of an employee's retention standing, it shall correct the error and adjust any erroneous reduction-in-force action to accord with the employee's proper retention standing as of the effective date established by this section.

*Subpart F—Release From Competitive Level*

**§ 351.601. Order of release from competitive level**

(a) Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. An agency may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing except:

(1) As required under Sec. 351.606 when an employee is retained under a mandatory exception or under Sec. 351.806 when an employee is entitled to a new written notice of reduction in force; or

(2) As permitted under Sec. 351.607 when an employee is retained under a permissive continuing exception or under Sec. 351.608 when an employee is retained under a permissive temporary exception.

(b) When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

**§ 351.602. Prohibitions**

An agency may not release a competing employee from a competitive level while retaining in that level an employee with:

(a) A specifically limited temporary appointment;

(b) A specifically limited temporary or term promotion.

**§ 351.603. Actions subsequent to release from competitive level**

An employee reached for release from a competitive level shall be offered assignment to another position in accordance with subpart G of this part. If the employee accepts, the employee shall be assigned to the position offered. If the employee has no assignment right or does not accept an offer under subpart G, the employee shall be furloughed or separated.

**§ 351.604. Use of furlough**

(a) An agency may furlough a competing employee only when it intends within 1 year to recall the employee to duty in the position from which furloughed.

(b) An agency may not separate a competing employee under this part while an employee with lower retention standing in the same competitive level is on furlough.

(c) An agency may not furlough a competing employee for more than 1 year.

(d) When an agency recalls employees to duty in the competitive level from which furloughed, it shall recall them in the order of their retention standing, beginning with highest standing employee.

**§ 351.605. Liquidation provisions**

When an agency will abolish all positions in a competitive area within 180 days, it must release employees in group and subgroup order consistent with Sec. 351.601(a). At its discretion, the agency may release the employees in group order without regard to retention standing within a subgroup, except as provided in Sec. 351.606. When an agency releases an employee under this section, the notice to the employee must cite this authority and give the date the liquidation will be completed. An agency may also apply Secs. 351.607 and 351.608 in a liquidation.

**Sec. 351.606. Mandatory exceptions**

(a) Armed Forces restoration rights. When an agency applies Sec. 351.601 or Sec. 351.605, it shall give retention priorities over other employees in the same subgroup to each group I or II employee entitled under 38 U.S.C. 2021 or 2024 to retention for, as applicable, 6 months or 1 year after restoration, as provided in part 353 of this chapter.

(b) Use of annual leave to reach initial eligibility for retirement or continuance of health benefits. (1) An agency shall make a temporary exception under this section to retain an employee who is being involuntarily separated under this part, and who elects to use annual leave to remain on the agency's rolls after the effective date the employee would otherwise have been separated by reduction in force, in order to establish initial eligibility for immediate retirement under 5 U.S.C. 8336, 8412, or 8414, and/or to establish initial eligibility under 5 U.S.C. 8905 to continue health benefits coverage into retirement.

(2) An agency shall make a temporary exception under this section to retain an employee who is being involuntarily separated under authority of part 752 of this chapter because of the employee's decision to decline relocation (including transfer of function), and who elects to use annual leave to remain on the agency's rolls after the effective date the employee would otherwise have been separated by adverse action, in order to establish initial eligibility for immediate retirement under 5 U.S.C. 8336, 8412, or 8414, and/or to establish initial eligibility under 5 U.S.C. 8905 to continue health benefits coverage into retirement.

(3) An employee retained under paragraph (b) this section must be covered by chapter 63 of title 5, United States Code.

(4) An agency may not retain an employee under this section past the date that the employee first becomes eligible for immediate retirement, or for continuation of health benefits into retirement, except that an employee may be retained long enough to satisfy both retirement and health benefits requirements.

(5) Except as permitted by 5 CFR 351.608(d), an agency may not approve an employee's use of any other type of leave after the employee has been retained under a temporary exception authorized by paragraph (b) of this section.

(6) Annual leave for purposes of paragraph (b) of this section is described in Sec. 630.212 of Title 5, CFR.

(c) Documentation. Each agency shall record on the retention register, for inspection by each employee, the reasons for any deviation from the order of release required by Sec. 351.601 or Sec. 351.605.

**§ 351.607. Permissive continuing exceptions**

An agency may make exception to the order of release in Sec. 351.601 and to the action provisions of Sec. 351.603 when needed to retain an employee on duties that cannot be taken over within 90 days and without undue interruption to the activity by an employee with higher retention standing. The agency shall notify in writing each higher-standing employee reached for release from the same competitive level of the reasons for the exception.

**§ 351.608. Permissive temporary exceptions**

(a) *General*. (1) In accordance with this section, an agency may make a temporary exception to the order of release in Sec. 351.601, and to the action provisions of Sec. 351.603, when needed to retain an employee after the effective date of a reduction in force. Except as otherwise provided in paragraphs (c) and (e) of this section, an agency may not make a temporary exception for more than 90 days.

(2) After the effective date of a reduction in force action, an agency may not amend or cancel the reduction in force notice of an employee retained under a temporary exception so as to avoid completion of the reduction in force action.

(b) *Undue interruption*. An agency may make a temporary exception for not more than 90 days when needed to continue an activity without undue interruption.

(c) *Government obligation*. An agency may make a temporary exception to satisfy a Government obligation to the retained employee without regard to the 90–day limit set forth under paragraph (a)(1) of this section.

(d) *Sick leave*. An agency may make a temporary exception to retain on sick leave a lower standing employee covered by an applicable leave system for Federal employees, who is on approved sick leave on the effective date of the reduction in force, for a period not to exceed the date the employee's sick leave is exhausted. Use of sick leave for this purpose must be in accordance with the requirements in part 630, subpart D of this chapter (or other applicable leave system for Federal employees). An agency may not approve an employee's use of any other type of leave after the employee has been retained under this paragraph (d).

(e)(1) An agency may make a temporary exception to retain on accrued annual leave a lower standing employee who:

(i) Is being involuntarily separated under this part;

(ii) Is covered by a Federal leave system under authority other than chapter 63 of title 5, United States Code; and,

(iii) Will attain first eligibility for an immediate retirement benefit under 5 U.S.C. 8336, 8412, or 8414 (or other authority), and/or establish eligibility under 5 U.S.C. 8905 (or other authority) to carry health benefits coverage into retirement during the period represented by the amount of the employee's accrued annual leave.

(2) An agency may not approve an employee's use of any other type of leave after the employee has been retained under this paragraph (e).

(3) This exception may not exceed the date the employee first becomes eligible for immediate retirement or for continuation of health benefits into retirement, except that an employee may be retained long enough to satisfy both retirement and health benefits requirements.

(4) Accrued annual leave includes all accumulated, accrued, and restored annual leave, as applicable, in addition to annual leave earned and available to the employee after the effective date of the reduction in force. When approving a temporary exception under this provision, an agency may not advance annual leave or consider any annual leave that might be credited to an employee's account after the effective date of the reduction in force other than annual leave earned while in an annual leave status.

(f) *Other exceptions*. An agency may make a temporary exception under this section to extend an employee's separation date beyond the effective date of the reduction in force when the temporary retention of a lower standing employee does not adversely affect the right of any higher standing employee who is released ahead of the lower standing employee. The agency may establish a maximum number of days, up to 90 days, for which an exception may be approved.

(g) *Notice to employees*. When an agency approves an exception for more than 30 days, it must:

(1) Notify in writing each higher standing employee in the same competitive level reached for release of the reasons for the exception and the date the lower standing employee's retention will end; and

(2) List opposite the employee's name on the retention register the reasons for the exception and the date the employee's retention will end.

*Subpart G—Assignment Rights (Bump and Retreat)*

**351.701 Assignment involving displacement**

(a) General. When a group I or II competitive service employee with a current annual performance rating of record of minimally successful (Level 2) or equivalent, or higher, is released from a competitive level, an agency shall offer assignment, rather than furlough or separate, in accordance with paragraphs (b), (c), and (d) of this section to another competitive position which requires no reduction, or the least possible reduction, in representative rate. The employee must be qualified for the offered position. The offered position shall be in the same competitive area, last at least 3 months, and have the same type of work schedule (e.g., full-time, part-time, intermittent, or seasonal) as the position from which the employee is released. Upon accepting an offer of assignment, or displacing another employee under this part, an employee retains the same status and tenure in the new position. The promotion potential of the offered position is not a consideration in determining an employee's right of assignment.

(b) Lower subgroup—bumping. A released employee shall be assigned in accordance with paragraph (a) of this section and bump to a position that:

(1) Is held by another employee in a lower tenure group or in a lower subgroup within the same tenure group; and

(2) Is no more than three grades (or appropriate grade intervals or equivalent) below the position from which the employee was released.

(c) Same subgroup—retreating. A released employee shall be assigned in accordance with paragraphs (a) and (d) of this section and retreat to a position that:

(1) Is held by another employee with lower retention standing in the same tenure group and subgroup;

(2) Is not more than three grades (or appropriate grade intervals or equivalent) below the position from which the employee was released, except that for a preference eligible employee with a compensable service-connected disability of 30 percent or more the limit is five grades (or appropriate grade intervals or equivalent); and

(3) Is the same position, or an essentially identical position, formerly held by the released employee as a competing employee in a Federal agency (i.e., when held by the released employee in an executive, legislative, or judicial branch agency, the position would have been placed in tenure groups I, II, or III, or equivalent). In determining whether a position is essentially identical, the determination is based on the competitive level criteria found in Sec. 351.403, but not necessarily in regard to the respective grade, classification series, type of work schedule, or type of service, of the two positions.

(d) Limitation. An employee with a current annual performance rating of record of minimally successful (Level 2) or equivalent may be assigned under paragraph (c) of this section only to a position held by another employee with a current annual performance rating of record no higher than minimally successful (Level 2) or equivalent.

(e) Pay rates. (1) The determination of equivalent grade intervals shall be based on a comparison of representative rates.

(2) Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific reduction-in-force notices, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force, assignment rights shall be determined on the basis of the new pay rates.

(f)(1) In determining applicable grades (or grade intervals) under Secs. 351. 701(b)(2) and 351.701(c)(2), the agency uses the grade progression of the released employee's position of record to determine the grade (or interval) limits of the employee's assignment rights.

(2) For positions covered by the General Schedule, the agency must determine whether a one-grade, two-grade, or mixed grade interval progression is applicable to the position of the released employee.

(3) For positions not covered by the General Schedule, the agency must determine the normal line of progression for each occupational series and grade level to determine the grade (or interval) limits of the released employee's assignment rights. If the agency determines that there is no normal line of progression for an occupational series and grade level, the agency provides the released employee with assignment rights to positions within three actual grades lower on a one-grade basis. The normal line of progression may include positions in different pay systems.

(4) For positions where no grade structure exists, the agency determines a line of progression for each occupation and pay rate, and provides assignment rights to positions within three grades (or intervals) lower on that basis.

(5) If the released employee holds a position that is less than three grades above the lowest grade in the applicable classification system (e.g., the employee holds a GS–2 position), the agency provides the released employee with assignment rights up to three actual grades lower on a one-grade basis in other pay systems.

**§351.702. Qualifications for assignment**

(a) Except as provided in Sec. 351.703, an employee is qualified for assignment under Sec. 351.701 if the employee:

(1) Meets the standards and requirements for the position, including any minimum educational requirement, and any selective placement factors established by the agency;

(2) Is physically qualified, with reasonable accommodation where appropriate, to perform the duties of the position;

(3) Has the capacity, adaptability, and special skills needed to satisfactorily perform the duties of the position without undue interruption. This determination includes recency of experience, when appropriate.

(b) An employee who is released from a competitive level during a leave of absence because of a corpensable injury may not be denied an assignment right solely because the employee is not physically qualified for the duties of the position if the physical disqualification resulted from the compensable injury.

(c) If an agency determines, on the basis of evidence before it, that a preference eligible employee who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of a position to which the employee would otherwise have been assigned under this part, the agency must notify the employee of the reasons for the determination.

(e) An agency may formally designate as a trainee or developmental position a position in a program with all of the following characteristics:

(1) The program must have been designed to meet the agency's needs and requirements for the development of skilled personnel;

(2) The program must have been formally designated, with its provisions made known to employees and supervisors;

(3) The program must be developmental by design, offering planned growth in duties and responsibilities, and providing advancement in recognized lines of career progression; and

(4) The program must be fully implemented, with the participants chosen through standard selection procedures. To be considered qualified for assignment under Sec. 351.701 to a formally designated trainee or developmental position in a program having all of the characteristics covered in paragraphs (e)(1), (2), (3), and (4) of this section, an employee must meet all of the conditions required for selection and entry into the program.

**§351.703. Exception to qualifications**

An agency may assign an employee to a vacant position under Sec. 351.201(b) or Sec. 351.701 of this part if:

(a) The employee meets any minimum education requirement for the position; and

(b) The agency determines that the employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position.

**§351.704. Rights and prohibitions**

(a)(1) An agency may satisfy an employee's right to assignment under Sec. 351.701 by assignment to a vacant position under Sec. 351.201(b), or by assignment under any applicable administrative assignment provisions of Sec. 351.705, to a position having a representative rate equal to that the employee would be entitled under Sec. 351.701. An agency may also offer an employee assignment under Sec. 351.201(b) to a vacant position in lieu of separation by reduction in force under 5 CFR part 351. Any offer of assignment under Sec. 351.201(b) to a vacant position must meet the requirements set forth under Sec. 351.701.

(2) An agency may, at its discretion, choose to offer a vacant other-than-full-time position to a full-time employee or to offer a vacant full-time position to an other-than-full-time employee in lieu of separation by reduction in force.

(b) Section 351.701 does not:

(1) Authorize or permit an agency to assign an employee to a position having a higher representative rate;

(2) Authorize or permit an agency to displace a full-time employee by an other-than-full-time employee, or to satisfy an other-than-full-time employee's right to assignment by assigning the employee to a vacant full-time position.

(3) Authorize or permit an agency to displace an other-than-full-time employee by a full-time employee, or to satisfy a full-time employee's right to assignment by assigning the employee to a vacant other-than-full-time position.

(4) Authorize or permit an agency to assign a competing employee to a temporary position (i.e., a position under an appointment not to exceed 1 year), except as an offer of assignment in lieu of separation by reduction in force under this part when the employee has no right to a position under Sec. 351.701 or Sec. 351.704(a)(1) of this part. This option does not preclude an agency from, as an alternative, also using a temporary position to reemploy a competing employee following separation by reduction in force under this part.

(5) Authorize or permit an agency to displace an employee or to satisfy a competing employee's right to assignment by assigning the employee to a position with a different type of work schedule (e.g., full-time, part-time, intermittent, or seasonal) than the position from which the employee is released.

**§351.705. Administrative assignment**

(a) An agency may, at its discretion, adopt provisions which:

(1) Permit a competing employee to displace an employee with lower retention standing in the same subgroup consistent with Sec. 351.701 when the agency cannot make an equally reasonable assignment by displacing an employee in a lower subgroup;

(2) Permit an employee in subgroup III–AD to displace an employee in subgroup III–A or III–B, or permit an employee in subgroup III–A to displace an employee is subgroup III–B consistent with Sec. 351.701; or

(3) Provide competing employees in the excepted service with assignment rights to other positions under the same appointing authority on the same basis as assignment rights provided to competitive service employees under Sec. 351.701 and in paragraphs (a) (1) and (2) of this section.

(b) Provisions adopted by an agency under paragraph (a) of this section:

(1) Shall be consistent with this part;

(2) Shall be uniformly and consistently applied in any one reduction in force;

(3) May not provide for the assignment of an other-than-full-time employee to a full-time position;

(4) May not provide for the assignment of a full-time employee to an other-than-full-time position;

(5) May not provide for the assignment of an employee in a competitive service position to a position in the excepted service; and

(6) May not provide for the assignment of an employee in an excepted position to a position in the competitive service.

*Subpart H—Notice to Employee*

**§351.801. Notice period**

(a)(1) Except as provided in paragraph (b) of this section, each competing employee selected for release from a competitive level under this part is entitled to a specific written notice at least 60 full days before the effective date of release.

(2) At the same time an agency issues a notice to an employee, it must give a written notice to the exclusive representative(s), as defined in 5 U.S.C. 7103(a)(16), as applied by the CAA, of each affected employee at the time of the notice. When a significant number of employees will be separated, an agency must also satisfy the notice requirements of Secs. 351.803 (b) and (c).

(b) When a reduction in force is caused by circumstances not reasonably foreseeable, an agency may provide a notice period of less than 60 days, but the shortened notice period must cover at least 30 full days before the effective date of release.

(c) The notice period begins the day after the employee receives the notice.

(d) When an agency retains an employee under Sec. 351.607 or Sec. 351.608, the notice to the employee shall cite the date on which the retention period ends as the effective date of the employee's release from the competitive level.

**§ 351.802. Content of notice**

(a)(1) The action to be taken, the reasons for the action, and its effective date;

(2) The employee's competitive area, competitive level, subgroup, service date, and three most recent ratings of record received during the last 4 years;

(3) The place where the employee may inspect the regulations and record pertinent to this case;

(4) The reasons for retaining a lower-standing employee in the same competitive level under Sec. 351.607 or Sec. 351.608;

(5) Information on reemployment rights, except as permitted by Sec. 351.803(a); and

(6) The employee's right, as applicable, to grieve under a negotiated grievance procedure.

(b) When an agency issues an employee a notice, the agency must, upon the employee's request, provide the employee with a copy of retention regulations found in part 351 of this chapter.

**§ 351.803. Notice of eligibility for reemployment and other placement assistance**

(a) The employee must be given a release to authorize, at his or her option, the release of his or her resume and other relevant employment information for employment referral to State dislocated worker unit(s) and potential public or private sector employers. The employee must also be given information concerning how to apply both for unemployment insurance through the appropriate State program and benefits available under the State dislocated worker unit(s), as designated or created under title III of the Job Training Partnership Act, and an estimate of severance pay (if eligible).

(b) When 50 or more employees in a competitive area receive separation notices under this part, the agency must provide written notification of the action, at the same time it issues specific notices of separation to employees, to:

(1) The State dislocated worker unit(s), as designated or created under title III of the Job Training Partnership Act;

(2) The chief elected official of local government(s) within which these separations will occur; and

(c) The notice required by paragraph (b) of this section must include:

(1) The number of employees to be separated from the agency by reduction in force (broken down by geographic area);

(2) The effective date of the separations.

**§ 351.804. Expiration of notice**

(a) A notice expires when followed by the action specified, or by an action less severe than specified, in the notice or in an amendment made to the notice before the agency takes the action.

(b) An agency may not take the action before the effective date in the notice; instead, the agency may cancel the reduction in force notice and issue a new notice subject to this subpart.

**§ 351.805. New notice required**

(a) An employee is entitled to a written notice of, as appropriate, at least 60 or 120 full days if the agency decides to take an action more severe than first specified.

(b) An agency must give an employee an amended written notice if the reduction in force is changed to a later date. A reduction in force action taken after the date specified in the notice given to the employee is not invalid for that reason, except when it is challenged by a higher-standing employee in the competitive level who is reached out of order for a reduction in force action as a result of the change in dates.

(c) An agency must give an employee an amended written notice and allow the employee to decide whether to accept a better offer of assignment under subpart G of this part that becomes available before or on the effective date of the reduction in force. The agency must give the employee the amended notice regardless of whether the employee has accepted or rejected a previous offer of assignment, provided that the employee has not voluntarily separated from his or her official position.

**§ 351.806. Status during notice period**

When possible, the agency shall retain the employee on active duty status during the notice period. When in an emergency the agency lacks work or funds for all or part of the notice period, it may place the employee on annual leave with or without his or her consent, or leave without pay with his or her consent, or in a nonpay status without his or her consent.

**§ 351.807. Certification of Expected Separation**

(a) For the purpose of enabling otherwise eligible employees to be considered for eligibility to participate in dislocated worker programs under the Job Training Partnership Act administered by the U.S. Department of Labor, an agency may issue a Certificate of Expected Separation to a competing employee who the agency believes, with a reasonable degree of certainty, will be separated from Federal employment by reduction in force procedures under this part. A certification may be issued up to 6 months prior to the effective date of the reduction in force.

(b) This certification may be issued to a competing employee only when the agency determines:

(1) There is a good likelihood the employee will be separated under this part;

(2) Employment opportunities in the same or similar position in the local commuting area are limited or nonexistent;

(3) Placement opportunities within the employee's own or other Federal agencies in the local commuting area are limited or nonexistent; and

(4) If eligible for optional retirement, the employee has not filed a retirement application or otherwise indicated in writing an intent to retire.

(c) A certification is to be addressed to each individual eligible employee and must be signed by an appropriate agency official. A certification must contain the expected date of reduction in force, a statement that each factor in paragraph (b) of this section has been satisfied, and a description of Job Training Partnership Act programs, the Interagency Placement Program, and the Reemployment Priority List.

(d) A certification may not be used to satisfy any of the notice requirements elsewhere in this subpart.

*Subpart I—Appeals and Corrective Action*

**§ 351.902. Correction by agency**

When an agency decides that an action under this part was unjustified or unwarranted and restores an individual to the former grade or rate of pay held or to an intermediate grade or rate of pay, it shall make the restoration retroactively effective to the date of the improper action.

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INTERIM SECTION 102(b) REPORT: ELECTRONIC INFORMATION SYSTEMS

[Review and Report on the Applicability to the Legislative Branch of Section 508 of the Rehabilitation Act of 1973, as Amended; submitted by the Board of Directors of the Office of Compliance Pursuant to Section 102(b) of the Congressional Accountability Act of 1995, 2 U.S.C. 1302(b), November 13, 2001]

I. INTRODUCTION

The Board of Directors (''the Board'') is charged with monitoring Federal law relating to terms and conditions of employment and access to public services and accommodations. The Congressional Accountability Act instructs the Board to report to Congress biannually: (1) whether or not those provisions are applicable to the Legislative Branch; and (2) whether inapplicable provisions should be made applicable to the Legislative Branch. Section 102(b)(1)&(2) of the Congressional Accountability Act (CAA), (2 U.S.C. 1302(b)(1)&(2)). However, the CAA does not prohibit the Board from reporting to Congress on an interim basis, in appropriate circumstances, when such a report would best effectuate the purposes of the statute.

II. SECTION 508, REHABILITATION ACT AMENDMENTS OF 1998

The Board's December 31, 2000 Report did not address certain 1998 amendments[1] to Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), which subsequently were implemented by Executive Branch regulation in June 2001.[2] The essence of these amendments requires that Executive Branch agencies provide their disabled employees and disabled members of the public with access to an agency's electronic data and information. For example, visually impaired persons must be able to utilize agency web sites through software that converts visual information to an effective audio format. In those rare instances where such compliance would impose an undue burden on an agency or department, Section 508 permits delivery of those services in alternate manner. Section 508 does not apply to the employing offices covered by the CAA, or to the Congressional instrumentalities GAO, GPO, or Library of Congress.[3]

The section 508 amendments originated in Senate Bill S. 1579. The Labor and Human Resources Committee's Report articulated that this legislation stemmed primarily from the need to ''reestablish[] and realign[] the national workforce development and training system to make it more user-friendly and accessible.'' Sen. Rept. 105–166 at 2 (Mar. 2, 1998). Thus, the legislation was primarily perceived as a vocational rehabilitation and training matter. However, there is no doubt that the particular purpose of the

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[1] P.L. 105–220, 112 Stat. 1202, § 408(a) (Aug. 7, 1998).

[2] 65 FR 80500 (Dec. 21, 2000), codified at, 36 CFR part 1194 (2001).

[3] The CAA applies the Americans with Disabilities Act (''ADA'') directly to these instrumentalities. Some of the other statutes referenced in the CAA, such as Occupational Safety & Health Act (''OSHA'') and the Family Medical Leave Act ('' FMLA''), are applied to GAO and the Library of Congress through the CAA, as regulated by the Office of Compliance. The Office has no regulatory authority of any kind with respect to GPO.

proposed amendments to section 508 was to: require[] each Federal agency to procure, maintain, and use electronic and information technology that allows individuals with disabilities the same access to information technology as individuals without disabilities. Id. at 58.

The section 508 amendments require that employees and the general public, irrespective of disability, have comparable access to electronic information systems. The Senate proposal was incorporated as part of the Senate amendments to H.R. 1385, the Workforce Investment Act of 1998 and largely adopted in the Conference Report.[4]

III. THE OFFICE'S EXISTING EFFORTS TO ENHANCE ELECTRONIC INFORMATION ACCESS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990

The Office of Compliance already maintains an active role regarding employee accessibility to electronic information systems through the requirements of the Americans With Disabilities Act of 1990 (ADA), which is applied to employing offices of the Congress in the Congressional Accountability Act (''Act''). Section 201(a) of the Act (2 U.S.C. §1311(a)) states, in relevant part, that ''[a]ll personnel actions affecting covered employees shall be made free from any discrimination based on . . . (3) disability within the meaning of . . . sections 102 through 104 of the . . . [ADA]''.[5]

Section 210 of the Act (2 U.S.C. §1331) applies the ADA's public access requirements to employing offices, and authorizes ADA court proceedings regarding alleged violations by GAO, GPO, and the Library of Congress. The executive branch regulations implementing the public access provisions of the ADA have included the requirements at 28 CFR §35.160 that:

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

28 CFR §36.302 also requires in relevant part:

(a) GENERAL. A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. . . .

In 28 CFR §36.303, the concept of ''auxiliary aids and services'' is set forth as one form of ''reasonable accommodation'':

(a) GENERAL. A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the . . . services . . . being offered or would result in an undue burden. . . .

(b) EXAMPLES. The term ''auxiliary aids and services'' includes:

(1) Qualified interpreters, note takers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings,

Brailled materials, large printed materials, or other effective methods of making visually delivered materials available to individuals with visual impairments; . . . .

(c) EFFECTIVE COMMUNICATION. A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

These ADA regulations, already promulgated by the Attorney General pursuant to Title II and Title III of the ADA, and in use in the executive branch, were among those which the Board of Directors of the Office of Compliance submitted to the Senate on January 7, 1997 for final adoption as regulations under the Congressional Accountability Act. The same proposed regulations were submitted to the House two days later. Congress did not approve these proposed regulations. Consequently, pursuant to section 411 of the CAA (2 U.S.C. §1411), the Executive Branch regulations became applicable ''by default'' to all employing offices under the CAA.

In December, 1998, the General Counsel of the Office of Compliance submitted a Report on Inspections for Compliance with the Americans with Disabilities Act, as required by section 210(f)(2) of the CAA. (2 U.S.C. §1331(f)(2)). The Report outlined the requirements of the ADA, including the fact that ''[t]he ADA requires that aids to communication, called auxiliary aids, be furnished to persons with disabilities when necessary for effective communication.'' Id. at 8. The Report (at 16) also highlighted the role of electronic communication in this effort:

Legislative Information on the Internet.—A large amount of legislative information is now available on the Internet. The Library of Congress's Thomas site (http://www.loc.gov), for example, has the text of bills and information about their status; copies of the Congressional Record; committee schedules, reports, and selected hearing transcripts; House and Senate Roll Call Votes; and links to other sites with legislative information. Most Senators and Members of the House of Representatives also maintain web sites as a means of communicating with their constituents.

Persons with disabilities are often avid users of the Internet and other electronic information services. In addition to making legislative information readily available to individuals with hearing or mobility impairments, the Internet also serves people who are blind. Text on the Internet can be read aloud by a computer equipped with a speech synthesizer and text-to-speech software or can be converted to a Braille format.

The usability of the web site for a person who is blind depends on its design. For example, if image maps are used on a Member's web site, there should be an alternate method of selecting options so the text-to-speech software can process the information. Unless this is done, it will be difficult or impossible for a blind user to get access to information on the site. . . .

In the past several years, the Office staff has also responded to a number of inquiries from employing offices about the 1998 section 508 amendments to the Rehabilitation Act. The Office has informed offices regarding the section 508 required amendments in the Federal Acquisition Regulation (FAR), and has further explained that ''the public access provisions of the CAA do not apply section 508 of the Rehabilitation Act to the entities of the Legislative Branch. . . .''

Because the CAA does not give the Office or its General Counsel authority to require that electronic information systems meet applicable accessibility standards absent a specific complaint from an individual with a particular disability, our ADA enforcement activities—as distinct from our educational activities—have been necessarily restricted and reactive rather than pro-active.

IV. THE IMPACT OF SECTION 508'S IMPLEMENTING REGULATIONS

On December 21, 2000, the Architectural and Transportation Barriers Compliance Safety Board published its final regulations including ''standards setting forth a definition of electronic and information technology and the technical and functional performance criteria necessary for such technology to comply with section 508.'' See note 2 supra. The effective date of those regulations was February 20, 2001. The final amendments to the Federal Acquisition Regulation implementing section 508 were published on April 25, 2001, and went into effect as of June 25, 2001.[6] There now exists a web site concerning section 508 standards, issues, and developments in the executive branch: www.section508.gov. Individuals with specific questions are encouraged to visit that site.

There are substantial differences between the standards mandated by Title II of the ADA and by Section 508 of the Rehabilitation Act. Although the two regulatory schemes overlap, there is little question that Section 508 applies significantly more stringent technical requirements for electronic information technology accessibility. While the ADA requires that public entities—including employing offices under the CAA—provide reasonably equivalent access to information, the methodology for delivering that access remains flexible. Thus, for example, if a sight impaired employee or member of the public cannot access material on an employing office's web site, under ADA that office can satisfy its responsibility to either individual by having the relevant material read to that person. Under Section 508, however, an agency of the executive branch must offer technology through its web site that allows all individuals, with or without disabilities, directly to obtain the information through the site itself. For instance, an agency must upgrade its site with a capacity to reformat the information for sight impaired individuals by means of a ''screen reader,'' which translates the visual material on a computer screen into automated audible output.[7] Thus, section 508 requires that the means to access information exist within the electronic medium itself.

Consequently, this Office's existing authority, confined to enforcement case-by-case of the ADA requirements and the provision of general information about section 508, does not fully effectuate the public policy goal of the Section 508 Amendments.

The Office, therefore, wishes to amplify its December 31, 2000 Report to Congress by reporting that the legislative branch is not mandated to meet the higher level of electronic information accessibility which Congress requires of the executive branch pursuant to section 508.

[4] H. Conf. Rept. 105–659, 105th Cong., 2d Sess. (July 29, 1998).

[5] Section 201 of the CAA also applies, for purposes of proscribing employment discrimination, the meaning of ''disability'' as set forth in section 501 of the Rehabilitation Act. However, section 508 of the Rehabilitation Act is a separate and free standing provision and is not incorporated into the CAA simply by reason of the application of section 501.

[6] 66 FR 20893 (Apr. 25, 2001), codified at, 48 CFR part 39 (2001).

[7] This document is not the appropriate venue for any extensive technical description of the differences between section 508 and ADA requirements.

V. THE RECOMMENDATION OF THE BOARD OF DIRECTORS

When the section 508 amendments were enacted as part of the Workforce Investment Act of 1998, much if not most of the technology necessary to carry out its substantive mandates did not exist. Indeed, even at this stage, some in the electronic information community consider fully compliant technology to be non-existent. In any event, the Executive Branch is fully engaged in reaching Section 508 compliance. Furthermore, both the Library of Congress and the Government Printing Office, each of which maintains extensive and heavily visited web sites (GPO operates approximately 30 web sites for other executive and legislative branch agencies), have announced that they are proceeding voluntarily to achieve section 508 compliance. However, absent Congressional action, universal legislative branch electronic information accessibility will remain optional, and not a legal requirement.

The Congress commissioned this Board to monitor and comment on all laws which concern ''access to public services and accommodations.'' This responsibility of the Board helps ensure that the Legislative Branch is kept apprised regarding advances in access to electronic information technology, and is advised ''whether such provisions should be made applicable to the legislative branch.''

Pursuant to that mandate, the Board of Directors of the Office of Compliance recommends that the Congress enact amendments to sections 201 and 210 of the CAA to incorporate the substantive employee access and public access requirements of section 508 of the Rehabilitation Act of 1973 for all CAA-covered employing offices. We further suggest that the Office's existing section 401 and section 210 regulatory and enforcement authorities covering both employee and public access to electronic information systems be extended to include section 508 substantive requirements. Finally, we suggest that section 508 requirements regarding employee and public access also be applied to the Government Printing Office, Government Accounting Office, and Library of Congress.

The Office of Compliance stands ready to participate in the coordination of section 508 training and education for those in Congress and in the instrumentalities who are responsible for the maintenance and development of electronic information systems.

This Supplemental Section 102(b) Report is also available on the web site of the Office of Compliance, at www.compliance.gov.

## REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. BYRD, from the Committee on Appropriations:

Special Report entitled ''Further Revised Allocation to Subcommittees of Budget Totals for Fiscal Year 2002'' (Rept. No. 107–110).

By Mr. HARKIN, from the Committee on Agriculture, Nutrition, and Forestry, without amendment:

S. 1519: A bill to amend the Consolidated Farm and Rural Development Act to provide farm credit assistance for activated reservists.

By Mr. CLELAND, from the Committee on Armed Services, without amendment and with a preamble:

S. Con. Res. 55: A concurrent resolution honoring the 19 United States servicemen who died in the terrorist bombing of the Khobar Towers in Saudi Arabia on June 25, 1996.

## EXECUTIVE REPORTS OF COMMITTEES

The following executive reports of committees were submitted:

By Mr. LEVIN for the Committee on Armed Services.

*Peter B. Teets, of Maryland, to be Under Secretary of the Air Force.

By Mr. NELSON for the Committee on Armed Services.

*Claude M. Bolton, Jr., of Florida, to be an Assistant Secretary of the Army.

By Mr. LEVIN for the Committee on Armed Services.

Navy nomination of Rear Adm. (lh) Anthony W. Lengerich.

Army nomination of Col. Bruce H. Barlow.

Navy nomination of Rear Adm. (lh) Richard B. Porterfield.

Navy nomination of Capt. Stephen A. Turcotte.

Navy nomination of Rear Adm. (lh) David Architzel.

Army nominations beginning Brigadier General Keith B. Alexander and ending Brigadier General William G. Webster Jr., which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD on September 21, 2001.

Navy nomination of Vice Adm. Charles W. Moore Jr.

Air Force nominations beginning Maj. Gen. Thomas J. Fiscus and ending Brig. Gen. Jack L. Rives, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD on November 8, 2001.

Mr. LEVIN. Mr. President, for the Committee on Armed Services I report favorably the following nomination lists which were printed in the RECORDS on the dates indicated, and ask unanimous consent, to save the expense of reprinting on the Executive Calendar that these nominations lie at the Secretary's desk for the information of Senators.

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

Army nominations beginning Vern J. Abdoo and ending Douglas K. Zimmerman II, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD on November 27, 2001.

Navy nomination of John B. Stockel.

Navy nomination of Philip F. Stanley.

*Nomination was reported with recommendation that it be confirmed subject to the nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.

(Nominations without an asterisk were reported with the recommendation that they be confirmed.)

## INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second times by unanimous consent, and referred as indicated:

By Mr. LUGAR (for himself, Mr. HELMS, Mr. HAGEL, and Mr. DOMENICI):

S. 1778. A bill to designate the National Foreign Affairs Training Center as the George P. Shultz National Foreign Affairs Training Center; to the Committee on Foreign Relations.

By Mr. BIDEN (for himself and Mr. HELMS):

S. 1779. A bill to authorize the establishment of ''Radio Free Afghanistan'', and for other purposes; to the Committee on Foreign Relations.

By Mr. THOMPSON (for himself and Mr. WARNER):

S. 1780. A bill to provide increased flexibility Governmentwide for the procurement of property and services to facilitate the defense against terrorism, and for other purposes; to the Committee on Governmental Affairs.

By Mr. MCCAIN (for himself and Mr. BROWNBACK):

S. 1781. A bill to direct the Secretary of Commerce to establish a voluntary national registry system for greenhouse gases trading among industry, to make changes to United States Global Change Research Program, and for other purposes; to the Committee on Commerce , Science, and Transportation.

By Mr. WARNER (for himself, Mr. STEVENS, Mr. ALLEN, Mr . CLELAND, and Mr. INOUYE):

S. 1782. A bill to authorize the burial in Arlington National Cemetery of any former Reservist who died in the September 11, 2001, terrorist attacks and would have been eligible for burial in Arlington National Cemetery but for age at time of death; to the Committee on Veterans' Affairs.

## ADDITIONAL COSPONSORS

S. 278

At the request of Mr. ENSIGN, his name was added as a cosponsor of S. 278, a bill to restore health care coverage to retired members of the uniformed services.

S. 605

At the request of Mrs. HUTCHISON, the name of the Senator from Colorado (Mr. ALLARD) was added as a cosponsor of S. 605, a bill to amend the Internal Revenue Code of 1986 to encourage a strong community-based banking system.

S. 826

At the request of Mrs. LINCOLN, the name of the Senator from Connecticut (Mr. DODD) was added as a cosponsor of S. 826, a bill to amend title XVIII of the Social Security Act to eliminate cost-sharing under the medicare program for bone mass measurements.

S. 839

At the request of Mrs. HUTCHISON, the name of the Senator from Missouri (Mrs. CARNAHAN) was added as a cosponsor of S. 839, a bill to amend title XVIII of the Social Security Act to increase the amount of payment for inpatient hospital services under the medicare program and to freeze the reduction in payments to hospitals for indirect costs of medical education.

S. 905

At the request of Mr. HARKIN, the name of the Senator from New Jersey (Mr. CORZINE) was added as a cosponsor of S. 905, a bill to provide incentives for school construction, and for other purposes.

S. 990

At the request of Mr. SMITH of New Hampshire, the name of the Senator from Minnesota (Mr. DAYTON) was added as a cosponsor of S. 990, a bill to amend the Pittman-Robertson Wildlife